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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1082/3/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24th July 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

Intervener

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

Mr. Christopher Vajda QC and Mr. Phillip Woolfe (instructed by the Office of Communications) appeared for the Respondent.

Mr. Stephen Wisking (Herbert Smith) appeared for the Intervener.

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CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good morning. Can I just begin by thanking everyone for all the
2 submissions, although we should say because of the late arrival of Rapture's latest
3 submissions at 17.52 last evening we have not had an opportunity properly to consider the
4 contents or the documents attached and that is rather unfortunate. We hope it is not going to
5 be the precedent, which so far it appears to have become that documents from Rapture are
6 delivered so late, which is not very useful to the parties or to the Tribunal.
7 Having said that, can I just make one or two opening remarks? One concerns a slightly
8 different way of thinking about this case – it has been going through our minds so I think
9 we ought to say what we are thinking about – and that is the nature of the appeal. It seems,
10 subject to any submissions, that the appeal is delimited by the dispute, and the dispute is
11 effectively an *inter partes* dispute.
12 The parties have the opportunity at the Ofcom stage to put in evidence in relation to the
13 dispute – in fact, that is how it comes before Ofcom. We also understand, and I am sure
14 you will correct us if we are wrong, that the parties are consulted on a draft determination
15 before the final determination is made and, accordingly, they will have an opportunity at
16 that stage to provide further evidence and further submissions.
17 That brings us on to the question of whether the notice of appeal in this case is within the
18 dispute between the parties that Ofcom was asked to determine – I am not saying whether it
19 is or it is not, I am just going through the thought process. If it is not, then the question is
20 whether or not the Tribunal has jurisdiction to decide the appeal and that is relevant to
21 whether the notice of appeal should be amended to include the new grounds.
22 The next question is as to the jurisdiction of the Tribunal in admitting evidence which was
23 not placed by the parties before Ofcom, and if it has that jurisdiction on what basis that
24 evidence should be admitted. On the one hand we see a need for the Ofcom dispute
25 resolution procedure to be determinative of disputes. However, on the other hand, there is a
26 desirability that a judicial process should achieve the right results and, in that regard, there
27 are also Article 6 considerations. There may be instances where the parties may put in new
28 evidence such as where the additional evidence could not have been obtained with
29 reasonable diligence at the Ofcom dispute resolution stage and which would have had an
30 important effect when Ofcom was determining the dispute. But whether parties should be
31 entitled to put before the Tribunal evidence which could have been (but was not) put before
32 Ofcom, is one that we are going to need to consider.
33 In that regard, we have briefly looked at Ofcom's Guidelines for handling complaints and
34 disputes, which I think is in what we have marked "File 2" but is in "File 1 of the Defence

1 to the Notice of Appeal under s.192” (tab 3) – I am not actually going to refer any more to
2 it. Anyway, we have looked at that briefly but we have not been able to glean from that
3 document the process which Ofcom adopts to obtain the evidence and submissions from the
4 parties to the dispute, and whether there is a stage in that process for one party to address
5 the other party’s submissions or evidence. That may be relevant to the question of what
6 further information or evidence is admissible before us, or how we should deal with the
7 admissibility question.

8 We note that subsection 6 of s.192 of the Communications’ Act provides that the grounds of
9 appeal should be set out in sufficient detail to indicate to what extent, if any, the appellant
10 contends that the decision appealed against was based on an error of fact or was wrong in
11 law, or both. So, subject to submissions, it seems to us on a preliminary view that this
12 provision is an indication that the appeal before this Tribunal, while an appeal on the merits,
13 should be founded on the material which the parties had placed before Ofcom and not on
14 matters which the parties could have but did not place before Ofcom. So it seems to us that
15 it may be that consideration needs to be given to those points in the submissions that are
16 made to us today on the applications before us. Of course, in our usual way we will be
17 prepared to rise for a few minutes for everyone to consider what we have said – if that is
18 necessary.

19 Those are our preliminary thoughts. Mr. Bowsher.

20 MR. BOWSHER: I am much obliged, madam. Let me first deal with the procedural matter. I
21 have already addressed late delivery of an earlier document in a previous note.

22 THE CHAIRMAN: I know it is nothing to do with you, but everything in this case has been late
23 and it is not really very satisfactory.

24 MR. BOWSHER: I apologise for the late delivery of the skeleton yesterday. The short point
25 there, I am afraid, is it was not practicable for those in our team to meet until yesterday to
26 discuss what we had received from the other parties, it simply could not be done, and so in
27 the course of yesterday all we sought to do in our short note yesterday evening was to draw
28 together, as it were, our position in the light of what we had read from Sky and Ofcom.

29 THE CHAIRMAN: There was also the documents that are attached that we asked for.

30 MR. BOWSHER: I am sorry?

31 THE CHAIRMAN: The struck out – that would have been useful to have a look at.

32 MR. BOWSHER: I do not want to get into the whys and wherefores of this. The reality is that it
33 happened.

34 THE CHAIRMAN: We are where we are.

1 MR. BOWSHER: We are where we are – if necessary we can go into why things happened the
2 way they did. More importantly, perhaps, the nature of the appeal: it might be appropriate
3 for me to ask you to rise in a moment for a few minutes just to reflect on what you have
4 said, but may I just react instantly?

5 There is one easy answer, and one answer which is almost to say I am not sure whether we
6 could ever deal with the entirety of the way you have put the matter before us at all, but the
7 easy answer to that is this, and I have not entirely thought through it, assume for the
8 moment that you are right that the dispute before the Tribunal is entirely limited to that
9 which was before Ofcom, the way we have put the case – in which ever notice of appeal – is
10 based on the same factual material; it is factual material that Ofcom largely produced from
11 Sky (there was obviously some factual material that was put forward) but the factual basis
12 of our appeal is, broadly speaking, the same. What we have put forward in our notices of
13 appeal and in the supporting material is, in one way or another, a comment or criticism of
14 Ofcom’s analysis. It is second level facts, not the primary facts. The primary facts are what
15 they are – the set top box costs what it costs. It may be that we disagree with that, that
16 subsequent evidence comes forward that we are able to show that Ofcom was working on a
17 wrong fact which we have subsequently been able to establish fraud, for example – I am not
18 saying that is or is not the case, I am just giving an example. But in principle the facts are
19 what they were before Ofcom. What we are primarily doing is saying that having looked at
20 the determination it seems to us that Ofcom fell short of what it should have done in
21 analysing that. We do that in two ways: we say it erred in its analysis of fact and it erred in
22 its understanding of the relevant law. We have sought to set that out. Mr. Borwick in his --
23 --

24 THE CHAIRMAN: Just hold on, if that is right then you would not have to put any more new
25 evidence, because you would be able to say that on the material that is there.

26 MR. BOWSHER: Well not entirely, because what Ofcom have done is come and said what they
27 say is fair and reasonable. Mr. Borwick is putting forward a position as someone
28 experienced in the industry who has done this job for a very large entity, in a similarly
29 regulated entity in saying: “In my view a proper approach to doing this sort of process is
30 this, this and this”. That is a second level analysis. He is putting forward an analysis which
31 is second level in the sense it is simply saying: “I think, looking at the facts that were
32 common to the parties, that were common at the dispute”, that the right approach to fair and
33 reasonable is this ...” Fairness and reasonableness one can have eternal arguments – is that
34 purely a question of law? Is it a question, analysis of fact? It is a mixed question and it

1 seems to us in this team that the right way of taking it forward was to try and come forward
2 with an expert who could help the Tribunal to say: “In my experience [Mr. Borwick’s
3 experience] of the industry the right approach to the fair and reasonable question is this”
4 “The right approach to allocation of costs is this ...”

5 Now, that is not a question about the primary facts that are before Ofcom. The question as
6 to what was or was not fair and reasonable has moved on. The dispute that was before
7 Ofcom is no longer the same dispute because Ofcom has taken its decision. We are not now
8 re-fighting that dispute before Ofcom. To that extent things have moved on. Ofcom has
9 taken its decision and we are saying that decision was wrong. We are inviting the Tribunal
10 on the merits to say Ofcom’s approach was wrong and what we are coming forward with
11 are arguments of law and other analysis which says that that approach was incorrect as a
12 matter of fact and law. All this must be subject to a caveat that this is in broad terms
13 because there may be something that I have missed. In broad terms we are not saying there
14 is a fact wrong there, they made an incorrect finding of fact. We are saying: “No”, having
15 established, for example, as we agreed that there was a ceiling and a floor to what the right
16 charge for the EPG was we say they erred then in the way they then took the matter
17 forward. The facts were right, the Guidelines were right. We are not challenging the
18 Guidelines, we are not saying they were wrong in terms of the factual limits of that
19 parameter. What we are saying what they then did was to unpack the costs in the wrong
20 way and they got themselves into the wrong part of the range.

21 THE CHAIRMAN: You did not say that to them at the time they were doing it when you knew
22 they were doing it?

23 MR. BOWSHER: There was an obvious practical reason why we did not do it in that way.

24 THE CHAIRMAN: Because you did not have your advice.

25 MR. BOWSHER: At that point it was Mr. Henry acting on his own, and they did not have the
26 assistance of Orricks. I said there is an easy answer and a much more difficult answer and I
27 am not quite sure how practically we can deal with that today. The easy answer is I would
28 submit that the dispute before Ofcom was a dispute about, in its narrow terms, what was the
29 right charge for this EPG access? If we had been using High Court pleadings for that case
30 one could have done it in a page and a half – two and a half pages maybe. It would have
31 been a very short pleading, amendments would have been very clear. We simply would not
32 be having the sort of discussion we are having today. This is largely a question about
33 arguments, and rewording of how you couch arguments. The dispute in that sense has been

1 consistent. What we are really saying is the dispute was always there, this was the dispute
2 before Ofcom.

3 THE CHAIRMAN: This is an appeal against the determination of Ofcom, it is not a rehearing. It
4 is an appeal on the merits.

5 MR. BOWSHER: It is an appeal on the merits which, in my submission, comes very close to a
6 rehearing just as any other rehearing. A point has been made at some point or other in the
7 defence of Ofcom about the nature of the appellate function generally. I have not picked
8 this up in any of my submissions, but I submit in fact Ofcom's position is run on this.
9 Fundamentally an appeal is a rehearing. What has happened, of course, is that the Court of
10 Appeal has by its rules indicated that it limits itself in all but exceptional circumstances, but
11 we know that in fact it has the power to admit new evidence, and so on and so forth – it
12 does in fact rehear appeals; it has that power. What it in fact does and what it sets out in the
13 CPR is "This is the way we normally deal with appeals.

14 This appeal is, as we know, somewhat different from other business of this Tribunal.

15 THE CHAIRMAN: Absolutely.

16 MR. BOWSHER: I emphasise one of the things we intended to do by putting in a new notice of
17 appeal was to take away from this dispute some of the knottier areas of procedure, but I can
18 see that the way you have put it perhaps brings this point back in.

19 THE CHAIRMAN: I think we have to be very careful because we have to make sure that we are
20 doing it within our jurisdiction because we only have a statutory jurisdiction.

21 MR. BOWSHER: I will stop in a minute – this was very much a shooting from the hip response.
22 The more difficult analysis is I am not sure, in order to give a comprehensive answer to the
23 proposition you are putting forward I think what we will have to go back to is all the records
24 of what led up to the determination and referring that to the Act and consider in detail. I am
25 a little hesitant to say that if I ask the Tribunal to rise for 10 minutes I doubt that I will have
26 the answer in 10 minutes' time, and I am not sure how long I would need to give a
27 comprehensive answer to that.

28 I would submit that, given the fact that under s.195 the Tribunal is required to decide the
29 appeal on the merits by reference to the grounds of appeal set out in the notice of appeal we
30 are entitled, in my submission -----

31 THE CHAIRMAN: Yes, but you have to look at 192(6) as well.

32 MR. BOWSHER: We say that Ofcom erred in fact or in law, or in both, in its analysis of the
33 facts. It may be that a point to be made against us is that there is some *res judicata*
34 principle relating to a determination, or that we should not be allowed to make some point

1 now because that point was available to Rapture to make in considering the draft
2 determination, for example. But it still remains the case that we are entitled to make these
3 points as a ground of appeal, and say: “No, you Ofcom analysed the facts incorrectly. Your
4 secondary analysis, your deductions and so forth are incorrect.”

5 THE CHAIRMAN: You would be allowed to do that in the Court of Appeal as well.

6 MR. BOWSHER: Indeed. Within s.192(6)(a), because that is an error of fact or law, or a mixed
7 question, it is a question of analysis. That falls therefore between the definition of the
8 dispute, we are simply saying: “That is the dispute, you got it wrong”. It may be that the
9 arguments we are raising now are arguments that were open to us to raise below, and that
10 might – I do not agree with this – but it might be argued that that is a reason why we should
11 not be allowed to raise them before the Tribunal. That is simply a point, as it is in the Court
12 of Appeal, saying : “You are raising a point above which you did not raise below, you need
13 to ask for permission to raise that point”.

14 THE CHAIRMAN: And then we get into Article 6, I think.

15 MR. BOWSHER: Again, I parked that point for a second.

16 THE CHAIRMAN: One of the reasons it says “Appeal on the merits” is because of the Article 6
17 point.

18 MR. BOWSHER: Is it? Well I will be guided by the Tribunal. I can see why that might be right.
19 As the grounds can encompass all of these matters, if I am right and the grounds of appeal
20 are capable of encompassing us, and I do not believe that Ofcom’s defence – again, I will be
21 kicked if I have got this wrong – I do not believe that they have taken this point ----

22 THE CHAIRMAN: They have not ----

23 MR. BOWSHER: -- that you are foreshadowing in their defence, and whatever else may be new
24 or otherwise (I will come on to that in our substituted notice) I would submit that there is no
25 difference of kind in what we are now saying. If they have not taken that point now there is
26 no reason for them to take it in respect of our substituted notice.

27 THE CHAIRMAN: The fact is they have not actually taken the point square on, the way I have
28 analysed it, and that is why I say it, but it goes to our jurisdiction and therefore I thought it
29 important that we raise it, because otherwise somebody at a later stage – as happened in
30 another case – raises it right at the end after the decision.

31 MR. BOWSHER: I understand that you are raising this matter of your own motion, and I
32 understand why you are doing it. I am probably exhausting the point. Just to try and sum-
33 up, in my submission the dispute is defined by what was before Ofcom. We are entitled to
34 say they got it wrong. If it was a matter we should have said below, it is a matter for the

1 Tribunal to consider whether that is an argument we can raise, but it does not mean that the
2 dispute is different, the dispute is the same, we are just coming up with new arguments
3 regarding the existing dispute, and it falls within the general compass of the Tribunal being
4 required to decide the appeal, and the appeal – as you have rightly indicated – is as
5 permitted; the permitted scope of the appeal is that defined in s.192. It is then a question of
6 the Tribunal’s procedures as to what the applicant is entitled to put before you.

7 (After a pause) Let me deal then with – can I can loosely call it – the “access to justice”
8 issue ----

9 THE CHAIRMAN: Yes.

10 MR. BOWSHER: -- which in fact arises, I would submit in three ways. It arises as a matter of
11 English law, Article 6 may be new and different but there are some principles that existed
12 before it; there were some principles regarding the law of amendment of cases before it
13 about the parties should be entitled to bring forward their case, of course subject to costs’
14 issues which are perhaps a little different in this case. The principles were there, Article 6
15 was there. There is also, of course, an EC law issue here regarding the need for there to be
16 an effective or equivalent remedy, because part of what we are referring to are rights that
17 derive from the relevant directive, the Community law rights’ referred to in the Act, so there
18 are a number of reasons why it is important that we – and I put this in a very broad sense –
19 that Rapture has access to justice. Now, I would submit that the appeal as we have framed
20 it is properly justiciable before the Tribunal it becomes a question of what is the proper
21 means of ensuring that Rapture has access to justice. The short point there is “We are here
22 now”. Rapture is putting forward on the basis of a team – I promised I would not try and
23 pull the heartstrings here – held together by goodwill and nothing else.

24 THE CHAIRMAN: But we know that. On the other hand, the case has to be dealt with in the
25 same way.

26 MR. BOWSHER: We submit that if the matter can be dealt with properly now it should be.

27 There is an alternative, and the alternative logic to what you suggest is that we simply go
28 back and start all over again, and try and crystallise a fresh dispute with Sky – I do not
29 know how long that would take because we would have to go through all that. As you have
30 seen from our draft we have intended to drop the issues about how long the negotiations
31 took, but clearly time is an issue in that process.

32 There is then the process of going all the way through Ofcom again – a costly procedure –
33 and re-crystallising the dispute; we say that would be pointless. The matter is here now.

34 There is no reason to suppose, from anything Sky or Ofcom have said that if we re-

1 crystallise the case that the facts would materially differ or the approach of Sky or Ofcom
2 would materially differ.

3 THE CHAIRMAN: This is only crossing my mind so I have not really thought about it, but it
4 might be that in the interests of justice – and if it is right that the procedure is not set out in
5 the guidelines etc. – that one could remit it for them to consider these points so that there is
6 a first line decision before one gets to us.

7 MR. BOWSHER: Yes.

8 THE CHAIRMAN: I do not know if that is possible.

9 MR. BOWSHER: We would have to look at that. Obviously, what we are asking for
10 fundamentally is a remission back to Ofcom after the Tribunal has looked at the matter and
11 – like an arbitration appeal – it is remitted back with a direction saying ----

12 THE CHAIRMAN: That they have to make this decision.

13 MR. BOWSHER: No, we are not necessarily even saying that. Yes, that was perhaps one
14 possibility but what we are saying is one outcome might be that “Yes, you have got this,
15 this and this wrong. Go back and re-analyse the facts on the basis of these principles”. That
16 might be an outcome.

17 THE CHAIRMAN: One of my questions is, because of cost – I am very conscious about the cost
18 of this – is whether one could short circuit that?

19 MR. BOWSHER: I am not sure whether it is a short circuit or not – that may be something I can
20 deal with in 10 minutes.

21 THE CHAIRMAN: That is something that everybody has heard.

22 MR. BOWSHER: Yes. But what we are saying is it is Ofcom’s job to do the factual analysis. In
23 this appeal what we seek is to correct certain misconceptions, we say, by Ofcom as to the
24 proper way of approaching its functions. What we want the Tribunal to do, what we ask the
25 Tribunal to do is correct those misconceptions, correct those errors, and then ask Ofcom to
26 do the work, the analytical work again.

27 THE CHAIRMAN: I suppose if one said they erred in law then one would not have the problem.

28 MR. BOWSHER: We certainly say on everything we put forward it is at the least a question of
29 law on an analysis of fact. It is a mixed question of fact and law. At one level it is an area
30 of law ----

31 THE CHAIRMAN: They have misdirected themselves as to the facts.

32 MR. BOWSHER: Misdirected themselves to the facts or the analysis of the facts, or whatever. I
33 would submit that the better approach, we are before the Tribunal, we have done this work,
34 that the Tribunal should look at this approach. There is nothing to suppose from what we

1 have done so far that Ofcom or Sky are going to change their position. What we submit is
2 required is for the Tribunal to look at this afresh and come up with its own view as to how
3 this dispute should be dealt with. There has not, as far as we can tell, been a case like this
4 dealing with this sort of principle and Ofcom clearly has a view as to how it should be dealt
5 with – the right approach in our submission is for the Tribunal to consider: “Is that the right
6 approach or not.” Whether or not that is the right approach is largely a question of law. it
7 may be entirely a question of law, but I do not want to say ----

8 THE CHAIRMAN: It is a question of our jurisdiction in relation to an appeal, which goes back to
9 my point, you see.

10 MR. BOWSHER: We are back where I started in a sense, that we say they got it wrong – not
11 because they got the facts wrong necessarily, but because they analysed them, they drew the
12 wrong deductions, they drew the wrong inferences and so on and so forth, and that is either
13 an error of law or an error on a question of mixed law and fact.

14 THE CHAIRMAN: And a question of whether you need any further evidence in order to deal
15 with that or whether you can do it on submissions.

16 MR. BOWSHER: We can do it purely on submission, but insofar as it is a question of mixed law
17 and fact it is about inference from fact. In our submission, and it seemed to us looking at
18 the matter, that the Tribunal was likely to be assisted by having the view of someone who
19 has worked for a number of years (in telecoms not television but it is a similar regime)
20 working for a large regulated entity dealing with these sorts of issues, for him to express a
21 view as to how he thought these facts should be assessed. It seemed yes, that could be
22 packaged, much of what he says is reflected in argument and that is why we are here today
23 in a sense on the substituted notice because having read what Mr. Borwick says we have
24 said that that means what we said before can be put better, differently or whatever. In my
25 submission all that goes to say is that this is the same dispute, we are simply putting
26 different – we hope better – arguments in respect of the existing dispute. After all – again
27 going back to my high court analogy – if we were in the Court of Appeal there are, as it
28 were, two issues here. Is this a different dispute? That is a question of the joinder of the
29 pleadings. Was this a point that actually was an issue between the parties ----

30 THE CHAIRMAN: And you say “yes” it was.

31 MR. BOWSHER: Yes, it was. There is a different issue, which is was that a point you made
32 below, are we in the Court of Appeal going to allow you to make a point, which clearly
33 relates to the dispute, but which you did not make before. That is a point which, as we
34 know, the Court of Appeal will consider and determine.

1 THE CHAIRMAN: What they often do is if they do think that the evidence ought to be in they just
2 quash the decision and it should go back.

3 MR. BOWSHER: They sometimes do, yes.

4 THE CHAIRMAN: Unless it is a very simple point that there has been a completely wrong fact,
5 and if you put that fact in the answer is obvious, they normally send it back. If it needs a lot
6 of rehearing then they will send it back.

7 MR. BOWSHER: That is true. Analogies are always dangerous and I am just giving ----

8 THE CHAIRMAN: And there is a reason for that because you are entitled to two bites of the
9 cherry.

10 MR. BOWSHER: There is of course an issue here that Ofcom ----

11 THE CHAIRMAN: Or three bites of the cherry if you are lucky!

12 MR. BOWSHER: -- Ofcom is not a first instance judge, they may be a first instance Body, a first
13 instance level.

14 THE CHAIRMAN: Determinator.

15 MR. BOWSHER: But it is not an arbitrator a first instance judge.

16 THE CHAIRMAN: That is why it is called an appeal on the merits, you see – or one of the
17 reasons anyway.

18 MR. BOWSHER: I cannot take that point. It may be that it is appropriate for me to go away for
19 five minutes and just consider whether there is anything more I can say on this. I am not
20 sure that in terms of detail ----

21 THE CHAIRMAN: I think you have made your position quite clear, but we will see what
22 everybody else says. I suspect that five minutes would be useful.

23 MR. BOWSHER: It might be worth taking five minutes – I do not know whether other people
24 want to make their own position now so that we can consider the position in the round. I
25 would suggest that is a better way ahead.

26 THE CHAIRMAN: Mr. Vajda

27 MR. VAJDA: The position of the Office is that we have sympathy and adopt a number of the
28 points that you, madam, have made this morning, but that really goes to the question of
29 evidence, particularly new evidence that is sought to be admitted. In my respectful
30 submission the most convenient course would be to deal with the pleading issue first
31 because, as you know, the position of the Office is that it objects to virtually everything that
32 is sought to be put in. If the Office is correct on that, that means that there is going to be no
33 evidence and that side steps the issue.

34 So far as jurisdiction is concerned ----

1 THE CHAIRMAN: Well it does not quite side step the issue because the question is whether one
2 ought to take what I was saying this morning into account in deciding whether or not ----

3 MR. VAJDA: There is very limited evidence. There is the one witness statement of Mr. Henry,
4 so I practice if we are looking at this case proportionately we do not need to spend time on
5 that.

6 THE CHAIRMAN: No, I agree.

7 MR. VAJDA: If I could just say one other thing on this, we are obviously very grateful for the
8 care and attention the Tribunal is giving this case, but the one point that the Office did make
9 in its defence was in relation to the scope of the appeal if you remember that has now
10 dropped because that is one of the points that Mr. Bowsher is no longer pursuing, but it is
11 important because the point that we make there, which really echoes the point that you,
12 madam Chairman, have been making is that effectively you cannot have something which
13 comes to this Tribunal which goes beyond the scope of what is before Ofcom and
14 effectively what was sought originally, and Mr. Bowsher has now taken that away, what
15 was sought originally was effectively to deal with non-pricing issues before the Tribunal –
16 we had an objection to that, but that has now gone completely, so we are now simply on the
17 question of price. In my respectful submission, as I say, the most convenient course would
18 be to get to the question of the pleading and then if and insofar as any pleading is allowed
19 in one can then get on to the question of whether or not any witness evidence is going to be
20 allowed in and we would have submissions on that as well.

21 Subject to that, madam, that is all I can say at the moment.

22 MR. WISKING: I do not have much more to add to that. I agree with Ofcom's submission that I
23 think it is most appropriately addressed within an analysis of the pleadings. We would like
24 to reflect on the jurisdiction point, but just to note that the question of proportionality and
25 dealing with this case efficiently needs to be taken into account in looking at the pleadings
26 and, in particular, we have already outlined areas where Rapture have sought to effectively
27 add grounds of appeal which I doubt frankly were raised before Ofcom that seek to put in to
28 question the charging levels for any platform service that Sky offers to any EPG charger, or
29 any conditional accessible charger – that is found in the section on the appropriate rate of
30 return when they have added a new argument which alleges that the platform returns are
31 excessive because the charges are unfair. So we have concerns about the addition of those
32 kinds of arguments which seem to go well beyond what was before Ofcom. As things stand
33 there is no evidence in support of that argument, but it leaves my clients in a difficult
34 position as to how to deal with that, whether it should seek to put forward evidence to

1 address that argument or not. Its preference would be that that argument was not put
2 forward at all because those sorts of issues have a real risk of expanding the nature of this
3 case which is just not needed. But I think these sorts of issues are best addressed in the
4 context of the amendment issue.

5 Similarly, I would second the comments on evidence. Although we put forward evidence as
6 part of our statement of intervention that was largely either responsive to the witness
7 statement of Mr. Henry, which appears in the original notice of appeal, or sought to address
8 the two issues which have now been dropped, the delay and the channel number. Again, we
9 would be supportive of relying upon the original evidence before Ofcom rather than
10 introducing large amounts of what purports to be expert evidence.

11 MR. VAJDA: It might be convenient to take five minutes because I know those behind me have
12 just indicated they would be grateful for that.

13 THE CHAIRMAN: Shall we say 11.25?

14 MR. VAJDA: Yes, I am grateful.

15 (The hearing adjourned at 11.10 p.m. and resumed at 11.25 p.m.)

16 MR. BOWSER: I do not think there is very much more that I wanted to add on reflection, but
17 perhaps I could just pick up two or three points that have been made, and sketch out the way
18 we see this.

19 First, on what I would broadly have called the “access to justice” issue because it obviously
20 arises in a number of legal ways, and this relates to the way in which the Tribunal has put to
21 us the issue about the nature of the dispute, the procedure before Ofcom is not a procedure
22 that necessarily contemplates the assistance of lawyers and expert witnesses. It would be
23 surprising in our submission if a procedure that should be capable of being operated, and
24 was operated by businessmen without access to legal representation and legal thinking
25 should therefore become, as it were, the eye of the needle through which the dispute must
26 pass. If the real dispute was put before the Ofcom by Rapture – by Mr. Henry, the Director
27 of Rapture – that is the dispute and it would be surprising if that were always the filter, if
28 every time after an Ofcom decision were produced which seemed unsatisfactory the
29 position became: “You cannot raise new points now as a matter of law because you did not
30 raise them before.” That is not the nature of the Ofcom process. I was struggling before to
31 put my finger on what the real nature of a first instance court and Ofcom is, that is it. The
32 Ofcom procedure is a business man’s procedure, not a lawyer’s procedure and it would be,
33 in my submission, quite wrong for this Tribunal to seek to impose an unduly narrow

1 definition of the dispute; it would make a nonsense of the sequence that goes through the
2 Act.

3 There is nothing in s.185 of the Act that somehow makes it necessary to raise all your points
4 of law and analysis before the dispute, the dispute is just a dispute. We know about, from
5 other areas of law, how one discusses disputes, we do not want to get into issues about
6 “Who won the Boat Race” and that sort of thing with references from other areas of law. It
7 is simple and obvious, in my submission, that the dispute that we raise now, we wish to
8 pursue is the dispute about the proper price for EPG. It is perhaps relevant for me just to
9 pick up, by way of an example, and it is perhaps fortuitous a point made by Mr. Wisking for
10 Sky. He says “Well, we do not want appropriate rate of return to be raised”, I paraphrase,
11 but that was the point that he has alighted on as he does not think should be raised now. For
12 a number of reasons – not least because it was not the way we saw the matter – I have not
13 sought for today to track back in any of our analyses, each and every point in our substituted
14 notice back to the determination.

15 But if I may impose upon your time and patience a little just to go back to the determination
16 and just take appropriate rate of return as an example. It is attached to our original notice of
17 appeal – the original determination – and I hope that you have it there. I have managed tear
18 my files apart and I am not sure that I have re-assembled them correctly, so I may not be the
19 best guide.

20 THE CHAIRMAN: We have the determination, it is file 2.

21 MR. BOWSHER: If you could just take the determination and perhaps it would be useful just to
22 have that and then take our substituted notice of appeal – *de bene esse*, as it were.

23 If we can miss out the current notice of appeal just for ease of reference ----

24 THE CHAIRMAN: If you succeed you are saying that we should look at this and forget about
25 everything before?

26 MR. BOWSHER: If we could just look at “Appropriate rate of return”, which is raised at p.15 of
27 our substituted notice. I was not proposing to read it out but what you will see – paras. 49
28 to 51 of our substituted notice – is a short passage, and it is short for a simple reason. It is
29 essentially a sort of conclusionary section. We deal with discrimination somewhat
30 differently because we say there that they should have dealt with this matter differently. Up
31 to that point we are going through the building blocks of an argument saying that Ofcom
32 have incorrectly analysed the costs and so forth. The core question is: what is the right rate
33 of return? It is a conclusionary question and we deal with it relatively shortly, but it sums
34 up what comes before.

1 There is not actually a reference in the substituted notice to the original notice but for your
2 note, in my short note of last week we actually give references to a number of parts of the
3 original notice where the same point is raised.

4 It would be surprising if one could say that this is not a point – and after all the appropriate
5 rate of return is pretty crucial, it lies at the heart of this case.

6 THE CHAIRMAN: You say here it is 5.75 to 5.102 of the determination.

7 MR. BOWSHER: Indeed, can I just show it to you because there is nothing obscure about our
8 reference here, p.42 of the determination. Under the heading: “Was Sky’s return on the
9 platform excessive?” Rapture’s comments: “Rapture has commented that” and again I
10 am not going to read it out, you can see what was said by Mr. Henry for Rapture. Ofcom
11 expressed a view and deal with that at some length. Then they go into Sky’s position and
12 form a conclusion. What you can see when you come to 5.100 on p.46 is – I am skipping
13 over it, the Tribunal may wish to go back and look at this in more detail, it is quite a lengthy
14 passage – that this is treated by Ofcom as, as it were, the conclusion of the process. I would
15 submit there can be no shadow of a doubt that the appropriate rate of return is in this dispute
16 and has always been in this dispute and any suggestion to the contrary is misguided. I have
17 taken that as an example because it is the one that arose. It is an important example,
18 though, given the conclusionary nature of the question we are dealing with.
19 Can I take one other example? I am jumping ahead of myself because when we come on to
20 deal with the pleading we will have to deal with these points. But it is perhaps worth
21 highlighting. Perhaps almost at the other end of the extreme is the one point which we have
22 said in our notes we think is probably new. It is the one that is labelled “Unbundling of
23 services and charges”. It is on p.12 of our substituted notice. It is certainly true that that is
24 not a label or a heading that appears in the determination or the original notice. In fact, in
25 my submission, and I am not resiling – I do not want it to be suggested in any way that I am
26 making an ambiguous submission here – in fact it falls slap bang in the middle of enhancing
27 our existing argument, rewording our existing argument, albeit with the benefit of technical
28 assistance, which I certainly would not have been able to provide, which others with the
29 right qualifications have been able to provide. It leads on from the previous heading: “Costs
30 reasonably and necessarily incurred in supplying the services.” So the first question on p.11
31 – if one just goes on the headings in our notice – is: What are the right costs to consider in
32 doing this calculation. We refer to the Guidelines, which we quote there.

33 “The obligation on Ofcom in this respect was that ‘in assessing the cost to be
34 recovered from conditional access or access control charges [it should follow the

1 principle] that those costs should be reasonably and necessarily incurred in the
2 provision of those services’.”

3 We then go on and say how it was we say they failed to do it. If you then go on to the next
4 section: “Unbundling of services and charges” you will see that what we then pick up is in
5 fact the immediately following passage from the Guideline which is, as it were, coming
6 from the more general to the more specific.

7 “The Guidelines require Ofcom to consider” it is considering in the part of this
8 costs’ analysis whether “... ‘the services offered [are], if technically feasible ...
9 sufficiently ‘unbundled’.”

10 That is not a point we specifically raise but it is really, in our submission, just a sub-point of
11 the broad general dispute which was what costs should be attributed to supplying this
12 service?

13 At para.41 we say:

14 “The clear effect of these Guidelines is that Ofcom must consider whether the price
15 arrived at produces the result that the broadcaster contributes only to the common
16 costs from which it benefits.”

17 Using the unbundling analysis as a tool to get at “What are the right costs?” it is back to
18 what are the right costs’ question. These were issues which were in play at the
19 determination, they are still in play now. It would have been nice if Mr. Henry had been
20 able to come along with teams of lawyers and economists and so forth before Ofcom but he
21 did not, and it would be wholly wrong and, in my submission, an incorrect approach to
22 analysing this disputes procedure under s.185 and following to set up a process that would
23 make that necessary. Unfortunately, remission back will create that problem, because you
24 would create the situation that if Ofcom take a decision based on a businessman’s
25 submission, Ofcom are not a judge, they have to act of their own motion. They are an
26 inquisitor not a judge. They must, by virtue of their nature, have had an inquisitorial role,
27 and if they fail and we then wish to attack them, and at that point the business comes along
28 and says: “I want to come to this Tribunal with legal advice”, and that legal or economic
29 advice says: “What about this other argument? What about this other way of looking at the
30 dispute?” In my submission there is nothing wrong in the Tribunal admitting those other
31 arguments. There may be procedural reasons, as I have conceded why you may decide
32 “That is not an argument we think we should hear.” We think you should have heard that
33 before because for practical reasons we do not think we are able to deal with that. If you
34 want to challenge the factual analysis of the number of set top boxes sold in wherever, we

1 the Tribunal do not want to get into that. If you think that may be – I am not conceding this
2 – a point at which you would say: “We are not dealing with that, send it back”. But you
3 should not, in my submission, shut out all these additional legal and inferential factual
4 questions – the mixed law and fact questions. Those are points which the Court of Appeal
5 would be only too happy to deal with if they wanted to deal with them and we submit that
6 this Tribunal should also deal with them.

7 In coming into court today we were handed an Ofcom commentary on new points raised by
8 Rapture in the substituted notice of appeal – literally on walking into court.

9 THE CHAIRMAN: I do not think we have seen that, have we?

10 MR. BOWSHER: It is a schedule which the court and the Tribunal may not have seen. We have
11 not studied it. You have seen the way we put it. There may be many procedural defects that
12 have been made by us but, in my submission, the text of the substituted notice of appeal has
13 been in existence and in the possession of everyone for well over a week now. If there was
14 a comparison to be made it could have been made before now. There may be reasons why
15 it has not been done, and it is simply not for me to cast the first stone.

16 THE CHAIRMAN: I do not think you can talk about that, do you?

17 MR. BOWSHER: It is not for me to cast the first stone, but I am not in a position to deal with
18 that this morning and I we will have to consider how we take that further. Unless there is
19 anything further? That was really in the general context of responding to the point you have
20 made.

21 THE CHAIRMAN: Yes. The right thing to do is just to get on with the application?

22 MR. VAJDA: Indeed, I thought that was the whole purpose of this morning. In terms of
23 proportionality we have come here, we have prepared for effectively an application.

24 THE CHAIRMAN: Absolutely.

25 MR. VAJDA: Indeed, it was said there was an application to amend and, in my respectful
26 submission the correct thing now is for Mr. Bowsher to make his application and I will then
27 respond to it line by line.

28 THE CHAIRMAN: Does Mr. Wisking agree with that?

29 MR. WISKING: I am content with that, yes.

30 MR. BOWSHER: We have made our application and I have probably exhausted many of the
31 points that I would have made in the application.

32 THE CHAIRMAN: There are two applications. There is one to amend the notice of appeal on
33 the basis of two grounds now, if I understand it; and the other is the admissibility of
34 evidence.

1 MR. BOWSHER: I am putting evidence to one side.

2 THE CHAIRMAN: So there are two grounds.

3 MR. BOWSHER: Sorry, just to be clear ----

4 THE CHAIRMAN: You say in what we received this morning, which you delivered last night,
5 that there are two grounds which were not in your original application.

6 MR. BOWSHER: Yes, sorry, the two grounds. In this application to amend the starting point we
7 have tried to take is the relevant paragraph of the Tribunal's Guidance, para. 11.1. There
8 are a number of ways of looking at this application to amend. It seemed to us that the right
9 approach was simply to put forward the application in respect of the entire notice of appeal.

10 THE CHAIRMAN: I think because of the way that the notice of application has to be set out with
11 the evidence and with effectively one's initial submissions, one has to "unbundle" – if I can
12 use that word – what would be in the pleading from what would be in the submissions and
13 what would be in the evidence. Insofar as it would be in submissions and/or evidence you
14 do not need permission. But insofar as it would be in the pleading you do need permission,
15 and it is very difficult to unbundle it.

16 MR. BOWSHER: There is a question of judgment as to where the line is to be drawn.

17 THE CHAIRMAN: So I start on the basis what are the grounds?

18 MR. BOWSHER: It is useful to look at our notice, although I do not think there is anything
19 different about the note we sent yesterday from the note of last week, but it is perhaps useful
20 just to have it set out at p.3 and 4 of yesterday's note simply because it is listed out there.
21 "B" we say are all grounds which were pleaded and they are simply elaborating, focusing or
22 whatever.

23 THE CHAIRMAN: You say the new things are the Sky platform model and the unbundling.

24 MR. BOWSHER: Yes.

25 THE CHAIRMAN: Now you have just addressed us on the basis the unbundling actually is not.

26 MR. BOWSHER: We say unbundling is new. You are absolutely right, it is a question of
27 judgment as to whether that is a new ground or a further elaboration and more detailed
28 taking forward of an existing argument about costs. Again, I am not seeking to say that I
29 was wrong in what I said. It seemed to us the right way to deal with the Tribunal was to be
30 forthright about it and say ----

31 THE CHAIRMAN: I think it is very helpful.

32 MR. BOWSHER: -- "It is probably new, but it is only just new", if I can put it that way. I hope,
33 by the way, I have already taken you to it, you can see why we say it is only just new, and
34 the reason we are bringing it forward now is its nature – as you have seen in the notice – is

1 somewhat technical, it required elaboration and assistance with technical expertise and one
2 ground for bringing this amendment is that it was not practicable to make that argument
3 before. You can say that Mr. Henry should have thought of it, and perhaps Mr. Henry with
4 the assistance of Orricks should have thought of it before, they did not until we discussed it
5 with experts and counsel – it was, as it were, the next level of argument we have developed.
6 It was not practicable to deal with it before – it simply was not available to us. It required a
7 level of technical knowledge and expertise of the way these sorts of costs can be unpacked
8 and it was simply not something that was put forward. It is in fact just another way of
9 putting the costs’ allocation issue. So whether or not it is new, it is only barely new, it is
10 ancillary to or quite an appropriate development of an existing point. In my submission, no
11 one is prejudiced by us doing this point now. It would be quite different. If we had sought
12 to pretend the point was not there, turned up at a hearing before the Tribunal and then under
13 the general heading of “Costs’ repackaging” said: “Oh, by the way we have this unbundling
14 point which we now want to develop”, the other parties would have had a very serious
15 ground for complaining to us. We wanted to avoid anyone being put in that position of
16 coming to a hearing and not ready to deal with it, so we wanted to be straightforward about
17 it. We say the right thing to do would be to give permission for that amendment to be
18 made. It is a very short point – well not a short point, but it is shortly expressed.
19 The Sky platform model out of date, it is a short point which one can see in the
20 supplemental notice at para.32. I am not sure that I can say very much more about it than
21 the way we have put it in the supplemental notice. This is a short point, again I was hesitant
22 to get into too much of a technical detail of our appeal, but you will understand that one part
23 of the analysis is an analysis by Ofcom of the Sky platform model, which includes a lot of
24 information which we have not seen, and nor are we asking to see in our disclosure
25 application. There is clearly a debate about what, in fact, is in there and what it means. We
26 say that it is clear from Sky’s notice of intervention that the platform model was out of date
27 and never intended to be used as a tool for calculating individual charges for platform
28 services including EPG services. We say that is plain from the relevant passage in the
29 intervention notice. I do not think it is necessary to take you to it; we say that is plain now.
30 We are told that we have misunderstood that. If we have misunderstood it no doubt it will
31 be explained why. It is not clear why we have misunderstood it but it seems to us that this
32 is a point we clearly could not have made until we had seen Sky’s statement of intervention.

33 THE CHAIRMAN: Paragraph 32, that stands alone?

1 MR. BOWSHER: It is a new point in the sense that up until now Ofcom have relied upon Sky's
2 platform model. We say another reason why your reliance on Sky's platform model seems
3 a little bit surprising (in para.32) it does not seem that Sky relied on it on the basis that you
4 say you rely upon it. There seems to be an inconsistency and understanding about what the
5 platform model means. Now, we may have got that wrong.

6 THE CHAIRMAN: But that would be an error of law or the misuse of ----

7 MR. BOWSHER: Failure to properly analyse the fact before Ofcom.

8 THE CHAIRMAN: Yes. So it is not a new ground in that sense?

9 MR. BOWSHER: It is a new error in the general sense.

10 THE CHAIRMAN: A new error from the original application.

11 MR. BOWSHER: Yes.

12 THE CHAIRMAN: It is within the determination?

13 MR. BOWSHER: Yes. If one goes back to para.27 of our substituted notice. You may recall
14 from looking at this that the issue here – this is a massive over-simplification – there is a
15 ceiling and a floor ----

16 THE CHAIRMAN: And there is a price between.

17 MR. BOWSHER: And there is a price somewhere in between. We say that Ofcom got it wrong.
18 At 29: “In its Defence, Ofcom says” ----

19 THE CHAIRMAN: That could have been put into a reply, could it not?

20 MR. BOWSHER: This point is just a re-statement of what is in the determination. It is perhaps
21 put a little bit more crisply in the defence, but the point is the same in the defence, and we
22 are simply seeking to use the short statement in the defence.

23 THE CHAIRMAN: Where is it in the determination?

24 MR. BOWSHER: Footnote 8, we actually refer to a number of paragraphs in the determination
25 which deal with this point – footnote 8 of the substituted notice.

26 THE CHAIRMAN: I see, yes.

27 MR. BOWSHER: If you have the determination, p.41 – just before where we were, actually.
28 There is the general heading: “Where Sky's charges set between the floor and the ceiling?”
29 it is the same point, para.29 we say:
30 “Ofcom says that its ‘analysis of the Sky Platform Model indicated that there was a
31 very wide range of potentially fair and reasonable charges, because there was a
32 very large gap between the incremental cost of providing EPG services and the
33 stand-alone cost of providing the service’.”

1 THE CHAIRMAN: Just show me where in the Determination they deal with the platform model
2 which is what para. 32 is dealing with.

3 MR. WISKING: I think it is first referred to at 5.27.

4 MR. BOWSHER: Yes, it is the basis of the analysis of common costs from 5.26 through, I think,
5 to point 5.74.

6 THE CHAIRMAN: It says: "Sky has previously explained to Ofcom that the costs in its platform
7 model may relate to different companies and the model does not map directly on to any
8 particular Sky"

9 MR. BOWSHER: You will see the following analysis is just littered with references back to the
10 Sky platform, because it is the data on which ----

11 THE CHAIRMAN: I was just trying to work out where we getting to.

12 PROFESSOR STONEMAN: It does seem rather odd that you should have even in your amended
13 notice of appeal a comment from the Sky intervention. The intervention was in response to
14 your previous notice of appeal and it would seem to me that this is something that you say
15 in reply at a later stage, we do not have it in the notice of appeal at this stage.

16 MR. BOWSHER: I am much obliged for that indication. I will tell you why we did it in that
17 way, simply because I have in other appellate Tribunals been criticised only too often for
18 putting in the reply matters which ought to be dealt with as a separate matter of appeal and
19 so as a matter of bootstraps' caution, because it is potentially a separate ground of appeal,
20 and potentially a separate matter of appeal to say "Your reliance on that data source is
21 wrong."

22 THE CHAIRMAN: In your original notice of appeal you should have been saying they should
23 not have been relying on that platform model.

24 MR. BOWSHER: Yes, that is what we did.

25 THE CHAIRMAN: You did not do it in your original notice of appeal.

26 MR. BOWSHER: We did do it in the original notice of appeal.

27 THE CHAIRMAN: You did?

28 MR. BOWSHER: Yes.

29 THE CHAIRMAN: Why is there a problem with para.32?

30 MR. BOWSHER: We are simply saying it is another reason why they should not look at it that
31 way. The platform model is very odd. In putting forward the substituted notice – I may
32 have been wrong in this – it seemed to us that there were two points that we needed to be
33 clear about. First, to recognise where we were at the time we drafted it. If there were points

1 then available to us on whatever the date was it was important that they were before the
2 Tribunal and that the Tribunal could see what they were.

3 THE CHAIRMAN: The difficulty we have – and I think the difficulty that everybody has got
4 probably – is that what we do not have is something that says: “These are our grounds of
5 appeal. These are submissions we are making on our grounds of appeal, and this is the
6 evidence that supports it.”

7 MR. BOWSHER: That last point, if the Tribunal is right on the point about dispute, that last
8 point, this is the evidence that supports it arguably simply would not arise. The original
9 notice is not quite structure in that way.

10 THE CHAIRMAN: And the difficulty is the new is not either, so one cannot work out what are
11 the grounds of appeal, what are the submissions, and what are ----

12 MR. BOWSHER: Well in my submission that is not quite right. The notice is pretty clear what
13 our grounds will be, though the headings tell you what it is that we say they did wrong, and
14 we summarise in a series of subparagraphs what it is that we say they did wrong. We tried
15 to do it in a sequential manner that does, to some extent, track the logic of the original
16 notice.

17 THE CHAIRMAN: But 32 does not have a new heading.

18 MR. BOWSHER: No, because it is under the general heading. There is a danger it becomes a
19 semantic question about what are grounds, what are arguments, and so forth. The complaint
20 here – I was just about to get to it, I was just in the middle of para.29 and the reason we
21 have taken the defence is because it is perhaps clearer in the defence than it was in the
22 determination what Ofcom thought they were doing. In para. 29 of our notice we have
23 quoted from the defence because it is clear from there what they thought they were doing in
24 the determination.

25 “It is clear that Ofcom assumed that it followed from the large gap which it found
26 to exist between the floor of the incremental cost and the ceiling of the stand-alone
27 cost that ‘there is a very broad range within which Sky may set the price’.”

28 We have referred there to the defence, and the relevant of the determination is pp.41 and 42.

29 Paragraph 30:

30 “This approach represents a serious error in approach. it does not follow from the
31 fact that there is a large gap ... that there is wide range of potentially fair and
32 reasonable charges.”

1 That is the key argument. Just because there is a wide range between the floor and the
2 ceiling does not mean that anywhere between the floor and the ceiling will do. We say that
3 that is the error that they fell into.

4 “In other words, there is no relationship between the gap between incremental and stand-
5 alone costs and what is fair and reasonable and non-discriminatory ...” and so forth. The
6 central question is whether the price arrived at represents a reasonable contribution. So we
7 then say this is how you should do it. You should not just look at the floor and the ceiling,
8 you should look at the reasonably incurred common costs and that, of course, foreshadows
9 the next argument we have already talked about, about what are the correct costs.

10 Paragraph 32 is an “and also” point, namely that the Sky platform model, which we have
11 just seen referred to as being the basis of this analysis, it seemed to us looking at the
12 statement of intervention that Sky’s statement of intervention about the nature of that model
13 was different from Ofcom’s basis upon which it used it. We may be wrong on that, but
14 Ofcom have used the model on the basis of certain assumptions which it seemed to us from
15 the Sky statement of intervention was incorrect.

16 As I said earlier on our intent was simply to be forthcoming with the Tribunal. If the
17 Tribunal says “No, you do not need to make this point now”, or “It is not really a new
18 point” that is not a problem, but we ----

19 THE CHAIRMAN: Depending on what everybody else says, but I am not terribly concerned
20 personally as to whether you have put in things that should have gone into a reply or
21 whatever, it may be convenient to leave it at this stage and not allow you to reply.

22 MR. BOWSHER: Yes.

23 THE CHAIRMAN: The question is whether it is a new ground and therefore you would not have
24 been allowed to put it into a reply.

25 MR. BOWSHER: It is plainly a new matter, because we could not possibly have known when we
26 settled the original notice that Sky were going to say what they said in their statement of
27 intervention.

28 THE CHAIRMAN: And therefore you would have put it in as part of your reply.

29 MR. BOWSHER: We would either have put in a reply or in some jurisdictions we would have
30 applied to amend our notice of appeal because it would have been a fresh ground of appeal,
31 perhaps in this jurisdiction we can just as easily deal with this as a reply, it probably does
32 not matter. Given the peculiar situation in which we found ourselves there did not seem any
33 purpose in playing games with the Tribunal in terms of ----

34 THE CHAIRMAN: No, you have done it very fairly.

1 MR. BOWSHER: As to all the other points we have set out in the notice our position – they are
2 set out on p.4 of our note of yesterday. We have simply sought either to take out those
3 points which if permission is granted we do not propose to pursue, and I do not wish to go
4 into the reasons why not unless the Tribunal particularly wishes me to do so, but it will be
5 apparent in some cases why we do not want to pursue them, I think.

6 The other points, 1 to 5 are headings either explicitly used or are closely related to existing
7 material in the existing notice. The only point which is a new heading is the discrimination
8 point. The heading there, if you look at the substituted notice (p.16) it is a really a reference
9 back to all that has gone before but putting it in a legal context saying that you were under
10 an obligation to ensure that these obligations were complied with, and a flip side of the
11 principles of non-discrimination and equal treatment is that appropriate differences are
12 made between people who are in different positions; Rapture is in a different position from
13 other people, and you should have taken account of that. That argument is just a different
14 legal setting for an argument which underlies all that we are putting elsewhere in my
15 submission. It is by reference to different legal provisions, but we say that has always been
16 part of the overall dispute.

17 THE CHAIRMAN: You give it a legal name, but the matters which are within it were there
18 before?

19 MR. BOWSHER: Yes, and if it was not obvious from the original notice that what we were
20 saying is Rapture is small and should not be charged so much, that is the theme throughout.
21 If one had been trying to plead this in half a page that might have been what we would have
22 said in a non-technical way.

23 THE CHAIRMAN: And accordingly there was discrimination.

24 MR. BOWSHER: It is probably best if I just listen to what my learned friends have to say about
25 this before taking it any further, because we say it really is quite simple. Yes, it is right that
26 these matters should not normally be dealt with by way of amendment at this stage of the
27 proceedings in this Tribunal, but there are a number of unusual circumstances here. In
28 many proceedings – maybe most proceedings – before this Tribunal the issues that are
29 raised are well known, they have been canvassed before a Regulator with laws and experts -
30 ---

31 THE CHAIRMAN: I am not sure that is true, actually.

32 MR. BOWSHER: In some cases. If I put it differently, the expectation that all matters are
33 brought forward in an original notice of appeal within two months ought not to be a

1 problem in an ideal situation where all of these matters have been canvassed before the
2 Regulator with access to a full team.

3 THE CHAIRMAN: I do not think we can treat this being a dispute *inter partes* in the same way
4 as we can treat a complaint to a regulator. I think they are totally different.

5 MR. BOWSHER: I think you have probably just made my point. This is different in a number of
6 ways, I have already made this point in a different context, this is a dispute that arises in a
7 particular way: two businesses have a dispute, no particular reason why lawyers should be
8 involved. It is referred to the Regulator who has a *quasi* inquisitorial role – again, no
9 particular reason why lawyers should be involved. A determination is produced and one
10 can say everything should be produced within two months. There are a number of, we
11 would say, exceptional circumstances here, namely, Rapture did not have the funds in order
12 to secure a large team – or any team – within that period. It has now secured a team, and it
13 had got part of the team together when it put in the notice of appeal to get that notice of
14 appeal in in time. We have now managed to have access to a technical expert who enabled
15 us to reword and focus our arguments.

16 Now, on one view the substituted notice of appeal is simply a shortening and focusing of
17 the grounds of appeal; on one view we do not need permission for any of it because it is
18 simply saying what we have said before in a different way taking account of what is said in
19 the Guidance in para.11.1, and that is not the approach taken in the High Court, but when
20 one takes ----

21 THE CHAIRMAN: Well it is actually in a way. I do not think we are supposed to have said
22 anything different from that.

23 MR. BOWSHER: Yes, but if one certainly looks at what is said in para. 11.1 it says given the
24 nature of the pleadings rewording what you have already said may not be need for
25 amendment.

26 THE CHAIRMAN: But if it includes a new ground it does?

27 MR. BOWSHER: What we are saying is that the sensible way for us to proceed is for us to come
28 forward with our enhanced, shortened, focused, improved notice of appeal on the basis of
29 our existing grounds and seek permission wholesale from the Tribunal because that seems
30 the right, sensible and forthright way of dealing with things.

31 THE CHAIRMAN: Part of the difficulty is that because you have tried to support it by new
32 expert evidence it looks like it may well be a new ground.

33 MR. BOWSHER: It is certainly reworded with the benefit of a quite different discipline and
34 additional – but that does not mean it is a new ground, in fact, Mr. Henry – as one can see

1 from the determination was quite capable of putting very sophisticated arguments to Ofcom.
2 It is simply that there is now a rather different slant being put on some of these points, but
3 they are not fundamentally different.

4 THE CHAIRMAN: Well let us see what the others have to say.

5 MR. BOWSHER: I will sit down and see what others have to say about that. We say not in
6 reality really new, and the appropriate way forward would be to grant permission for us to
7 amend. I will not deal with the evidence point now, we can perhaps come on to that
8 presently.

9 THE CHAIRMAN: No, let us deal with the pleading point first.

10 MR. BOWSHER: Unless there is anything I can assist with at this stage?

11 THE CHAIRMAN: No, thank you. Mr. Vajda?

12 MR. VAJDA: Madam Chairman, members of the Tribunal, we have prepared a short
13 commentary in relation to the specific new grounds, but before I deal with that can I
14 mention two matters of some importance by way of background? The first, of course, the
15 discussion at the last CMC and, as I understood it, and looking at the matter broadly,
16 effectively what the Tribunal is saying is that “You have done something which is more
17 Judicial Review than merits, you might want to consider re-amending.”

18 THE CHAIRMAN: Absolutely.

19 MR. VAJDA: That was effectively what the Tribunal had in mind?

20 THE CHAIRMAN: Yes.

21 MR. VAJDA: The exercise that has been undergone is, in my respectful submission, a
22 completely different exercise. That is point 1 by way of background. Point 2 by way of
23 background, this arises out of the observations that you, madam Chairman, made this
24 morning about the procedure before the Regulator, is that Mr. Bowsher appeared to give the
25 impression that this was just something between businessmen and lawyers did not get
26 involved.

27 Can I just show you the Guidelines and actually what happened in this case, because again
28 this is important background?

29 THE CHAIRMAN: Yes.

30 MR. VAJDA: If we just look at the Ofcom defence, at flag 4 I think it is. I am going to take the
31 Tribunal to the enforcement guidelines of 2006 explained in our defence, these were not
32 actually in force but they are effectively what we were doing – they are a fuller version. I
33 would like to take you to some salient passages. The first is at p.7 where it says in the
34 second bullet:

1 “These Guidelines are not legal advice and those who believe that they may be
2 affected by any of the issues or powers discussed in these Guidelines are strongly
3 advised to get independent legal advice.”

4 That is in fact what Ofcom suggested to Mr. Henry that he did and, in fact, as I will show
5 you in a moment that is exactly what Mr. Henry did when he retained the services of Orrick.

6 THE CHAIRMAN: You say at a time of ----

7 MR. VAJDA: The point is plainly Ofcom is saying that you may need to get lawyers involved.

8 THE CHAIRMAN: But that is at the time of the Ofcom determination?

9 MR. VAJDA: No, no, this is in relation to handling the whole dispute.

10 THE CHAIRMAN: Right.

11 MR. VAJDA: So if we then go to p.25 of these Guidelines, you will see ----

12 THE CHAIRMAN: What am I supposed to be looking at, the Guidelines or your defence?

13 MR. VAJDA: The Guidelines, p.25. Has madam Chairman not been looking at the Guidelines so
14 far? If you have not been looking at the Guidelines ----

15 THE CHAIRMAN: No. You asked us to look at the defence and I was getting confused.

16 MR. VAJDA: The Guidelines are annex 4 to the defence.

17 THE CHAIRMAN: The Guidelines that I was referring to originally?

18 MR. VAJDA: Yes.

19 THE CHAIRMAN: At annex 4?

20 MR. VAJDA: Annex 4. If you go to p.7 of Annex 4, the second bullet, and I apologise that I was
21 taking it obviously too quickly.

22 THE CHAIRMAN: Yes, but you said the “defence” and we went to the “defence”.

23 MR. VAJDA:

24 “These guidelines are not legal advice and those who believe they may be affected
25 by of the issues or powers discussed in these Guidelines are strongly advised to get
26 independent legal advice.”

27 So that is the first point. Now if we go to p.25 of these Guidelines -----

28 THE CHAIRMAN: And you are going to show us that although these ----

29 MR. VAJDA: We are not going to get into that level of detail. What we said in the defence is that
30 effectively we operated pursuant to the ----

31 THE CHAIRMAN: And he was told that, is what you are saying?

32 MR. VAJDA: Yes, we will show you a letter. At 25 we have a section which is headed

33 “Information gathering.” Now, to a lawyer that means “evidence”, that is the receipt of
34 evidence, which is absolutely critical and it goes exactly with the point that you, madam

1 Chairman, have picked up this morning about how one has evidence before the Regulator,
2 because the Regulator is acting like a court is acting as a dispute resolution body.

3 The last passage I would like to take you to is on p.41.

4 THE CHAIRMAN: Is there anything in the information gathering? I looked at this very quickly
5 this morning and I was not sure how that relates to being a dispute resolution body rather
6 than an investigation body. What I did not know is how you do it, you see, because this is
7 all about how they are going to collect information, and how they go out, etc. It is not an
8 *inter partes* – these Guidelines apply to various things and it is much more useful to other
9 things than to the dispute resolution part of it. “Competition complaints, and complaints,
10 and disputes concerning regulatory rules”, if you look at the heading?

11 MR. VAJDA: Yes. There is a specific section on dispute which is s.6 at .31, and that is
12 “Resolving disputes” We have no role in resolving disputes, and then we see jurisdictional
13 issues which we have looked at, handling the dispute, and then we have ----

14 THE CHAIRMAN: It does not say how they do it, does it? It may do, I just may have missed it.
15 It is the same with what their role is.

16 MR. VAJDA: Well no, not necessarily, because if you one goes to p.40 one has a very useful
17 little flow chart which sets out when a dispute is accepted, initial analysis and draft
18 information request sent, final information or test deadline.

19 THE CHAIRMAN: It does not say that if you exchange the information or ----

20 MR. VAJDA: What you then had was you have a draft determination at the end.

21 THE CHAIRMAN: Yes, I mentioned that.

22 MR. VAJDA: Yes, which is then available to comment by both parties at that stage. But plainly
23 Ofcom is acting here, it is not acting like a High Court Judge where it is just acting as a sort
24 of referee and there is a ping pong match going on. It is acting much more as ----

25 THE CHAIRMAN: Inquisitorially?

26 MR. VAJDA: Inquisitorial but Madam Chairman was entirely right to say that this is a dispute
27 between two parties and there is an information gathering process with that and that then
28 culminates in the draft determination which you see half way along this line in figure 1:
29 “Prepare and publish draft determination, and that is quite an important stage because then
30 you see that that happens almost half way through, and then there is comment on that.

31 THE CHAIRMAN: But nowhere in here, apart from if you take 653 in the table, does it actually
32 explain their procedure for determining the dispute. They send information requests.

33 MR. VAJDA: Yes and the procedure is set out in figure one and that is the procedure. It is
34 important – if you want to put a little line over draft determination because I will come back

1 to that in a moment in relation to the participation of lawyers in this case. Then if we could
2 just look at then p.41 you see a section: “Costs and expenses in dealing with disputes. In
3 dealing with the ... Ofcom will normally incur costs such as legal costs and expenses by
4 example e.g. taking up the senior managers and in tunnel experts.

5 In relation to Rapture, what Ofcom did was to refer Rapture to the *pro bono* scheme.

6 Unfortunately it is in the second volume of the Rapture defence. If we go to flag 40 you
7 should have an email from David Henry of 15th ----

8 THE CHAIRMAN: To Mr. Kelly?

9 MR. VAJDA: Mr. Kelly is somebody who worked at but no longer is at Ofcom. You will see in
10 the second paragraph: “I have also arranged to meet with the City law firm, before meeting
11 with Ofcom next week, who have offered to help with advice on the submission” as well as
12 starting the damages thing and there is nothing to suggest that that was anybody other than
13 Orrick who are an extremely experienced firm. “I visited out of interest their website
14 yesterday and they tell me that they are experts in competition regulatory matters. So they
15 were well on board; he had excellent advice there no doubt, and I am then instructed that in
16 fact Orricks came to a meeting with Ofcom on 20th February 2007 to discuss the draft
17 determination.

18 THE CHAIRMAN: What date – 20th February?

19 MR. VAJDA: 20th February. So he had access on a *pro bono* basis to some of the finest legal
20 brains in the city dealing with competition law.

21 There are two background points and in relation to the application to amend our
22 submissions fall into two parts. First, there is the question of time. The order of the
23 Tribunal that was made on 1st June required any application to be made by 10th July. No
24 application was made until 20th July, and it is surprising that neither in the application itself
25 nor, Mr. Bowsher has said this morning, has there been any explanation as to why they
26 should not have been compliant with the time limit of the 10th July.

27 THE CHAIRMAN: Is anybody prejudiced by this because they did actually put in all the
28 material, they just did not make the application?

29 MR. VAJDA: All I want to say and, of course, it is a case that Mr. Bowsher is extremely familiar
30 with; that is the *Prater* case – you will remember the decision, of Sir Christopher Bellamy
31 [2006] CAT 11. This Tribunal has established a fearsome reputation for sticking with time
32 limits and we have had no explanation today as to why the Tribunal should depart from that.
33 I say no more on that.

1 I now turn to the second limb, which is “do the proposed amendments comply with
2 Rule 11?” Now, what is said by Mr. Bowsher, and I am going on what he said last night in
3 his submissions, is that he accepts that there are two new grounds – the Sky platform model
4 point (I will come to in a moment) and the unbundling point. In relation to all the other
5 stuff what he says is it is simply clarification or development.

6 Let me deal first of all with the two new grounds that he himself accepts are new.

7 THE CHAIRMAN: Today he may have resiled from that slightly.

8 MR. VAJDA: I think what he said, in relation to unbundling of services, was that it was almost
9 new, but I am not sure that he has actually resiled from it.

10 THE CHAIRMAN: I said “May have”.

11 MR. VAJDA: I think the words were: “only barely new”, but anyway – there may be degrees of
12 newness, but I suspect, consistent with proportionality, we are not going to want to get into
13 that today.

14 Dealing with the platform model point first. Subject to the time point that I have mentioned
15 which, in my submission, the Tribunal does need to hear Mr. Bowsher on, we very much
16 adopt what the Tribunal has been saying to Mr. Bowsher this morning. First, it is difficult
17 to see how this is a new ground, because it is just para.32, it stands there. If this point is
18 going to come in we see that the sensible way of dealing with it is by way of reply, that is
19 the obvious way and that avoids the time problem, and Mr. Bowsher would be entitled to
20 have a reply and then we may wish to put in a short rejoinder on that.

21 THE CHAIRMAN: If that was the only point, do we want to re-do the whole thing or can we not
22 say that this is a notice of application with a reply in it.

23 MR. VAJDA: Well let us get to the mechanics in a moment because there is a very important
24 point here which I shall develop in a moment, that it is not simply a question of “Oh, well
25 let us just have the substituted notice of appeal, it might be just much easier, because
26 effectively that would mean the Office completely re-pleading the defence which would be
27 a nightmare, and I say that with some feeling.

28 What I am saying is para.32, if that gets put into reply we would not object, because as I say
29 that falls outside the ambit of the Tribunal’s order, and that would be a convenient way
30 forward.

31 I turn then to the second new point, which is the unbundling of services. Now, if one goes
32 to the little commentary that we have given the Tribunal, and go to p.2, we see “Unbundling
33 of services and charges”, and there we have a cross reference to where Mr. Bowsher said, in
34 his note, there was reference to the old notice of appeal, and he says none. It is common

1 ground that that is a new point. We say there is absolutely no explanation as to how this
2 ground falls into any of the three limbs of Rule 11(3)(a). We have had no argument,
3 detailed or otherwise, as to how this is a matter which came to light since the notice of
4 appeal, bearing in mind that they have had the expert advice of Orricks for some time. We
5 have had no explanation as to why it was not practicable – (b) – and plainly, this does not
6 fall within exceptional, so we say that that must fail.

7 THE CHAIRMAN: I think what he says is they are all doing it *pro bono* and they did not have
8 that access before.

9 MR. VAJDA: There is nothing about *pro bono* here. We are dealing with a major US law firm
10 which has very great expertise – if one goes on to the website one can see all the Blue Chip
11 clients they act for in this area.

12 MR. BOWSER: I am sorry to intervene – before my learned friend gets too far down this line
13 of argument on the basis of Orricks position, may I just intervene on one point, would it be
14 possible?

15 MR. VAJDA: Yes.

16 MR. BOWSER: I do not want my learned friend to base too much of his argument on this. I
17 will make copies of this¹ for the Tribunal, but he makes a great deal of the position of
18 Orricks and how Orricks were contacted in November under the *pro bono* scheme. It is
19 worth looking at the scheme outline and conditions. The scheme says (second bullet):
20 “Each adviser is committed to providing up to two hours’ worth of free legal advice.” I am
21 afraid most of what my learned friend is saying about the position of Orricks falls away in
22 that context.

23 THE CHAIRMAN: Well I am not sure that is right, is it, because in fact they did go and see
24 Ofcom, and that must have been in addition to the two hours. So even if their requirement
25 is only two hours what they do is something maybe very different.

26 MR. BOWSER: To assume from that that Orricks are somehow acting throughout this
27 procedure as if they were acting on a paid basis to advise on all matters is, frankly, absurd.
28 Further, there is no expert evidence *pro bono* scheme. I do not think it is appropriate for me
29 to tell the Tribunal how we have secured an expert ----

30 THE CHAIRMAN: No.

31 MR. BOWSER: -- but if necessary and it happens on a private basis we can go into that. We
32 have secured expert evidence to assist, but to somehow assert that on the basis of the fact

¹ Referring to the *pro bono* scheme outline and conditions.

1 that Mr. Henry had a few conversations in November, and that Orricks turned up to a
2 meeting, that somehow Orricks are to be deemed from November to have been acting as a
3 full service regulatory law firm is just not correct. Thank you – I am sorry to have
4 intervened, but I think it was important.

5 MR. VAJDA: I am grateful.

6 THE CHAIRMAN: We know what they did.

7 MR. VAJDA: We know what they did. They attended the meeting on 20th, and the reality is that
8 this amendment has to fall within one of the three limbs, and the closest it could possibly
9 get to, in my respectful submission, would be “exceptional”. But if, for example, Mr.
10 Henry himself had drafted the notice – the notice of appeal is actually signed by a partner of
11 Orricks – I mean it appears that that is the work of a lawyer -----

12 THE CHAIRMAN: Yes.

13 MR. VAJDA: -- and we say that simply does not fall within ----

14 THE CHAIRMAN: Do you say this point is one which a lawyer drafting a notice of application
15 with competition experience, which this lawyer did have, could have been made?

16 MR. VAJDA: Yes, that with respect is not the correct test.

17 THE CHAIRMAN: No.

18 MR. VAJDA: The correct test is – for example, if this was before the Court of Appeal the Court
19 of Appeal would say: “Does it fall within (a), (b) or (c)? I say no argument has been
20 addressed as to how it falls within either (a), (b) or (c), and that is the test, there is no other
21 test. It is very dangerous to substitute what Parliament has laid down with another test.
22 So that is what I say on unbundling.

23 I then come to the six further points, which are not said to be new grounds but are said to
24 develop or clarify the original notice of appeal. If I could start off before dealing with each
25 of them in turn by saying that if in fact these are already in the original notice of appeal, the
26 important thing is that you do not need to amend at all, they are simply that you can stick
27 with the original notice of appeal, they can be made by way of oral argument or skeleton
28 argument.

29 If, on the other hand, they are not in the original notice of appeal, they are effectively new
30 points. There is an important point of practice here which I have already pointed out, that if
31 in fact the Tribunal were to permit the substituted notice to go in Ofcom would have to re-
32 do the defence. The normal procedure, as you madam Chairman are aware and, indeed, as
33 Mr. Bowsher alluded to, is that the party who is put to that cost would be compensated in
34 costs. Now that claim does not apply in the present case because it is simply not possible.

1 So this would involve putting in a substituted notice of appeal which we say would be
2 completely the wrong approach here. If there is to be any amendment it should be done by
3 reference to the original notice of appeal with some additional paragraphs, because
4 otherwise Ofcom will be involved in considerable resources which will effectively have
5 been thrown away both in time ----

6 THE CHAIRMAN: I suppose we had better make sure that there is not an offer to pay the costs
7 – I assume there is not.

8 MR. VAJDA: Well I suspect not.

9 MR. BOWSHER: No, and ----

10 MR. VAJDA: I am not criticising.

11 MR. BOWSHER: The second statement of Mr. Henry, which we are not on – I do not know if
12 you have had a chance to look at it, but again in the interests of trying to be as forthcoming
13 as possible, it sets out a pretty bleak situation so there is no possibility of making such an
14 offer.

15 MR. VAJDA: I fully understand the circumstances under which my learned friend is acting, and
16 so it is not a criticism, but it is an observation that the Tribunal needs to bear in mind.

17 THE CHAIRMAN: What you would say is that they ought to have come back to us at an earlier
18 stage and said: “Actually we are thinking about re-doing all this; stop your timetable?”

19 MR. VAJDA: No, I am not.

20 THE CHAIRMAN: In order to prevent you putting in the defence.

21 MR. VAJDA: Well the notice of appeal was drafted, we had a ----

22 THE CHAIRMAN: We had a CMC, I said that it looks as if you have focused on Judicial
23 Review ----

24 MR. VAJDA: Rather than merit.

25 THE CHAIRMAN: -- and you ought to go away and consider that. Meanwhile your defence was
26 not in at that stage. It was only after your defence was in that they then decided to
27 substitute and put all these points in, and what you are saying is – or what you might say –
28 is if they had stopped the timetable that is one thing and come back and said “Hold it, we
29 actually want to try and re-do this a bit now that we are a proper team”. But they did not do
30 that, and you are now prejudice because you are going to have to do two defences.

31 MR. VAJDA: I do not want to make too much of the point because certainly it was our
32 understanding that any application would be a modest one in terms of effectively turning
33 what madam Chairman thought was a Judicial Review into a merits’ appeal, and there
34 would be a small amount of tweaking and that was that, but this is completely outside, and

1 Indeed, had we had any idea that this sort of exercise would have gone on, we would have
2 said it would be plainly absurd for us to put in a defence.

3 THE CHAIRMAN: Absolutely, that is what I am saying and either at that hearing or at some
4 point immediately afterwards – because that hearing went on the basis that you were going
5 to put in a defence, because otherwise we would have done something else.

6 MR. VAJDA: Precisely, yes. What I would like to do, and I apologise although I feel there is
7 really no alternative, is to go through – I hope not in excruciating detail – effectively these
8 points and explain why they are more than, if you like, clarification, and in order to speed
9 things up we have prepared overnight this commentary.

10 THE CHAIRMAN: Yes, very useful.

11 MR. VAJDA: I hope, like going to the dentist it will not be too painful, we can all have a bit of
12 anaesthetic. The first point is negotiation. It is perfectly true that the issue of negotiation
13 was raised in what we call the old notice of appeal. The main point that was raised in the
14 old notice of appeal was that there was no real negotiation. What Rapture were saying is
15 that Mr. Wisking’s clients were basically not ----

16 THE CHAIRMAN: And that point is not being taken any more?

17 MR. VAJDA: Well it is not entirely clear, but there are a whole load of new points that have been
18 taken, and if we can just look at the new notice of appeal and indeed, what we say the first
19 comment in the old notice of appeal was that because there was no real negotiation Ofcom
20 should have dis-applied the Guidelines, and what is now being said is that actually the clear
21 effect of the Guidelines is that you should have had a certain form of negotiations and if we
22 pick this up in the new notice of appeal at p.5 and there is the cross-reference one sees at
23 footnote 2, to 54 to 57. But then the real meat of this comes at para.22:

24 “... the requirement to enter into negotiations exists at least in part to help to
25 ensure the application of several other principles ...”

26 and that is, if you like, the background and 25, this is where the punch comes in:

27 “The clear effect of the provision in the Guidelines set out above as applied to this
28 case is that:

29 a. Sky should have entered into such negotiations as would occur in a
30 competitive market with Rapture”

31 and then if one goes to:

32 d. In the event that such negotiations as one would expect in a competitive
33 market, using the published rate as a starting point, did not occur, Ofcom

1 “(57) In the absence of any real ability to negotiate, Ofcom could not have
2 concluded ... and should have departed from these Guidelines to do so.”

3 So that is diametrically opposed to what is being said now.

4 THE CHAIRMAN: So if that is the ground, it is a new ground now?

5 MR. VAJDA: The argument that has been put – yes. So we say we have (54) to (57) [of the old
6 notice] can plainly stand but they should not be supplemented by what is in (21) to (26) [of
7 the new/substituted notice].

8 THE CHAIRMAN: Because it is not supplementary.

9 MR. VAJDA: No, it is the new ground. Can I then come to the second little point on our
10 commentary? Perhaps again the most convenient course would be if we look at it in the
11 substituted notice of appeal at 27 (p.8). The relevant paragraphs are 27 to 35. There is an
12 element here where the draftsman wanders around a bit because we have what we would
13 call some degree of reply material at 29, but I am not going to be focusing on that. 32 is the
14 platform point ----

15 THE CHAIRMAN: Which you have dealt with.

16 MR. VAJDA: -- we have said we can deal with in reply. But then the critical feature is:

17 “33. The most significant element of common costs considered by Ofcom was the
18 contribution to set top boxes.”

19 Then it says in the third line: “The set top box subsidy should not, however, have been
20 treated as a common cost.” So there is a very important point, STB not common cost.
21 The Tribunal will notice para.34 begins with the tantalising words: “Regulatory precedent”
22 but the reader is not actually informed what regulatory precedent is being referred to there
23 at all. When we look at the cross references – if we go back to the commentary – we will
24 look at those paragraphs, but none of those refer to any regulatory precedent, so we are
25 simply in the dark as to what regulatory precedent is being referred to there.

26 THE CHAIRMAN: I assume it is the regulatory precedent in the so-called expert’s evidence.

27 MR. VAJDA: It may be. To be fair to those representing the other side, what they say is, as I
28 understand it, that the expert evidence is to be incorporated almost by reference into the
29 pleading, but I am going to leave that to one side at the moment. I will come back to that in
30 a moment, because there is a short passage in Mr. Borwick’s evidence that I would like to
31 show the Tribunal in a moment. But if one then looks at the errors at 35 we have at “d” on
32 p.11:

33 “(d) Wrongly including the cost of all set top boxes in the calculation of stand-
34 alone cost”, and then

1 “(f) Failing to treat the set top box as an externality instead of a common cost.”

2 I would like now just to look at one passage in the witness evidence of Mr. Borwick,
3 because he is relied on very heavily in this respect. Does the Tribunal have his evidence.
4 At para.6 on p.3 he says:

5 “‘In my view Ofcom’s determination was flawed. It is clear from the non-
6 confidential version available, and from the Ofcom defence that the central flaw
7 with Ofcom’s determination is they incorrectly identified the STB subsidy as a
8 common cost in the provision of EPG...”

9 So that, if you like, is a big point. It is a major error there. We say that that is entirely new,
10 because the approach previously had been that there are certain benefits for getting Rapture
11 on to the platform, and these should be taken into account, but there was no attack on it
12 being a common cost as such. If one goes to some of the cross-reference old notice of
13 appeal paragraphs that Mr. Bowsher has given us – maybe we should go through this.
14 Paragraph 48, for example, on p.16. It is perfectly true, as Mr. Woolfe points out to me,
15 that Mr. Bowsher does not refer to para.48 but I hope I will be forgiven for referring to
16 para.48:

17 “‘Rapture further submits that any ‘externality’ (i.e. additional viewers arising from
18 the STB subsidy) should apply only to the proportion of subscribers who are truly
19 incremental as a result of the subsidy”.

20 So effectively it is a degree point there, whereas in Mr. Borwick’s approach, and in the
21 approach of the substitute it is a matter of principle. We then see the arguments that are
22 made at 49 to 53 which are cross-referred. It is dealing with level of risk, which is a
23 different point. Then if we go to 62 to 65 that is dealing with duration with which the
24 subsidy should be repaid, so it is not an attack on the subsidy as such, we are saying that
25 you are allocating over a wrong period of time.

26 Then the last cross-references are at 70 to 74, and we see at 73 it said that: “... only the costs
27 associated with the basic set-top boxes should be taken into account.” There is an
28 argument here which we have dealt with in the defence that effectively it said well, Sky has
29 an all-singing, all-dancing set top box, you should not have taken that into account; you
30 should have taken the cost of a more basic set top box. That is the argument that was being
31 put at that time.

32 Then at 74: “... should only have to contribute towards the costs corresponding to the parts
33 of the set-top box that it actually uses for EPG services.” So we say that this is a new point,

1 and a new ground. I am not saying that it could not be run as an alternative to the ground
2 that is run in the notice of appeal, but is ----

3 THE CHAIRMAN: A different ground.

4 MR. VAJDA: -- a different ground. So that takes us, I hope, to p.2 of our little commentary. We
5 then come to what I call the third ground, which is “Costs reasonably and necessarily
6 incurred”, and again perhaps I could ask the Tribunal to cast their eye very briefly over
7 paras. 36 to 38, which are to be found at pp.11 to 12. Paragraph 37 again drifts in to reply
8 mode, but that is not my main ----

9 THE CHAIRMAN: No, because you say if it is reply then ----

10 MR. VAJDA: Yes, exactly. But at 38, these are the errors that Ofcom are said to have committed
11 and we will see that among the errors, if we go over the page at “c” :

12 “Included the cost of all set-top boxes in the category of common costs relevant to
13 the service provided to Rapture.”

14 So the paragraphs, if we go back now to the old notice of appeal, which is paras. 45 to 48,
15 this is really dealing, as I understand it, with costs efficiency, that is at 45, and then the
16 point at 48, which I have already taken the Tribunal to, which is dealing with what degree
17 of subsidy does Rapture benefit from? The short point here again, 45 to 48 it is in the
18 original notice of appeal, we are not taking objection it, that is what Rapture should stick
19 with and we say that effectively 36 to 38 is wanting to add something new, because one
20 asks the rhetorical question: “Why do you need it if it is already in there?” We have
21 pleaded to 45 to 48, we are for our part content with our response to 45 to 48, and we think
22 that matters should rest there.

23 I dealt with unbundling of services, so I can then go to the next item on our little
24 commentary, which his “Willingness to pay”. Again, perhaps we can start by looking at
25 the substituted notice of appeal at 44, this is all under the heading – yes, at the bottom of
26 p.13 is the heading: “Willingness to pay” and there is a cross reference I will come to in a
27 moment or two. Now there is then an argument at 44 that:

28 “Ofcom failed adequately to consider whether there was a close linkage between
29 Rapture’s retail revenues and the access charge ...”

30 and then that Ofcom failed to take that into account. Then if we look at 45, this is the point
31 that Mr. Bowsher spent a little time this morning on:

32 “... principles of fairness, reasonableness and non-discrimination require Ofcom to
33 differentiate in the price charged for access at least between small broadcasters ...
34 and large broadcasters.”

1 We say that argument is also a discrimination argument, not put originally. Then 47 says
2 that we failed ----

3 THE CHAIRMAN: Well I think he said that it probably was put but not identified in that way.

4 MR. VAJDA: Well perhaps he will then explain to the Tribunal orally where it was put. Then we
5 have at 47: "... failed properly to take into account ... general duties." Now, the Tribunal
6 may wish to put in the margin there, that is 80 to 89, which is a cross-reference. This is
7 actually put in a slightly different way from that, because at least in the previous one they
8 explained how there is a failure, in the new one they do not explain that, so it looks as if it is
9 wider, particularly para.82 of the original notice of appeal. Then, when one comes to the
10 catalogue of errors that Ofcom is said to have fallen into at para.48, again we cannot see
11 where that comes from in the original notice of appeal.

12 Can we now go to the original notice of appeal starting at para.77. 77 to 79 was effectively
13 a criticism of Ofcom on relying on wrong financial information; I think it is limited to that,
14 so you can see that there is no read across between that and the wider points that are made
15 at 44 to 48 in the substituted notice of appeal.

16 Then paras. 80 to 89 is "Failure to discharge statutory duties". As I said, there is obviously
17 a degree of read across between this and what we have seen in the new pleading at para. 47.
18 The new pleading at 47 is much more laconic, if I can put it this way, than the original
19 pleading. We have responded to the original pleading, it has to be said that some of this has
20 been quite difficult to grapple with but we have sought – I hope successfully – to respond to
21 it, and for example, helpfully in the original notice of appeal it said at 82:

22 "In the Determination although Ofcom recognised that it was bound by the above
23 duties and by the six Community requirements, it did not explain how it had
24 discharged itself."

25 So you could say that those are the reasoning points, so we dealt with that. 47 is just an all-
26 purpose, all-singing pleading. Again, I make exactly the same point. I think Herbert Smith
27 again make some very telling points in their letter of 19th July, if we can just look at those,
28 which are at pp.2 and 3: "Willingness to pay. The original notice of appeal did not directly
29 address the issue of willingness to pay." Effectively if one is looking at this in a nutshell,
30 madam Chairman, 77 and 79 of the original notice of appeal were really concerned with
31 more the ability to pay than the willingness to pay; that is what was being argued. Mr.
32 Wisking says that 77 to 79 are directed to whether Ofcom properly investigated Rapture's
33 financial position.

1 “The section of the Substituted Notice of Appeal dealing with willingness to pay
2 raises a number of entirely different issues, including the linkage between
3 Rapture’s “retail revenues” and the EPG charge ... and the suggestion that a
4 different charge should apply to small and large broadcasters...”.

5 We gratefully adopt what is said there. We have only two more points to do now, so we are
6 on the home straight. I have my eye on the time.

7 THE CHAIRMAN: Shall we try and do the two points?

8 MR. VAJDA: Yes. If we go back to the commentary we have “(v)” which is “Appropriate rate
9 of return”. Mr. Bowsher has addressed us briefly on that this morning, but again if I could
10 invite the Tribunal once again to look at the relevant ----

11 THE CHAIRMAN: Paragraphs 49 to 51 [of the new/substituted notice of appeal].

12 MR. VAJDA: Yes, which is at pages 15 to 16. Mr. Bowsher said that this case is all about what
13 is the correct price for EPG. Obviously he says that involves what is the appropriate rate of
14 return? That is quite a big question, but the way it was put in the original notice of appeal
15 was on a narrower basis, which I will come to in a moment. But para.49 to 51 is extremely
16 wide-ranging. He says at 50:

17 “The appropriate rate of return is dependent upon each of the factors set out above,
18 together with an assessment of appropriate allowance for profit.”

19 There is no indication of what that allowance should be. It arises from a price which is fair
20 reasonable and non-discriminatory is conformant with the guidelines. It says at 51:

21 “Ofcom erred:

- 22 a. In considering that the rate of return achieved by Sky in this case was
23 not excessive since it was the result of unfair and unreasonable prices.”

24 So effectively what is being said here, and this is the point that Mr. Wisking makes very
25 powerfully in his letter, is that what is said is “Well, it is excessive because it was an unfair,
26 unreasonable price.”

27 At “b” there is some link between what is at “b” and the previous notice of appeal: “In
28 failing to consider what the risks of investment were at the time.” If we can now go back to
29 the original notice of appeal at paras. 49 to 53? Perhaps we can go straight to the punch
30 line, which is at para.53:

31 “It appears to Rapture that in light of the level of risk involved, the returns earned are likely
32 to be excessive”. The argument was, which again we have dealt with in our defence, that
33 this is no longer a novel service and one needs to adjust, so it was a very focused argument
34 on rate of return. We say we have now moved beyond that.

1 I think that is all I need say on that. Our little table refers again to Mr. Wisking's letter and
2 perhaps I could just ask the Tribunal to cast an eye over that either now or over lunch ----

3 THE CHAIRMAN: Noted, yes.

4 MR. VAJDA: -- there is a little passage where he deals with that. Then we come finally to
5 discrimination and perhaps while we have got the Herbert Smith letter open, we adopt and
6 endorse what is said there about discrimination.

7 THE CHAIRMAN: It tells us which paragraphs they think Rapture rely on – 58 to 60, and 76.

8 MR. VAJDA: Yes, let us just look at those because those are the cross-references given by Mr.
9 Bowsher, so if we go back to the original notice of appeal 58 to 60, the argument here is
10 effectively that you ought to take account of the fact that Rapture brings a benefit to the Sky
11 platform, that is the argument. So it is not a discrimination argument, it is simply saying
12 “We are actually bringing something to you, therefore ----”

13 THE CHAIRMAN: 58 does not help.

14 MR. VAJDA: 58 to 60 does not help. Then if we look at 76, which is the other one that is relied
15 on – this is a criticism of the evidence relied on by Ofcom, and I think the punch line comes
16 towards the end: “Rapture is aware of channels similar in size to Rapture that have been
17 unable to pay and have gone out of business. At paras 5.112 and 5.114 it appears that
18 Ofcom has not questioned submissions made by Sky, which it should have made an effort to
19 verify.”

20 Now, this you will see comes under the heading – it is a procedural point, you see at 4.3:
21 “failed to conduct a sufficiently thorough investigation to discharge its statutory duty”. So
22 what they are saying is that “You, Ofcom, were a bit lazy, you just accepted what Sky said.
23 It is not an argument that one of the reasons that this price is unlawful is because there is
24 discrimination; so we say it is like chalk and cheese.

25 So to sum-up, madam Chairman, what we say is in relation to the six points that Mr.
26 Bowsher says simply develop or clarify the original notice of appeal, we do not accept that.
27 We say that on analysis they are new grounds and they do not fall within any of the limbs of
28 Rule 11(3).

29 I have one or two more points, but perhaps ----

30 THE CHAIRMAN: This would be a convenient time to stop.

31 MR. VAJDA: Yes, but I will only be about another five to ten minutes.

32 THE CHAIRMAN: Right, and is Mr. Wisking going to merely support what has been said, or are
33 you going to take time doing that?

34 MR. WISKING: I think I will be very brief. All my submissions have all been made for me.

1 THE CHAIRMAN: Thank you. 5 past 2.

2 (The hearing adjourned at 1.05 p.m. and resumed at 2.05 p.m.)

3 MR. VAJDA: I am very, very near the end, what I wanted to do next was just to go back to the
4 original notice of appeal, I have made my particular points this morning but I just want to
5 show the Tribunal the structure of the original notice of appeal. Very helpfully it is set out
6 at pp. 8 and 9. One sees “Summary of Grounds” and there are effectively three grounds.
7 One sees at 3.1 the first ground is the scope of the dispute which is no longer, as I
8 understand it, being pursued.

9 THE CHAIRMAN: Well is that right, because it says:

10 “... too narrowly by only considering the charges for Sky’s EPG service, rather
11 than considering whether the basis of Sky’s EPG service provision was fair,
12 reasonable ...”

13 MR. VAJDA: Possibly not. Let us look at the “Grounds of Appeal” under s.4. The first ground
14 is “Ofcom erred in law”, and there we have stated the dispute. Then the time within which
15 they must handle the dispute and issues in dispute within the time frame. Then, if you like,
16 so far as I can see, the substantive attack is at 4.2 which is “Ofcom erred in exercising its
17 discretion.”

18 THE CHAIRMAN: Which is the second ground; if the ground is “Ofcom erred in law”, if the
19 ground is so wide – or is it because Ofcom erred in law because ----

20 MR. VAJDA: Well it is not entirely clear to me. The pleader has treated “Ofcom erred in its
21 discretion” as a separate ground, because it is 4.2 and it is in bold, and 4.1 “Ofcom erred in
22 law”, so it is obviously something different from 4.1.
23 Then if one looks at para. 38, at the bottom of p.13 it says: “Five of these six components
24 have not been properly analysed” and in fact what they criticise are components 1 to 5, and
25 in fact a comparable price should be offered to comparable users, and that is of course at the
26 heart of the discrimination point that is now being raised we say for the first time. So that
27 is, if you like, the substantive attack, and that goes from paras. 34 to 68, and then we have
28 4.3 which starts at p.20, which is “Failure to conduct a sufficiently thorough investigation
29 ..” that is failure to take account of various bits of evidence, or not doing it properly; and
30 then we get at para.80 (p.22) the discharge of duties and the way that that is pleaded is that
31 it was, if you like, a reasoning point – a failure to explain – para.82, how it had discharged
32 those duties. So we say that this is quite a different animal from what we had in the original
33 notice.

1 If I could then just make two final points which we invite the Tribunal to consider if the
2 Tribunal were to conclude that any of these grounds falls within one of the three gateways
3 because as I have indicated we do not regard this as being an exceptional case, but were the
4 Tribunal, for instance, to consider: Is this an exceptional case? Should they exercise
5 discretion? There are two factors that we say the Tribunal should also have regard to. First,
6 that this is an appeal from a dispute resolution – a statutory dispute – which is to be done in
7 four months, where speed is of the essence, it is to resolve a commercial dispute. We say
8 that that policy feeds into the level of appeal, that the Tribunal should be slow to allow
9 amendments which effectively slow down the ultimate resolution of that dispute.
10 Secondly, we invite the Tribunal also to have reference to a concept that has reared its head
11 both in this and the previous proceedings, that of proportionality. In this respect could I
12 invite the Tribunal to have a look at what Rapture asked the Tribunal to do in its original
13 notice of appeal at p.27:

14 “(102) Rapture respectfully requests that the Tribunal direct the proceedings in
15 such a manner that costs are as economic as possible.”

16 We say that the present exercise is diametrically opposed to such an approach. We would
17 also draw the Tribunal’s attention to Rapture’s concern at last bullet point at para.104 – the
18 interests of saving public funds. Those are points that would not in themselves mean that
19 there should be no amendment if one fell within one of the three gateways, but they are
20 factors that we say are plainly relevant to the Tribunal’s exercise of discretion were the
21 Tribunal to find that prima facie any of these grounds fell within the gateways.

22 My final point is that if, contrary to my submissions, the Tribunal were minded to allow any
23 amendment of the notice of appeal we would invite the Tribunal to direct that that is to be
24 done by reference to additions to the original notice of appeal.

25 I have already pointed out that to leave in the substituted notice of appeal would cause my
26 clients considerable extra expense, because they would effectively have to re-plead a
27 defence.

28 THE CHAIRMAN: You are going to have to do that anyway, are you not? If they did it by
29 crossing out bits and putting it in, those bits are going to be new anyway.

30 MR. VAJDA: No, but all the paragraph numbers, everything is the same, it would just be the new
31 underlined bits, so there is quite an important position here. Also the current position in our
32 respectful submission is unsatisfactory because effectively we have got the original note ----

33 THE CHAIRMAN: I think they say they are abandoning the original notice now, it will all be in
34 the substituted notice.

1 MR. VAJDA: The substituted notice itself cross-refers to the original notice and there is also the
2 other point so far as the substituted notice is concerned, and if I could just show the
3 Tribunal this, which is at p.3 of the substituted notice – para.7:

4 “Rapture specifically relies upon the comments upon and criticisms of the
5 Determination contained in the statement of Leo Borwick.”

6 I am not going to make any submissions about Mr. Borwick’s statement at the moment
7 because that may not be necessary depending on what the Tribunal decide on the pleading
8 point. What I am saying is that if any amendment were made we regard this form of
9 pleading as not being satisfactory because effectively one needs to know from the pleaded
10 case what the case is, and what one cannot have is part of the evidence incorporated into the
11 pleaded case. But that problem would disappear if the Tribunal adopted the approach that I
12 have indicated that insofar as any amendment is permitted it has to be done by addition to
13 the original notice of appeal and the Tribunal would make it clear in any Judgment that one
14 could not simply rely on comments in an unspecified way.

15 To summarise, our basic point is that in relation to the platform point we have no difficulty
16 about that, it has been done as a reply, but in relation to all other points we take the point
17 that they are new and they do not begin to meet any of the three gateways in Rule 11.3.

18 Those are my submissions.

19 THE CHAIRMAN: Thank you.

20 MR. WISKING: I will be very short. First, I adopt the submissions of Ofcom in relation to the
21 pleading.

22 THE CHAIRMAN: Particularly those that they adopted of yours.

23 MR. WISKING: Indeed! (Laughter) As I said before the points have been made for me. We too
24 are also concerned as a matter of proportionality about the costs’ implications of proceeding
25 with the substituted notice of appeal. I echo the submission of my friend that the current
26 situation where at the moment there is the old notice of appeal cross-referenced into the new
27 notice of appeal, supplemented by two explanatory notes is not really a satisfactory situation
28 and we would prefer that the original notice of appeal – if any amendment were allowed –
29 were amended so there is a single document which, to the extent we have to make
30 amendments to the statement of intervention we can do within the existing structure which
31 in turn follows the structure of the Ofcom defence.

32 The last point I was going to make is we too are content for the issue about the platform to
33 be dealt with as a matter of reply. I would add, however, that much has been made about
34 this being a novel point, but in fact in the determination itself at para.5.28 reference is made

1 to the date of the model which Ofcom used as part of its Determination as June 2005. As
2 regards the function or the purpose of the model within Sky that is described at para.5.30 of
3 the Determination, so there is nothing new about the point but we are content for it to be
4 dealt with as a matter of reply.

5 THE CHAIRMAN: Thank you. Mr. Bowsher?

6 MR. BOWSHER: Let me deal first with some of the general matters. My learned friend asks for
7 an explanation for the delay and so forth. The situation has already been set out in the note
8 of 17th July, which I prepared. Owing to a misunderstanding within our team all the
9 materials for the application, subject to one or two – Mr. Borwick’s CV and there is a
10 spreadsheet which got missed during the copying – but leaving that to one side the
11 substantive material for our various applications today were submitted on time, but owing to
12 a misunderstanding for which I have apologised and accepted responsibility as set out in
13 that earlier note the actual formal application – the letter asking for what we wanted was not
14 submitted at the same time; that is unfortunate.

15 The matter was somewhat compounded by the fact that the absence did not come to my
16 attention – you may recall that the Tribunal sent a letter ----

17 THE CHAIRMAN: Asking where it was.

18 MR. BOWSHER: I had misunderstood the letter. The letter of Friday, 13th from the Tribunal
19 came by email, was passed on to me – it actually caught up with me on my way to the
20 airport. I had, as it happened, some of the papers in this matter with me. On first reading
21 what was clear was what the Tribunal was asking for was the mark-up and if I put it this
22 way it had not occurred to me that the application had not been made, and therefore it was
23 not apparent to me from the letter that that is what was being said. It was only ----

24 THE CHAIRMAN: That is what was being said in the letter actually.

25 MR. BOWSHER: Whatever I should have read I was on holiday at the time, and I have to say
26 that when I first ----

27 THE CHAIRMAN: But there was an order, and the order said that any application had to be
28 made by 10th June.

29 MR. BOWSHER: Yes, and I have said the application has not been owing to a misunderstanding
30 for which I have apologised, the letter ----

31 THE CHAIRMAN: I do not understand how there could be a misunderstanding of the order.

32 MR. BOWSHER: It is not a misunderstanding of the order; it was a misunderstanding as to what
33 was going to be done by the date – what was going to be done by whom by the date. The
34 material was being prepared to comply with the order, it was produced and owing to a

1 misunderstanding for which I have apologised and accepted responsibility the covering
2 application was not provided. It was only in the course of the Monday – possibly the
3 Tuesday, I cannot now remember – that it became apparent to me that what had actually
4 happened was that no covering application had been made, at which point the short note
5 was then produced.

6 **THE CHAIRMAN:** What this letter said – 13th July – we referred to the substitute notice of
7 appeal and we referred to the order which said that any application had to be made. I think
8 if we look at the letter of 10th it was a one line letter: “Further to the order, please find
9 enclosed our substituted notice of appeal.” In response to that on 13th July the Tribunal
10 wrote to say we have got the substituted notice of appeal but the order said you had to
11 make an application and you have not done it – well we did not say “You have not done it”,
12 but ----

13 **MR. BOWSHER:** I am afraid that is quite important – I am not blaming the Tribunal, I am
14 simply saying this is why it is entirely my own personal fault, but ----

15 **THE CHAIRMAN:** That is why we said that that order did not grant permission to amend, which
16 it looked like because you had sent in your substituted notice

17 **MR. BOWSHER:** What I had read that letter as saying was: “We do not like the form in which
18 you have produced this notice of appeal because the order did not grant permission but
19 provided a timetable, yes and an application.” “It seems to the Tribunal that the appellant
20 has sought to submit an entirely new notice of appeal which is not want was contemplated.”

21 **THE CHAIRMAN:** We said this before, that did not grant permission to amend, “... but provided
22 a timetable for further applications including, if required by the appellant, an application for
23 permission.”

24 **MR. BOWSHER:** I am not going to excuse my misreading of the letter, but the way I read that
25 letter was that what the Tribunal was commenting on was the fact that ----

26 **THE CHAIRMAN:** Anyway, you did not realise at that point that you had not put in a notice of
27 application.

28 **MR. BOWSHER:** That there was no notice of application.

29 **THE CHAIRMAN:** Somebody in your team had not done what they were supposed to do.

30 **MR. BOWSHER:** No, I did not say “someone in my team”, I said it was not done and it is a
31 matter for which I am responsible. I am not blaming anyone. I have said it is a matter of my
32 responsibility, I have said that from the outset and unless the Tribunal particularly wants me
33 to get into that, I do not propose to get into what has happened within the team, who did
34 what and when. I do not think that is appropriate. I have apologised in the note to the

1 Tribunal of 17th July and that I would submit is that. An error was made in not putting in
2 the covering application. As I have said, when I read this letter² ----

3 THE CHAIRMAN: It was not apparent to you that the application had not been made.

4 MR. BOWSHER: It was not apparent, what leapt out to me was “That is not what we wanted you
5 to do” – putting in a new notice of appeal. It did not occur to me that underlying that was a
6 second or perhaps actually first problem – there was not actually a covering notice of
7 appeal. At some point, it must have been before I prepared the short note, it became
8 apparent in discussions – I do not know how it became apparent.

9 THE CHAIRMAN: Anyway, it became apparent that there had not been a notice of application.

10 MR. VAJDA: I do not want to compound Mr. Bowsher’s difficulty, but it might be helpful to the
11 Tribunal just to have a look at the short note addressing the Tribunal’s letter of 13th July
12 which says: “First I apologise for the failure to provide the application to which the material
13 relates.” That is the note settled on ----

14 THE CHAIRMAN: What are you looking at?

15 MR. VAJDA: The short note which is dated ----

16 THE CHAIRMAN: The 17th – yes.

17 MR. VAJDA: It made an apology for the failure to provide the application, and then the covering
18 letter of Orrick of 17th July – it is probably my fault, I should have taken the Tribunal to this
19 earlier – the last sentence of the second paragraph.

20 THE CHAIRMAN: You are looking at?

21 MR. VAJDA: The Orrick covering letter for 17th July, which says at the end of the second
22 paragraph: “The formal application ...” that is an application as I understand it to amend,
23 together with a request for permission to make the application out of time will be made
24 forthwith, and we still have not had the application to make it out of time.

25 MR. BOWSHER: As a point of record I do not think that is right. If one treats our 20th July letter
26 as making all our various applications the last heading is “Application for permission to
27 make out of time applications”, so I think that very last point is simply an incorrect point.
28 The reference to my note of 17th July ----

29 THE CHAIRMAN: Anyway, you are taking responsibility – it does not matter why but you are
30 saying it is your responsibility – for the fact that no application was made by 10th July?

31 MR. BOWSHER: Yes, and unfortunately it was not apparent to me that that was what the
32 problem was.

² Referring to the Tribunal’s letter of 13 July 2007.

1 THE CHAIRMAN: On 13th July it did not become apparent to you that there was still a problem.

2 MR. BOWSHER: That there was still a problem, although that was the problem. But once it had
3 become apparent to me that that was the problem, and I cannot quite remember how, this
4 short note was prepared – in some haste, I might add – to try and at least put in a
5 preliminary response to the points made, because what was already clear was that we knew
6 that addressing certainly (i) of 13th July letter was going to be difficult. One of the reasons
7 why we found ourselves driven into producing the substituted notice of appeal in the way
8 we did was we found, for all the reasons we had discussed earlier on today, it is quite
9 difficult when you actually start saying that this is the argument you want to make then to
10 try and get the little bit that you want to keep, and actually have a coherent, sensible
11 argument that actually makes linguistic sense, that is a coherent base for putting forward the
12 argument; it is quite difficult, it is not like a traditional pleading. Because of the nature of
13 the arguments you are putting forward it is easier and more sensible, and we anticipated
14 easier for the Tribunal to understand what we are saying, simply to write out in as short, we
15 hope lucid fashion – my learned friend says ‘laconic’ but there we are (Laughter) – what it
16 is we wanted to say.

17 THE CHAIRMAN: Well I think it depends and one cannot look at the form of how one looked at
18 it in the first notice – it depends on what is meant by grounds of appeal, and whether it is
19 just error of law or whether it is something greater and that is a matter of substance and not
20 form.

21 MR. BOWSHER: Can I come on to that. I am just dealing here with my learned friend’s points
22 about timing and so forth. The short point is this, we knew – certainly I knew – as it
23 happens, of those who had been involved in preparing the material that was submitted on
24 the requisite day by the requisite time none of us were in the country for the whole of last
25 week. That is not an excuse it is just a matter of fact. Again, one knew from experience
26 that trying to work out which bits of the original notice were exactly the same and which
27 were not was not that easy.

28 THE CHAIRMAN: That was why we asked for it to be done.

29 MR. BOWSHER: The point is simply this if one is trying to put forward the arguments in a crisp,
30 coherent way, trying to shoehorn them into previous text is not easily done. Hence, what
31 we tried to do in the short note and subsequently was to indicate the paragraphs of the
32 original notice where we say the references relate to. It is one of the reasons, and I mention
33 this now because it is as convenient a point as any, that when we put in the substituted
34 notice there was some concern as to whether or not we had actually covered the territory of

1 the original notice and we left the matter as it was. Having gone over the matter again and
2 again subsequently we are now content – as we have said most recently – that we rely upon
3 the substituted notice. We propose that the right way to deal with it – if we were to get
4 permission – would be to proceed with the substituted notice. We do not propose to remove
5 the references to the original notice because they may be of assistance in future, if someone
6 wants to go back and see where they came from, but we are not relying upon those
7 references to the original notice as part of the pleading.

8 THE CHAIRMAN: But where are the grounds of appeal in the new notice?

9 MR. BOWSHER: Each heading has “Ofcom erred in ...”

10 THE CHAIRMAN: Like 26?

11 MR. BOWSHER: 26, for example.

12 THE CHAIRMAN: So where are the grounds of appeal now which are different from the
13 grounds of appeal in the original notice?

14 MR. BOWSHER: Some of those are different or re-worded. I am getting slightly ahead of where
15 I want to go.

16 THE CHAIRMAN: Yes, pursue what you are going to do.

17 MR. BOWSHER: What we have sought to do is, we have set out by reference to each substantive
18 heading, the errors which we say Ofcom made, and that has been done in reference to each
19 individual heading – in a sense those are the grounds of appeal, because those are the errors
20 we say they made, and we set out the matters that lead to that.

21 THE CHAIRMAN: So in order to see whether there are new grounds of appeal one has to
22 compare that with the old one?

23 MR. BOWSHER: The problem is to some extent they are re-wordings or refocusing of the old
24 grounds, e.g. in the old notice, starting at 4.2 on p.12: “Ofcom erred in exercising its
25 discretion.” The key points that are made are, in fact, the underlined points.

26 THE CHAIRMAN: You have not crossed those out so where do we find those in your new ones,
27 the substitution?

28 MR. BOWSHER: They have each been re-worked within the substituted notice of appeal. So, for
29 example, input costs should be reasonably and necessarily incurred in providing a service.
30 That is at one level surprisingly like the heading on p.11.

31 THE CHAIRMAN: You see this is terribly confusing. How is one supposed to work it out? If
32 you look at p.14 of your old notice there is something underlined there: “Terms should be
33 consistent with those in a competitive market.”

34 MR. BOWSHER: Yes.

1 THE CHAIRMAN: I think one of the objections to the new notice is that that might have been a
2 new ground, but there is the heading in the old one.

3 MR. BOWSHER: Yes. I am sorry, I am not quite sure ...?

4 MR. VAJDA: It is not my pleading but I think in fairness to the pleader those are just references
5 to 5.14 of the Determination.

6 THE CHAIRMAN: Absolutely.

7 MR. VAJDA: It is not a ground, it is just saying “We are now going to come on to deal with
8 that”.

9 THE CHAIRMAN: Yes, but if they are going to come on to deal with that, and they have a
10 number of what we will call “submissions” underneath it then if that was the ground and
11 there were different submissions which support it then it would be wrong to say it was not a
12 ground. That is why it is not very clear because we cannot see ----

13 MR. VAJDA: This is not a ground, it is simply just saying “We are now looking at 5.12 to 5.14
14 of the Determination”.

15 MR. BOWSHER: If one is looking at the formal legal ground in the original notice – just looking
16 at 4.2.

17 THE CHAIRMAN: “Ofcom erred in exercising its discretion.”

18 MR. BOWSHER: “Ofcom erred in exercising its discretion.”

19 THE CHAIRMAN: Well no, that is how the pleader of this said that was the ground, the question
20 is whether that is the ground, or the ground is a bit wider than that? More descriptive than
21 that?

22 MR. BOWSHER: The intention is that you now have, just using the example you have just taken
23 – if you take para.26 of our new notice we now identify the specific errors that we are
24 directed to. We are not simply saying in general terms it erred in exercising its discretion
25 with regard to the guidelines and “here is the bit of the guidelines you erred in.” We are
26 now focusing it on specific errors and in fact you can find them in the notice ----

27 THE CHAIRMAN: But that is the problem ----

28 MR. BOWSHER: -- but they are not identified as specific grounds of appeal saying “This was
29 the error.”

30 THE CHAIRMAN: If these are the grounds of appeal now – para.26 for example – then we ought
31 to be able to find somewhere those things in the old notice.

32 MR. BOWSHER: Well yes, we can, but they are not worded necessarily in quite that way.

1 THE CHAIRMAN: No. If it is only a matter of wording that is one thing. If we cannot find
2 them that is another. Mr. Vajda has done a very neat job in showing us that you cannot find
3 them so you have to show us that you can.

4 MR. BOWSHER: Yes, I was just coming on to that. Before I get there – I had not reached that
5 point yet – my learned friend says that we have to get through one of the gateways; it is
6 perhaps relevant also to look at the context in which this arises. The context, and
7 “invitation” perhaps is the wrong word, but the matter was left in which Rapture was invited
8 to look at its grounds of appeal again and consider how to marry them up with the merits’
9 nature of this jurisdiction.

10 THE CHAIRMAN: I think what we were discussing – you were not here so you do not know –
11 the focus was because of the relief that was asked for.

12 MR. BOWSHER: Maybe I have misunderstood but the nature of a merits’ review makes it
13 necessary to consider what are the actual errors in considering this dispute that arise.

14 THE CHAIRMAN: They are the same on Judicial Review.

15 MR. BOWSHER: Well possibly. We went through the analysis, with further analysis from
16 experts and were able to improve and develop the argument. If I can just take you through
17 the matter by reference to the substituted notice? Taking that as the starting point, I would
18 submit that most of this is, in fact, just trying to re-word and focus what is already there and
19 that arguably, as I have already said, does not need permission to amend in any event. We
20 are simply trying to focus it, to make clear what we say the errors were and to make sure
21 that, as it were, the vehicle for putting forward the technical expert arguments that have
22 been developed by Mr. Borwick is in play, and that there is no point for the future about
23 “you cannot raise that technical point because you have not raised it before.”

24 There are one or two points where the newness may arise. Now, we say it is not the case
25 therefore that there are just three gateways, there are, in fact, more gateways than that
26 because arguably on one reading of 11.11 of the Guidance one does not need permission at
27 all although that seems a rather ----

28 THE CHAIRMAN: Well you do not need permission to put in submissions, you do need
29 permission to put in grounds.

30 MR. BOWSHER: With respect, that is not quite how it is put in 11.11.

31 THE CHAIRMAN: Do not forget it is guidelines and you possibly ought to go back to the right
32 Rule, but I think that is what the Guideline says.

33 MR. BOWSHER: 11.11 says in the middle:

1 “Since the form of a notice of appeal is not that of a traditional pleading, such as a
2 statement of case in the High Court litigation, but rather a narrative presentation of
3 factual and legal argument, the concept of ‘amendment’, as traditionally applied to
4 civil proceedings, cannot be directly transposed to proceedings before the Tribunal.
5 Thus it will not normally be necessary to apply formally to ‘amend’ simply to put
6 into different words the written submissions made in support of a ground of appeal
7 which is already set out in the notice of appeal. Permission to amend will however
8 be necessary where the appellant seeks to raise a new ground of appeal that lies
9 outside the four corners of the original appeal.”

10 THE CHAIRMAN: That is what I said.

11 MR. BOWSHER: What we say is we are re-wording and focusing on specific errors in this
12 substituted notice. Now, taking “negotiation” as the first point – if you have the original
13 notice and the substituted notice – in my submission what we are dealing with here is a
14 point which has really been in play from the outset. Paragraph 26 of the new notice set out
15 the errors. “Ofcom erred in: Finding that Sky did provide Rapture with the opportunity to
16 make ----”

17 THE CHAIRMAN: Yes, we have read them.

18 MR. BOWSHER: My learned friend says there is a difference. We say there is no real difference
19 here. What we are going back to, trying to focus on in this notice is the question as to what
20 happens where there have not been real negotiations?

21 THE CHAIRMAN: Well where do you find it in the old notice?

22 MR. BOWSHER: Paragraphs 54 to 57, and also 39 to 44. There are two aspects to it. 39 to 44
23 develops, as it were, the ground ----

24 THE CHAIRMAN: That is under: “Terms should be consistent with those in a competitive
25 market”

26 MR. BOWSHER: They should be, exactly. That is a starting point. Now for amendments 54 to
27 57 ----

28 THE CHAIRMAN: That is under: “The allocation of common costs should be negotiated
29 between the relevant parties.”

30 MR. BOWSHER: Yes, and the conclusion at the end there in 57 is:

31 “In the absence of any real ability to negotiate, Ofcom could not have concluded
32 that the charges were fair, reasonable and non-discriminatory, and should have
33 departed from these Guidelines to do so.”

1 What we have put in the new notice is different in the sense that we do not say that you
2 should abandon the Guidelines, what we say is that if you are following the Guidelines and
3 there has not been a real ability to negotiate Ofcom must try and establish what would have
4 been the price of what is effectively a hypothetical negotiation. It has failed, and so ----

5 THE CHAIRMAN: If, for example, the ground was:

6 “The allocation of common costs should be negotiated between the relevant parties
7 and where a rate card is published, this should serve as the starting point for
8 negotiation.”

9 would that cover (a) to (d)?

10 MR. BOWSHER: No, the key issue here is probably 57 where it says: “In the absence of any
11 real ability to negotiate, Ofcom could not have concluded that the charges were fair,
12 reasonable ...” it is difficult to take 57 alone, but if one builds up to it ----

13 THE CHAIRMAN: So if you had crossed out “... and should have departed from these
14 Guidelines to do so”, could you have then inserted (a) to (d) underneath as submissions?

15 MR. BOWSHER: Probably, yes, but the argument that led to it would have been different, or
16 would have involved more material, because what we have said in 22 to 25 there is more in
17 there in terms of argument building to that error than there was in the original notice. The
18 errors are those in 26 and as you rightly point out, whereas what we said there was in the
19 absence of a negotiation Ofcom could not conclude that the charges were the right charges,
20 what we say is in the absence of a real negotiation Ofcom should have worked out what the
21 right charges were. It is putting it in a slightly different way. We are putting it as a positive
22 obligation. Instead of just saying Ofcom could not assume that the charges were all right
23 simply because there was no negotiation, we are saying “no”, Ofcom needed to establish
24 what the correct charges would have been.

25 PROFESSOR STONEMAN: It seems to me that we are getting bogged down here. I think you
26 are operating on a wing and prayer at the moment trying to make things consistent that are
27 not consistent. This argument seems to be grounded on the fact that you are claiming that in
28 para. 26 (a) to (d) these are your grounds of appeal – or your new grounds of appeal – and
29 what you are trying to do is to show that they are the same as the grounds of appeal in the
30 original document. Having looked through this document here³, if paras. 26(a) to (d) are
31 your new grounds of appeal unfortunately the next 30 paragraphs in the document through

³ Referring to the new/substituted notice of appeal.

1 to para.56 bear no relationship to para.26 (a) to (d), and therefore I cannot see how 26 (a) to
2 (d) can be grounds of appeal.

3 MR. BOWSHER: 26 (a) to (d) are grounds of appeal under that heading, and then 38, for
4 example – I am jumping ahead ----

5 THE CHAIRMAN: As I understand it, it is slightly back to front. 26 (a) to (d) is your ground of
6 appeal and your reasons for 26 (a) to (d) (your submissions) are in 21 to 25?

7 MR. BOWSHER: Yes.

8 THE CHAIRMAN: And then the next one is 35 and your submissions in relation to that are 27 to
9 34?

10 MR. BOWSHER: Yes. 26(a) to (d) is not the only ground of appeal, there are other grounds of
11 appeal under that heading – under the heading of “negotiation”, the point being there that
12 Ofcom, we say, dealt with the matter incorrectly when looking at the nature of the
13 negotiations or lack of them. So you would not see 26(a) to (d) relating to, for example,
14 unbundling, or common costs. There is a relationship obviously because the whole thing
15 locks together.

16 THE CHAIRMAN: That actually shows that the drafter of the original document did not actually
17 identify what the real grounds of appeal were, that his grounds of appeal are too widely
18 drawn. Therefore, one needs to look into the document to find out what the grounds of
19 appeal were.

20 MR. BOWSHER: Yes.

21 THE CHAIRMAN: And then to see whether they are the same, and that I am afraid is where we
22 are all lost. I am not saying they are or not, I just cannot work it out.

23 MR. BOWSHER: Just dealing with negotiation, we say our grounds of appeal are para.26.

24 THE CHAIRMAN: Yes, now where do we find (a), (b), (c) and (d) in the old document?

25 MR. BOWSHER: You will not find them in those terms.

26 THE CHAIRMAN: No, but the basis of them.

27 MR. BOWSHER: The basis, the point we are driving at in 26 (a) to (d) is the point that we
28 conclude with in 57, and it builds up in a similar way. In 57, as I have said, our original
29 complaint was that there was not a real ability to negotiate and in the circumstances Ofcom
30 could not conclude “that the charges that were being imposed were fair, reasonable and
31 non-discriminatory and should have departed from these Guidelines to do so”.

32 THE CHAIRMAN: I think I can follow what you are saying, the difficulty is the way that it has
33 been done because what you are saying is that they did not negotiate. If you take (b),
34 Ofcom erred in:

1 “Assuming that the only question to be determined in such negotiations is the
2 viability of the channel in circumstances in which the published EPG listing charge
3 was imposed.”

4 So you are saying that there was not a real ability to negotiate because Ofcom erred in
5 assuming that the only question was that and therefore you could not negotiate anything
6 else, or it was not necessary to negotiate anything else?

7 MR. BOWSHER: That was an erroneous assumption. The next error is that they failed then to
8 take the matter forward and consider what the outcome of the negotiations ought to have
9 been.

10 THE CHAIRMAN: Yes but could you not have done that under 57? I think your submission is
11 that you could do it under 57.

12 MR. BOWSHER: We could do it under 57, we would want ----

13 THE CHAIRMAN: And have just crossed out “...and should have departed from these
14 Guidelines”, you are abandoning that bit of the case, there is nothing wrong with that.

15 MR. BOWSHER: In order to have explained 26 we would have wanted to make sure that we
16 have, as it were, the argument before 26. To do that we would have ended up re-wording
17 54 to 56 at least – probably more I am just not sure without looking at it, because what we
18 were trying to do is focus on those elements of the argument that we actually needed.

19 THE CHAIRMAN: You say 54 to 56 is in your new one because you have not crossed it out – is
20 that right?

21 MR. BOWSHER: Well we say that the arguments that are made there we have made better and
22 focused in the way we want to put them in the substituted notice.

23 PROFESSOR STONEMAN: The issue I was raising earlier as to what are grounds of appeal, I
24 have been doing a count here, I think you have 41 grounds of appeal so far on the argument
25 that (a) to (d) are all grounds of appeal, and I have been going through looking at the other
26 areas. Do you not think 41 is a bit excessive?

27 MR. BOWSHER: No, because they are individual errors. Of the 41, for example, some of them
28 are straightforward “failed to take this into account”, and so forth. There are a number of
29 elements which we say they got wrong and we are trying to break them down into
30 individual components as to what they should have done to get it right. I do not think the
31 number of grounds is really ----

32 PROFESSOR STONEMAN: Well I am thinking about my summer if I am going to go through
33 41 grounds of appeal (Laughter). Could you not have, perhaps, four or five different
34 grounds of appeal, a component and an argument in each? You said to me a little while ago

1 that (a) to (d) are just the grounds of appeal in that particular area. I have gone through and
2 counted the grounds of appeal and I think 41 is excessive, especially with a demand for
3 proportionality. Now either you have a different definition of what is a ground of appeal
4 than everybody else in the room or you are not being proportional.

5 MR. BOWSHER: Well, take for example the headings of the appeal are, as it were, the broad
6 categories of the grounds of appeal. I will come back to negotiation – take para.35 for
7 example.

8 THE CHAIRMAN: If you take para. 57 of your old notice:

9 “In the absence of any real ability to negotiate, Ofcom could not have concluded
10 that the charges were fair, reasonable and non-discriminatory ...”

11 And the reasons they could not conclude were that – I am now on para.26 –

12 “ a. ...Sky did not provide Rapture with the opportunity to make submissions of
13 the kind anticipated ..”

14 b. Assuming that the only question to be determined in such negotiations is the
15 viability of the channel in circumstances in which the published EPG listing charge
16 was imposed;”

17 Let me leave “b” because I am not quite sure how I do that one, but:

18 “c. In failing to consider whether negotiations were entered into as would be
19 expected in a competitive market; and

20 d. In failing to consider the likely price that such negotiations would have resulted
21 in.”

22 Why does that not just follow from 57 – if that is your case? I do not know if that is your
23 case.

24 PROFESSOR STONEMAN: I think that that is what I was trying to get at. There are grounds of
25 appeal and within that there are arguments, but the arguments themselves are not in
26 themselves grounds of appeal.

27 THE CHAIRMAN: It does not matter how one puts it, but would that not make it much easier to
28 understand in the light of the old notice of appeal? I do not know if one can do that with
29 each of them? I am not sure about “b”, I cannot quite work out how you deal with “b”.

30 MR. BOWSHER: “b” actually comes from para.56.

31 THE CHAIRMAN: So it is already there?

32 MR. BOWSHER: It is already there.

33 THE CHAIRMAN: So I do not have to worry about “b”.

1 MR. BOWSHER: It is expressed differently. We wanted to be sure that we have identified every
2 error that needs to be looked at, whether it is a ground of appeal or a part of a ground of
3 appeal I am not sure. The category here is that Ofcom misdirected itself, or erred in looking
4 at the way in which the price was negotiated, or rather not negotiated and drew incorrect
5 inferences from that.

6 THE CHAIRMAN: Can I just interrupt you. If 56 is, in fact, “b”, you could have said: “As stated
7 above the Guidelines are based on the assumption that genuine negotiations are possible.
8 Rapture contends that Ofcom erred in assuming that the only question to be determined ...”
9 etc. “... and therefore gave no real opportunity ...” if I go back to this one, “...to negotiate
10 the basis of the EPG service.” So if that is what you are saying you could have got it into
11 that. Looking at proportionality and the problem of having to re-plead the defence and the
12 intervention, because it is a new notice of appeal, that would have made it much simpler. I
13 do not know if you can do the whole thing like that.

14 MR. BOWSHER: In order to lead to that argument and make sure we have all the groundwork
15 we would certainly have to put in some other paragraphs. You would end up with lots of
16 subparagraph “a’s” and an argument which was much less easy to understand. That is the
17 problem because it would be two documents sitting on top of each other in a single
18 document, it would be a rather cumbersome document, and our intention was to produce
19 something that was short and easy to understand.

20 THE CHAIRMAN: The result of that is that we are having this hearing today.

21 MR. BOWSHER: Well we were having the hearing today anyway, to be blunt about that.

22 THE CHAIRMAN: It may not have been as difficult as it has now turned out to be.

23 MR. BOWSHER: I suspect that these issues would have arisen one way or the other.

24 THE CHAIRMAN: I did not understand that “26 b” was actually 56, I have not done an analysis
25 because it would take hours – or days.

26 MR. BOWSHER: One could do it that way, I suppose – the problem is you will end up with a
27 very messy document which will not be easy to use for anyone. It will involve a lot of re-
28 wording and it could probably be done for most of the points that arise if not all. To take
29 another point – the discrimination point – discrimination is a point that is raised in various
30 places, but in a different part of the notice, not in a single place. I am sure we can do it but
31 we would end up making the same argument in a number of different ways, different places.

32 THE CHAIRMAN: You could cross it out and only do it in one place.

1 MR. BOWSHER: Then we would be back where we are – is it the same argument or not? The
2 issue of discrimination is flagged up already in paragraphs – I have down – 16, 57, 78 and
3 97.

4 THE CHAIRMAN: What was your first one?

5 MR. BOWSHER: 16, 57, 78 and 97. That is where it was, we have taken it out of there because
6 the general “fair, reasonable” ----

7 THE CHAIRMAN: 16 has been crossed out, has it? No, only part of 16 has been crossed out.

8 MR. BOWSHER: The point is it was there as part of the original notice, as a general allegation.
9 It is raised specifically in 57 (as we have just seen), 78, and one can expand the non-
10 discriminatory arguments there in the way we have done in the notice by reference to what
11 are in the existing grounds, but again we will end up with arguments made a number of
12 different ways in different places and, I would suggest, less coherently, but they will be
13 there because they are all there.

14 THE CHAIRMAN: You assert that they are all there but we have to decide whether they are all
15 there and how do we do that.

16 MR. BOWSHER: Well I am going to carry on. “Negotiation” I have taken you through, and I
17 would submit that they are either directly all there in one way or another, or that the real
18 difference between what is in para.26 and the passage I am just looking at at para.57 is
19 really just a form of words. We are saying ----

20 THE CHAIRMAN: Sorry, 57 just mentions “non-discriminatory”.

21 MR. BOWSHER: Yes, I am talking about negotiation here. Paragraph 26 and they negotiate the
22 question ----

23 THE CHAIRMAN: I thought you were on discrimination.

24 MR. BOWSHER: I am sorry to confuse you. All I want to illustrate is that, for example, there
25 are other arguments which come up in a number of different places in the grounds. If we are
26 trying to draw them together into one place, which is what we sought to do, this was to
27 make it shorter, but one can certainly make the argument in a number of different places but
28 it will just become necessarily repetitive. For example, the same para.57, discrimination is
29 dealt with in our notice – just dealing with that, in our separate section E on p.16 we have
30 sought to draw together the points on discrimination.

31 THE CHAIRMAN: Yes, where do I find those in here? If we go to para.56, which is what you
32 say the grounds are, “Further, Ofcom erred in ...” I am not sure why the “Further” is there,
33 because that means it is in addition to everything else and this is supposed to be the ‘wrap-
34 up’ as I understand it.

1 “Further, Ofcom erred in:

2 a. Equating the obligation to consider willingness to pay with the obligation
3 of non-discrimination.”

4 Where do I find that – 45?

5 MR. BOWSHER: (After a pause) 78. This is the point that my learned friend was taking you to
6 about the 2002 Guidelines. If one actually looks back at the Guidelines, what the original
7 notice says is on this basis, and again we sought to make this clearer, given the factual
8 background we set out in 78 Ofcom could have assessed whether the charge was fair,
9 reasonable, and non-discriminatory.

10 THE CHAIRMAN: And they failed to do so because they did not get the right information from
11 Rapture is how I read that paragraph. Is that right? (After a pause) Well they did not go and
12 get the BARB figures, or whatever?

13 MR. BOWSHER: The previous sentence:

14 “As set out in the guidelines at para.3.7 a reasonably close linkage between retail
15 revenues and EPG charge would be expected.”

16 That, in fact, is part of the argument, because what that is saying is you have to look at the
17 Guidelines, the Guidelines require you to make that assumption or expectation.

18 THE CHAIRMAN: What has that to do with equating the obligation to consider willingness to
19 pay with the obligation of non-discrimination?

20 MR. BOWSHER: I am just wondering whether that is necessary.

21 THE CHAIRMAN: 76 could be 56 “b”, and “c” possibly.

22 MR. BOWSHER: I am just wondering whether 56 “a” is really a separate error as such, or just
23 part of

24 THE CHAIRMAN: “b” and “c” are 76 are they not?

25 MR. BOWSHER: Yes, they are conclusionary bits for what is in 76.

26 THE CHAIRMAN: I do not see how we can decide this unless one does this comparison. Mr.
27 Vajda has prepared a very nice comparison which shows that they are not in and it may well
28 be, as your submissions are, that they are in but we do not know where they are, and it is
29 only when one looks at these things that one can work it out.

30 MR. BOWSHER: I am sorry, I took discrimination for a different reason and we have got stuck
31 on that. What I wanted to show, going through each one, that they are in, albeit not in the
32 way they are put into the substituted notice, because one does have to pick bits out of the
33 original notice to establish, as you have seen, where the different arguments actually are.

1 THE CHAIRMAN: That is what we need to know, because if they are in then the grounds are in
2 and it is only a rewording of the arguments that support the grounds, or the submissions that
3 support the grounds.

4 MR. BOWSHER: I have taken you through the negotiations bit of the grounds, and what I was
5 going to do was try to go through the following passages and do exactly that exercise.

6 PROFESSOR STONEMAN: Madam Chairman, could I suggest that we do that off-line. I do not
7 think we have the patience to sit here while you go through every paragraph and relate it
8 back. I think we should have a document sent to us that lays it out and then we can actually
9 get on with some other material.

10 THE CHAIRMAN: Yes, there seems to be consensus here that it could be done in a document.

11 MR. SUMMERS: Forgive me, as you will appreciate, not all members of the Tribunal are
12 lawyers and those of us who are not do find it extremely difficult to cope with trying to put
13 these two documents together; I have certainly spent a considerable amount of time getting
14 not very far, and trying to adduce some of the conclusions that you are making from this
15 linguistic examination is proving extraordinarily difficult. There has to be frankly a more
16 direct and simpler way of identifying for us the points you are making.

17 MR. VAJDA: I share the concern of the Tribunal. I spent the whole of yesterday doing the
18 exercise that both the wing members have done and in terms of proportionality one spent the
19 whole day here – if you think of all the lawyers' time and expense this is not a proportionate
20 way, in my respectful submission for dealing with this; nor is it sensible that my friend now
21 gets an opportunity of putting in a document. The application was made, albeit late, it was
22 made, he knew perfectly well he had to come here and justify it and now to go away and
23 have a look at the document and we then have to spend another day (possibly come back)
24 this is completely disproportionate. The matter, in my respectful submission, should be
25 dealt with here and now.

26 THE CHAIRMAN: Yes, but if we deal with it here and now we are going to be here for hours,
27 because we have to go and look each time.

28 MR. VAJDA: The Tribunal heard me for about an hour and a half. I would have expected a
29 similar sort of document to be produced ----

30 THE CHAIRMAN: So would I, yes.

31 MR. VAJDA: -- and if it has not been produced, and if Mr. Bowsher is unable to convince the
32 Tribunal then the Tribunal should dismiss this here and now, because otherwise we are
33 simply going to come back and go through all this again and the cost is just unbelievable for
34 a case which is a very, very small case and it would not in my submission be proportionate

1 now to allow Mr. Bowsher to go back and produce a new document – I would then have to
2 spend another day, the people from Ofcom will have to spend another day. If the evidence
3 is not here and the Tribunal is not satisfied today this should be dismissed.

4 THE CHAIRMAN: The difficulty is whether we are satisfied, because we ----

5 MR. VAJDA: Well at the moment you are not satisfied.

6 THE CHAIRMAN: -- cannot work out which one is which. It is not that we are not satisfied it is
7 that we cannot work out if it is in there or not, and the only basis of the application can be on
8 new grounds. If they are not new grounds, if the matter is in the old document then it would
9 be wrong to strike it out.

10 MR. VAJDA: With respect, no. The Tribunal made it perfectly clear by letter of 13th July what it
11 expected. We have not had anything remotely in terms of compare and contrast until last
12 night when we got the strike out which, in fact, does not assist. In my respectful submission
13 if the Tribunal is not satisfied now the matter should be struck out and we should get on
14 with the substance of the case.

15 MR. BOWSHER: (After a pause) We have sought in our notes to give cross references ----

16 THE CHAIRMAN: It does not help us.

17 MR. BOWSHER: I apologise that it does not help. We can certainly ----

18 THE CHAIRMAN: Had you identified that, para.56 “b” or “c” or your old notice of appeal?

19 MR. BOWSHER: No, I had not previously identified that.

20 THE CHAIRMAN: That is the difficulty, is it not? Shall we rise, would that help?

21 MR. BOWSHER: I do not think we need to rise, I think we can deal with the matter this way

22 THE CHAIRMAN: I think we are going to rise for a moment.

23 MR. BOWSHER: Very well.

24 THE CHAIRMAN: Give us five minutes.

25 (The hearing adjourned at 3.20 p.m. and resumed at 3.40 p.m)

26 THE CHAIRMAN: The Tribunal’s feeling at the moment is that it is inappropriate to substitute
27 the new notice for the old notice since we cannot be satisfied without a proper comparison
28 being done as to whether or not the substitute notice contains the same grounds as the old
29 notice.

30 We do not consider that it is proportionate to make that comparison by way of oral
31 submissions. It seems to us that the appropriate way would be for the original notice to be
32 amended so that it is clear that either it contains, by way of amendment, no new grounds and
33 only revision of the submissions supporting the grounds, which were in the original notice,
34 or that the amendments are new grounds. Therefore, it seems to us that what Rapture has to

1 do is to amend the original notice and, in doing so, also to strike out what is not being relied
2 on.

3 We are extremely concerned about the costs incurred because of Rapture's approach to this
4 appeal so far. The issue of costs is not only the question of Rapture being advised *pro bono*,
5 it is also the costs which Ofcom (a public Body) has to bear when they would, in the
6 circumstances of the present appeal, normally recover from a party such as Rapture. It seems
7 to us that those advising Rapture must, when considering their approach to this appeal, have
8 that in mind as well as the fact that they are acting *pro bono*. That is where we have got to;
9 that is what our feeling is and we thought it was important that we said that now, because we
10 do not think that it is appropriate to try and do this comparison on the hoof.

11 MR. BOWSHER: I am much obliged for that indication. On the second point those assisting
12 Rapture have had very much in mind the wider issues. We take that to heart. If there is any
13 suggestion that we have not had regard to that we would heartily rebut it.

14 THE CHAIRMAN: We just wanted to make clear that is something that needs to be taken into
15 consideration.

16 MR. BOWSHER: It is something we have had regard to – very much had regard to – and any
17 suggestion to the contrary we would emphatically reject.

18 THE CHAIRMAN: We are not suggesting to the contrary, we are only saying that needs to be
19 taken into account.

20 MR. BOWSHER: It is for that reason, just to emphasise, that we have sought to narrow the scope
21 of the argument to try and put it forward in as concise and usable a context as possible. In
22 the light of that indication it is not sensible for me to take further time to go through an
23 exercise which is difficult.

24 THE CHAIRMAN: If you had come here with a schedule today that might have been different,
25 but at the end of the day I think our indication is that really it is much better to amend than
26 to substitute.

27 MR. BOWSHER: We will clearly have to work on that, all I will say is ----

28 THE CHAIRMAN: It is not an easy task.

29 MR. BOWSHER: It is not an easy task and it is an approach which to some extent we have
30 already tried. The result, while it may address some of the Tribunal's concerns, we fear we
31 will end up with a document which ends up being more difficult and costly to use.

32 THE CHAIRMAN: It seems to us that what you have done in your substitution is really much
33 more like a written submission, and it may well be that that is how you are going to have to
34 reconcile the original document.

1 MR. BOWSHER: That may be right, but in terms of proportionality – going back to the point
2 that you have just made - the outcome will be a document which, because as has already
3 been pointed out by the Tribunal, in the original notice ----

4 THE CHAIRMAN: I think there are two evils, and the question is which evil it is.

5 MR. BOWSHER: The grounds are not transparently spelt out in the original notice. In order to
6 do that and actually tee them up it was necessary we did it in a certain way. To do it again
7 by reference to the old document will create a difficult document to use.

8 THE CHAIRMAN: You have not set out what the grounds are, you have only explained to us
9 today that it is the paragraphs that say “erred”, and when one looks at the paragraphs that
10 say “erred” and start looking at the other document it does appear that one can find it.

11 MR. BOWSHER: We will have to work it out.

12 THE CHAIRMAN: I think it needs to be worked out.

13 MR. BOWSHER: We will have to go away and work on that. I do not think there is much point
14 in my taking that matter further. I do not know how you want to deal with the other matters.

15 THE CHAIRMAN: It seems to us at the moment – subject to what everybody says – that until
16 that is done we cannot really deal with the witness statements because we do not know how
17 much of any of the witness statements are relevant and what is going to go in and therefore
18 how can we decide? In fact whether there is going to be evidence or not that is something
19 additional. It may be that you want to consider whether in fact it is really expert evidence,
20 or whether it is actually material which is provided to you by way of assistance which
21 allows you to make the submissions. I do not know, but I think there is that consideration,
22 because otherwise we are going to have expert evidence by everybody and it is going to get
23 out of hand proportionately that way as well.

24 MR. BOWSHER: Can I raise a slightly different question on the factual evidence? Mr. Henry
25 has put in a first witness statement with his original notice, which ----

26 THE CHAIRMAN: Which stands.

27 MR. BOWSHER: -- largely deals with matters which we are not proposing to pursue. We have
28 not proposed to withdraw it on the basis that witnesses do not “unsay” things – we are not
29 suggesting Mr. Henry is not saying it any more, but there it is ----

30 THE CHAIRMAN: But there it is and it is not really relevant.

31 MR. BOWSHER: It floats off to some extent.

32 THE CHAIRMAN: We are not sure that is second witness statement is relevant either.

33 MR. BOWSHER: It covers two matters which seem pretty closely related to the nature of this
34 case but the nature of an EPG platform, and the financial situation of Rapture are bound

1 both to be matters which the Tribunal may be interested in; if they do not assist the Tribunal
2 then ----

3 THE CHAIRMAN: "I do not know" is the answer to that, I am not going to say either way. I
4 think one has to consider whether it is relevant or not.

5 MR. BOWSHER: What I wanted to raise was the first statement.

6 THE CHAIRMAN: Because I think he was asked by Ofcom to provide that sort of information
7 and he did not provide it at the first stage.

8 MR. BOWSHER: The statement is there, and what I wanted to raise particularly now is the first
9 statement and its status because it will be rather ----

10 THE CHAIRMAN: You have to decide whether you want to rely on it or not; if you want to rely
11 on it, it is there, it is in the notice of appeal and it is the evidence that you are adducing in
12 support of the original notice of appeal. If you decide that actually you do not want to rely
13 on it – and I do not know if there is anything challenged in it, if there is nothing that is
14 challenged in it, it does not really matter. If there is something that is challenged in it and it
15 is going to result in cross-examination and it is not really relevant then again we have to
16 consider proportionality.

17 MR. BOWSHER: That was really my question as to whether it needs to be left in the record or
18 not – to that extent whether one should withdraw it or ----

19 THE CHAIRMAN: Maybe you would like to have some discussions with everybody and see
20 where you get to. I do not think it is for us at the moment.

21 MR. BOWSHER: Very well, we will have to try and work on that basis.

22 THE CHAIRMAN: I do not think we can deal with the witness statements today. The third thing
23 was?

24 MR. BOWSHER: Disclosure, which is probably now very short, because all we are asking, albeit
25 there are some errors in the draft order, all we are asking for in our submission is disclosure
26 of documents referred to by Ofcom in its defence, which we have identified, save for the
27 Sky platform model which we do not ask to see because we know it would be very large and
28 our position will be that insofar as anyone needs to go back to look at the model that is
29 something that Ofcom should have to do following the Tribunal's decision – that really
30 would require a great deal of expert evidence – it is not something that this Tribunal should
31 be troubled with. We just do not want to see it.

32 THE CHAIRMAN: Does that mean we should not see it as well? I am not sure if we have a copy
33 or not but we think we may have a copy – we do have a copy, yes.

1 MR. BOWSHER: If it becomes material to dialogue between the Tribunal and Ofcom or Sky
2 then our position may have to change.

3 THE CHAIRMAN: But at the moment we are not going to look at it?

4 MR. BOWSHER: I doubt that very many of those documents are crucially relevant to the case.
5 A few of the ones we have asked for do seem to be important, but our position is simply that
6 we should see them, subject to the terms of the confidentiality ring that we have proposed.

7 THE CHAIRMAN: Is there an objection to you seeing them subject to the confidentiality ring?

8 MR. BOWSHER: Sky has raised certain specific points about some of the documents – in some
9 cases on relevance and in some cases on proposed redactions and so on and so forth. There
10 are many of those we could deal with. I obviously cannot see them to make submissions on
11 Sky’s comments. The only proportionate way I can see of dealing with them is simply to
12 invite the Tribunal to look at the documents and the comments Sky has made and decide
13 whether or not the documents should be disclosed within the confidentiality ring in full or
14 subject to whatever changes it is that Sky wants to have made, because the only other thing
15 to be done would be for Rapture to have further separate representation for the purposes of
16 this local procedural dispute which would be absurd.

17 THE CHAIRMAN: Can I ask Mr. Wisking, what is the objection within the confidentiality ring?

18 MR. WISKING: One point arises as result of today which is that Mr. Borwick is in the
19 confidentiality ring.

20 THE CHAIRMAN: Well we may take him out of the confidentiality ring for the time being.

21 MR. WISKING: Indeed, so that is one issue. Beyond that there is the question of third party
22 confidentiality. So in a very limited number of cases there are references to third parties
23 which is Sky has confidentiality obligations pursuant to commercial agreements with third
24 parties.

25 THE CHAIRMAN: Those would have to be redacted for the time being, because if we wanted to
26 pursue that we would have to go and ask the third parties.

27 MR. WISKING: Indeed, and there is no suggestion from Rapture that the identity of those third
28 parties is in any way relevant to their case at present.

29 THE CHAIRMAN: Is the only thing identity or is it the information?

30 MR. WISKING: In some cases it would be information which tends to disclose the identity. So
31 in some cases there is information in relation to those parties which would make it obvious
32 who the party was. But that is relatively limited in respect of the documents.

1 The other category is that there are some documents which, in our submission, are not
2 relevant, e.g. there are Sky submissions in relation to the jurisdictional point which we
3 discussed last time.

4 THE CHAIRMAN: As I understood it, what Mr. Bowsher was saying is that all the documents
5 are referred to in the defence. If they are referred to in the defence I cannot see how we can
6 say they are not relevant?

7 MR. WISKING: No, the reason the documents are referred to in the defence is that Ofcom has
8 put in with its defence a chronology which includes effectively a procedural chronology and
9 so each step in its investigation it will have a letter to Sky putting some questions, and there
10 may be a response back from Sky saying “We are going to answer the question in a slightly
11 different way”, and then there is the actual answer; in our submission that sort of regulatory
12 correspondence is not really relevant to the substance of this dispute. The reason it is
13 mentioned in the defence is it is cross-referred to in this chronology; it is not actually the
14 substance of the defence. On those documents, as with Rapture, we are content for the
15 Tribunal to decide. In our submission they are not relevant but in the interests of
16 proportionality we do not propose to spend a lot of time over it.

17 THE CHAIRMAN: Is there any problem with it being looked at within the confidentiality ring
18 between counsel, so that they were able to make submissions? Otherwise we do not know
19 enough about the case possibly to be able to decide whether they are relevant at this present
20 stage.

21 MR. WISKING: Can I take a moment. (After a pause) On the documents where the issue of
22 relevance arises we are content to take that approach. Obviously, with third party
23 confidentiality ----

24 THE CHAIRMAN: You cannot take that approach, not that is different, but you could do it
25 within some sort of confidentiality ring ----

26 MR. WISKING: Indeed.

27 THE CHAIRMAN: -- and if there is a problem – because they may say to you “It is relevant
28 because of X” and then you see the point, or you may say: “No, it is not relevant because of
29 X”, and they will see the point.

30 MR. WISKING: Indeed. So if we did it on a counsel to counsel basis.

31 THE CHAIRMAN: All right, are you content with that?

32 MR. BOWSHER: Yes, I am certainly content with that and I certainly do not want to see the
33 third party confidentiality material because it would put us in an invidious position.

34 THE CHAIRMAN: Absolutely.

1 MR. WISKING: Can I make two more points? On disclosure we in turn have asked for Rapture
2 documents which are also referred to in the Ofcom defence. We also do not know what they
3 are, and Rapture have not taken a position on that request.

4 MR. BOWSHER: I thought we had said ----

5 THE CHAIRMAN: What do you think you said?

6 MR. BOWSHER: I thought we said we had no problem with disclosure of any of them.

7 THE CHAIRMAN: They do not think they have a problem with disclosure of any of them, Mr.
8 Wisking.

9 MR. WISKING: Okay, that is fine. Is that within or without the confidentiality ring?

10 MR. BOWSHER: There is one qualification: except the business plan, I should say. There was a
11 business plan I think which we would need to check.

12 MR. WISKING: So would that be disclosed.

13 THE CHAIRMAN: Within the counsel confidentiality ring – it will be counsel and Mr. Wisking.
14 Within the advocates’ confidentiality ring.

15 MR. BOWSHER: I am sorry, I had not picked up the problem with this particular document
16 before and so I have not had a chance to look at it.

17 THE CHAIRMAN: Why do you not look at it and see what the problem is with it and consider
18 whether it can be disclosed to Mr. Wisking but to no one else?

19 MR. BOWSHER: It will either be to Mr. Wisking – if necessary if there is going to be a dispute
20 it would have to be referred to the Tribunal.

21 THE CHAIRMAN: But it is very difficult if we cannot get submissions from ----

22 MR. BOWSHER: No, I agree. I would have thought that we would deal with it with Mr. Wisking
23 otherwise we will have to ----

24 THE CHAIRMAN: It could be dealt with by somebody else in Herbert Smith’s – another partner,
25 if there is a problem that you think will colour his mind and therefore make it difficult for
26 him to make submissions.

27 MR. BOWSHER: We will have a look at that.

28 THE CHAIRMAN: That is a possibility is it not?

29 MR. BOWSHER: Indeed. Can I also make one similar point? It has been drawn to my attention
30 that, whilst in general we do not have any difficulty with disclosure within the
31 confidentiality ring of material in the determination, there is one graph which in a vertical
32 axis contains some financial information which we prefer not to disclose.

33 THE CHAIRMAN: Why do you not redact it for the time being and see if they make an
34 application.

1 MR. WISKING: In particular the relevant information in that graph, which is relevant for these
2 purposes appears in the text below the graph and that is disclosed, so I do not think there
3 should be a problem with that, but we can deal with that between us.

4 THE CHAIRMAN: Yes.

5 MR. WISKING: And one final point was that last time Rapture's submission was that the
6 original notice of appeal was confidential and it created a provisional confidentiality.

7 THE CHAIRMAN: Yes, it is unfortunate they did not say quite a while ago.

8 MR. WISKING: It now appears it is not, as is the new document, and I just want it formally
9 recorded therefore that the undertakings that were given previously now fall away.

10 THE CHAIRMAN: That is right, Mr. Bowsher, is it not? When I say "The approach that has
11 been taken to this appeal" I include all of that because that all could have been done much
12 earlier.

13 PROFESSOR STONEMAN: We are talking about confidentiality here in the platform model, I
14 understand we have a disk on which the platform model ---

15 THE CHAIRMAN: I have raised that.

16 PROFESSOR STONEMAN: -- yes, but I want to carry on further. I imagine that disk has lots of
17 numbers in it. To make any sense of Rapture's appeal as to whether rates of return are too
18 high or too low, or whether charging is right or not. I think we need to know in some detail
19 how the different categories within the platform model are identified, because looking
20 through the papers so far I cannot tell whether the rates of return that are being quoted are
21 net or gross of depreciation. I do not even know whether they are before or after tax. It
22 does not tell me how the set top box subsidy is calculated. It tells me that something like 62
23 per cent of the total capital stock is a subsidy to the set top box, but I do not know what
24 other capital is in there. I do not know how the internal rate of return calculation is done. I
25 do not need to know the numbers, so I do not need to be given any business secrets from
26 anybody but I do need to know how each of the different categories in the boxes are defined
27 for the purpose of the calculations that are made.

28 If it becomes necessary can that sort of information be made available to us all?

29 MR. WISKING: I think the answer is "yes" that information could be provided. It is probably
30 best provided in the form of a witness statement by someone who is familiar with the
31 platform model. The other question, however, is obviously that statement and the
32 information would need to be relevant to the appeal and the way in which Rapture seeks to
33 make an argument about the platform model or not as the case may be and they do not seek
34 access to the platform model at this stage. So it may be that this does not become relevant.

1 PROFESSOR STONEMAN: I agree entirely with that, yes.

2 THE CHAIRMAN: I think we ought first of all to work out what this amendment is and how the
3 approach is and, if it is relevant – and we are not going to look at that model, it is put away –
4 it may well that you do not need the platform model but you do need a bit of that
5 information, or it may be you do not, so at that stage you can consider – we have made the
6 point.

7 MR. WISKING: And, given the rules, whilst this is a piece of evidence that may come in later,
8 we would not have to address it as part of any amendment to the statement of intervention.
9 It has just been pointed out to me there is one other figure in the Ofcom defence – are you
10 seeking access to any redactions in the defence.

11 MR. BOWSHER: One paragraph we are.

12 THE CHAIRMAN: Is that a paragraph not to be disclosed to Sky?

13 MR. WISKING: No, not to be disclosed to Rapture, I think.

14 THE CHAIRMAN: Not to be disclosed to Rapture, right.

15 MR. BOWSHER: Is it para.120 of the statement of defence you are referring to.

16 THE CHAIRMAN: 120 has been excised from the Rapture version.

17 MR. WISKING: The position is there are four paragraphs of the defence which contain either a
18 complete redaction or information is summarised in the form of a range of numbers, and our
19 position as set out in our letter of 19th July is that we are content for all of that to be
20 disclosed to Rapture within the confidentiality ring, with the exception of one number again,
21 where it is contained within a very narrow range. This is in para.77, and perhaps we can
22 deal with it between us as we have discussed before.

23 THE CHAIRMAN: I would have thought if there is a problem you could come back. You have
24 given a range in para.77.

25 MR. WISKING: Yes, Ofcom have, it is a range between £10,000 and £20,000.

26 THE CHAIRMAN: You have not given the figure; the figure is within the range – it is quite a
27 fair range.

28 MR. WISKING: There was no suggestion from Rapture, and in fact I rely upon the range in one
29 of their documents – there is no suggestion the precise figure was ----

30 THE CHAIRMAN: I do not think that should cause a problem. That does not cause a problem to
31 you?

32 MR. BOWSHER: My hesitation is because I have not seen para.120, it is very difficult for me to
33 say anything.

34 THE CHAIRMAN: No, para.77. They have given you a range of £10,000 to £20,000.

1 MR. BOWSHER: At the moment we are happy with the range as it is. May I just make two
2 observations. First, the premise on which we proceeded on not asking for the Sky platform
3 model – and I think this is what the Tribunal contemplates is that the Tribunal itself would
4 not be looking at or considering it, it would not form part of the Tribunal’s consideration
5 until we have considered how it is disclosed. The other matter which Mr. Wisking raises is
6 the position of Mr. Borwick. I would ask that he should be within the confidentiality ring.
7 As you have just put to me, whether he is an expert or he is our technical adviser helping us
8 to make ---

9 THE CHAIRMAN: I think that depends on how you amend, so until we have seen the
10 amendment and dealt with the amendment I do not think it is appropriate. Once the
11 amendment is done, if it turns out that you need him for particular things then we can
12 consider whether he should be in the confidentiality ring.

13 MR. BOWSHER: With respect, whether he is necessary for the purposes of a specific allegation
14 or he is providing technical expert input to the team to enable us to understand some of the
15 technical issues he is, in my submission, part of the team helping us to understand the case,
16 and it would be appropriate in my submission that he be able to see all that we, as lawyers
17 can see, so that we can have a full discussion with him on those points.

18 THE CHAIRMAN: What do you say?

19 MR. WISKING: First, the submission just made raises some concerns about the status of Mr.
20 Borwick and his independence, but putting that to one side.

21 THE CHAIRMAN: He is independent of Rapture, as I understand it.

22 MR. WISKING: He has been described as being “part of the team.

23 THE CHAIRMAN: No, what he means is part of the legal team.

24 MR. WISKING: If it is just a question then of his expert evidence then, as the Tribunal has
25 already said, the scope of any expert evidence will depend upon the amendments and
26 whether there should be any expert evidence, and so whether he has access to documents,
27 and what documents can wait until the matter is resolved.

28 THE CHAIRMAN: I think what Mr. Bowsher is saying is that even if they decide not to try to
29 put him up as an expert he will still be advising and they will still be seeking advice from
30 him in relation to how they put the case. There are two sorts of experts: there is the expert
31 who comes here and there is the other expert who sits behind you, and whatever happens in
32 this case he is going to be sitting behind them. Therefore they should be able to discuss with
33 him the documents in the confidentiality ring. That is what you meant, Mr. Bowsher, is it
34 not?

1 MR. BOWSHER: Yes, exactly.

2 MR. WISKING: (After a pause) There are two points. First, until the amendment is made his
3 role is unclear, and it seems to us that he does not need access to documents to advise and
4 Rapture does not need advice of that kind in order to undertake ----

5 THE CHAIRMAN: Well is the appropriate solution to this, the compromise to this at the
6 moment, that he does not go into the confidentiality ring, that if it transpires that they need
7 to show him particular things then they can come back and hopefully either you will agree
8 it, or we will have to decide it, but hopefully you will agree it, because at the moment we do
9 not know what the amendments are.

10 MR. WISKING: Indeed. A second point which is not really resolved by the CV which we were
11 provided with is we do not know who he acts for, who he represents in other contexts which
12 does potentially raise issues.

13 THE CHAIRMAN: On the confidentiality?

14 MR. WISKING: And that would need to be addressed before we could take the next step.

15 THE CHAIRMAN: Absolutely. Is that all right, Mr. Bowsher?

16 MR. BOWSHER: Just on that last point, perhaps it is something we can discuss with Mr.
17 Wisking what he is looking for.

18 THE CHAIRMAN: Hopefully, in those discussions either now or in the future you will be able to
19 resolve whether or not, or insofar as he needs to be, how far he should be into the
20 confidentiality ring, but that may depend on his other activities.

21 MR. BOWSHER: I suppose so, yes.

22 MR. VAJDA: Can I make a few observations on what the Tribunal said. While, of course,
23 Ofcom is extremely grateful for the Tribunal's indications in relation to proportionality, so
24 far as Ofcom is concerned, the Tribunal's solution, or proposed solution does not actually
25 solve anything because Ofcom and the public purse have spent two days of my time and my
26 Junior's time ----

27 THE CHAIRMAN: We appreciate that but we were not sure how to resolve it.

28 MR. VAJDA: Yes. Our submission was that this application should be dismissed.

29 THE CHAIRMAN: I do not think that is appropriate, because we do not actually know whether
30 or not we can be satisfied or not.

31 MR. VAJDA: Then I am coming on to my next point which is that we need to have a Ruling
32 because Ofcom needs to consider its position, whether we need to take it any further,
33 because we are going to incur considerable further cost by doing it on the schedule route,
34 because when I remind the Tribunal ----

1 THE CHAIRMAN: Well can I remind you that originally you were saying that what they ought
2 to do is to produce a document which is the original notice of appeal with the amendments
3 in.

4 MR. VAJDA: Yes, but that is what they should have produced a long time ago for the purpose of
5 today's hearing. There is an important point here which is that two days of my time and two
6 days of Mr. Woolfe's time have been consumed on this, and more time is now being
7 consumed on the amendment point than on the substance of the case. Therefore, if it is the
8 Tribunal's wish that this should be done by way of a schedule we have no idea of what
9 timetable ----

10 THE CHAIRMAN: What we are saying is that it ought to be done by way of amendment.

11 MR. VAJDA: Yes, but I take it that the Tribunal is effectively rejecting our submission that the
12 amendment should not be permitted, in which case ----

13 THE CHAIRMAN: No, we are not, because we do not know. We are not giving permission to
14 amend. We are adjourning this application.

15 MR. VAJDA: What we need to have is an order so we can see what the position is. We would
16 ask for an order setting out what the terms of the adjournment are and the grounds for the
17 adjournment so that we can consider our position going forward, because this is not, with
18 respect, a satisfactory position for the Office.

19 THE CHAIRMAN: Well I think that incurs even more costs. I think the right answer is that we
20 make an order that this application is adjourned, that they produce an amended notice of
21 appeal with an application for permission to amend, insofar as it is necessary. It may not be
22 necessary because when we started looking at the two documents, one can find ----

23 MR. VAJDA: The effect of that approach, madam Chairman, is that we have had two days of
24 wasted time and effort because effectively there is now going to be given a second bite of
25 the cherry, and this needs to be recorded in an order and a Ruling so we can take what
26 course we think is appropriate and we may need to go higher up on this. So what I am
27 saying is we need to have clarity from the Tribunal ----

28 THE CHAIRMAN: Well that seems to be an additional line of costs ----

29 MR. VAJDA: No, no.

30 THE CHAIRMAN: It does, because let us see what the amendments are and if the situation is
31 that there are no new grounds because they can actually put it under the various headings
32 then that will be the end of it. If there are new grounds then we will have to take a position
33 then, but if you want to go up that is going to be another lot of costs which are quite
34 unnecessary.

1 MR. VAJDA: What I am asking is for the Tribunal to make an order today and to give reasons
2 for the order that it has made, so that everybody – particularly all those here – know what
3 the position is, because at the moment ----

4 THE CHAIRMAN: I have set out, I have just given you ----

5 MR. VAJDA: No, with respect it is not satisfactory because we have no idea when the check list
6 is to be provided for, how it is going to be ----

7 THE CHAIRMAN: We are going to make an order that they are going to have to do it within a
8 particular time.

9 MR. VAJDA: And how is it then going to be resolved whether or not it is going to be allowed or
10 not, because the cost of these CMCs is grossly ----

11 THE CHAIRMAN: I appreciate that.

12 MR. VAJDA: -- and therefore I am asking the Tribunal for an order setting out what the Tribunal
13 propose and reasons for it.

14 THE CHAIRMAN: I do not at the moment see why you need the reasons for the order. We have
15 made it absolutely clear the reasons for the order today.

16 MR. VAJDA: Our application effectively that this be dismissed has been rejected and therefore
17 we require reasons for that, because my application is ----

18 THE CHAIRMAN: No, because that matter has been adjourned.

19 MR. VAJDA: It has been adjourned to another day, and there is going to be a second bite of the
20 cherry. To most people that may not be a final rejection but the issue of costs will arise
21 again.

22 THE CHAIRMAN: Yes, but it is also access to justice, and if we threw it out today ----

23 MR. VAJDA: The Tribunal want to put up ----

24 THE CHAIRMAN: -- and it turned out that they could justify all this in the Court of Appeal then
25 that would be a complete waste of time for the Court of Appeal, so we need to give them the
26 opportunity to do it.

27 MR. VAJDA: All we are saying is that we need to have a reasoned Judgment from the Tribunal
28 with an order and ----

29 THE CHAIRMAN: Well I will consider whether I give a reasoned Judgment. You will get an
30 order.

31 MR. VAJDA: Yes. In relation to the terms of order are we going to be permitted to make
32 submissions.

33 THE CHAIRMAN: Absolutely, we are going to discuss that now.

1 MR. VAJDA: I am grateful, then that is all I wanted to say on that. I am sorry, I do not want to
2 sound overtly confrontational; I understand from the Tribunal's point of view going offline
3 saves the Tribunal's time, but it does not save the Office's time and I want to make the point
4 that the Office is now spending more money on its lawyers dealing with proposed future
5 amendments than on the substance of the case and that, in my view, is not consistent with
6 the principle of proportionality, and what the Tribunal has proposed is not really going to
7 save the Office any money at all.

8 THE CHAIRMAN: How long do you want? I will tell you that we are not really prepared to give
9 you very much time to do it. (After a pause) If you cannot do it I cannot see how we can
10 decide whether or not there are new grounds, and if we cannot decide whether or not there
11 are new grounds then possibly one has sympathy with Mr. Vajda in a way.

12 MR. BOWSHER: I know this is not a straightforward task.

13 THE CHAIRMAN: It should have been done already, you see.

14 MR. BOWSHER: In reality we would ask for two weeks in which to do that. I do not know what
15 other people's movements are and so forth, but in my submission it actually would make
16 very little difference in terms of additional costs or whatever for us to take two weeks and
17 that in my submission is an appropriate length of time to make sure we can do it properly
18 and ensure that the interests of access are properly protected. If necessary I have some
19 observations to make about Mr. Vajda's submissions about the order and proportionality,
20 but I will save those for perhaps another time.

21 THE CHAIRMAN: You can make them now but let us just work out how many days.

22 MR. BOWSHER: Let us deal with timing first.

23 THE CHAIRMAN: Yes. Mr. Vajda, two weeks?

24 MR. VAJDA: I am not going to object, two weeks is not going to make a difference. I simply
25 observe that it is since 1st June (and it is now 24th July) that this point has been made, but I
26 am not going to object to two weeks. Again, speaking on the hoof, as it were, and I am not
27 entirely sure what is in the Tribunal's mind, and obviously this will be important to what
28 steps the Office takes next, but if the Tribunal is actually going to indicate in the order that
29 there are certain things that are going to be off limits, or whatever, in terms of amendment
30 that may affect what we are doing.

31 THE CHAIRMAN: What do you mean by "off limits"?

32 MR. VAJDA: Because as Professor Stoneman pointed out there are 41 new grounds of appeal
33 and the Office is very, very concerned about the amount of time being racked up on going
34 through a new document even if this is all done in writing, which I anticipate may be the

1 more sensible way than dealing with it orally. It is still going to involve a considerable
2 amount of time. I do not know whether the Tribunal has given consideration to saying given
3 what has happened, given the Tribunal's letter of 13th July, where all this was laid out, is to
4 say that in fact insofar as you are wishing to amend they should be confined to specific
5 defined areas which would reduce the volume of newness that the office would have to look
6 at.

7 THE CHAIRMAN: The fact is that they say that everything is in the old and therefore if
8 everything is in the old ----

9 MR. VAJDA: Then we do not need any amendment at all ----

10 THE CHAIRMAN: Well they do because what they are amending is their submissions which
11 they will not need permission to amend. It did look with one or two of the points one did
12 find the relevant passages in the old document which they can use.

13 MR. VAJDA: Then it is a totally useless exercise.

14 THE CHAIRMAN: Well that is what we want to see, is it not? That is why it would be wrong to
15 make a Ruling today.

16 MR. VAJDA: With respect it would not be wrong to make a Ruling today, it is not as if this point
17 has come out of the blue for Mr. Bowsher; it was flagged up by the Tribunal in their letter of
18 13th July loud and clear, and the Office is saying it is wrong and contrary to the principle of
19 proportionality given the amount of time spent coming here today, preparing for this, that
20 the applicants be given a second bite of the cherry.

21 THE CHAIRMAN: Well I understand that. Right, the application is adjourned. You have 14
22 days which is until 7th August. 7th August, a draft amended notice of application. It should
23 be clear from that – if you are right – that it is all submissions.

24 MR. BOWSHER: I am sorry.

25 THE CHAIRMAN: It should be clear from the draft amendment that it is all submissions and not
26 grounds of appeal. I am just wondering how we deal with that in order to avoid too much
27 costs in relation to it?

28 MR. BOWSHER: I am sorry, when you say "it" – one of the things we are going to have to do is
29 clarify the grounds of appeal. There are seven broad grounds of appeal. They are not stated
30 as such in the original as being grounds of appeal.

31 THE CHAIRMAN: You have not stated any grounds of appeal in yours, so until you elucidated
32 that there were these 41.

33 MR. BOWSHER: There are seven heads of appeal ----

34 THE CHAIRMAN: Seven grounds of appeal. There are three according to the original notice.

1 MR. BOWSHER: One of them has gone, it is the question about the scope of the dispute, one is
2 erred in law in exercising discretion – I cannot think what the third one is. My point is that
3 most of these points arise in the second, and in the original notice of appeal it is put very
4 broadly, and one of the things we are going to have to do is to break that out and make clear
5 what grounds were really comprised within that. So my caveat to the point you have just
6 put to me is when you say “It should all be clear it is all submission”, it is not quite that
7 simple.

8 THE CHAIRMAN: I may have been teasing you.

9 MR. BOWSHER: Because what you actually will be doing is breaking out what we say were
10 clearly comprised as being the grounds, even if they were not expressed as such.

11 THE CHAIRMAN: I am just wondering – I am just discussing this – whether, in para.3 of the old
12 notice which says “Summary of Grounds”, you can now make it clear what the grounds of
13 appeal are, which will make it clear whether or not they are new or old – you can do it by
14 reference to the paragraph numbers below. Do you see what I am trying to do? I am not
15 quite sure how you do it?

16 MR. BOWSHER: I can see what you are getting at – we will have a go..

17 THE CHAIRMAN: What would be nice is if we have a document that is absolutely clear. I
18 know it is very difficult to sort it out, but a document – or some explanation or something –
19 where we can actually see that either these are new grounds, or they are submissions. You
20 have heard what I say.

21 MR. BOWSHER: I have heard what you say.

22 THE CHAIRMAN: I am not sure what else needs to go into this order. There is the question of
23 the consent order in relation to confidentiality, but I assume you are going to sort that out
24 and send us a consent order.

25 MR. WISKING: Yes.

26 MR. BOWSHER: Yes, I am not sure I have a note of all the different points ----

27 THE CHAIRMAN: It will be on the transcript and the transcript will be available in a week.

28 MR. BOWSHER: When we have the transcript, so we can make sure that we have ticked off all
29 the points, we will have to tweak all of that, but there were a number of little fine tunings to
30 be made.

31 THE CHAIRMAN: Do we have to fix a provisional hearing date?

32 MR. VAJDA: There is the matter of how one is going to deal with the new amendment in a
33 proportionate way.

34 THE CHAIRMAN: That is why we are raising the question of a ----

1 MR. VAJDA: In my respectful submission CMCs are to be avoided if possible, they are
2 extremely expensive, and the longer they go on the less they seem – and this is a general
3 observation – we would respectfully submit we fix a date for the hearing and everything else
4 be done – we are perfectly content for it to be done – obviously if the Tribunal wishes
5 something to be done by way of CMC we can have it, but ----

6 THE CHAIRMAN: Why do we not try and do it in writing and see what happens.

7 MR. VAJDA: -- that is certainly the approach Lord Carlile has taken in his cases which seems to
8 work very well and we would urge that very much on this Tribunal. Certainly in relation to
9 the amendment point we would be happy for that to be dealt with.

10 THE CHAIRMAN: What we would need to do is the third thing – how long will you need to
11 look a the ----

12 MR. VAJDA: We will need a considerable period of time because ----

13 THE CHAIRMAN: You are all going away?

14 MR. VAJDA: It is not just that, I have been talking about simply the cost – also Ofcom has other
15 statutory obligations, so those who have been assisting me on this case are actually
16 committed to do other things. 14 days from today is 7th August, and also with the holiday
17 period and so on I think we would be looking at a period of five weeks.

18 THE CHAIRMAN: Which would take us to the middle of September some time.

19 MR. VAJDA: Mr. Woolfe tells me that would take us to Tuesday, 11th September.

20 THE CHAIRMAN: 11th September for written submissions by Ofcom.

21 MR. VAJDA: Yes, on the amended notice of appeal.

22 THE CHAIRMAN: I think maybe what I was getting at before was that Rapture ought to say
23 which paragraphs they are asking for permission to amend, and which paragraphs are
24 submissions.

25 MR. VAJDA: Well I thought there might be virtue in keeping things simple and just leaving it –
26 Rapture have now been given, as I understand it, according to this order 14 days.

27 THE CHAIRMAN: And in the 14 days they ought to say which paragraphs they are asking for
28 permission, which paragraphs they say are submissions.

29 MR. VAJDA: So be it.

30 THE CHAIRMAN: Notice of application together with identification of which (if any)
31 paragraphs require permission to amend. Then you have a starting point.

32 MR. VAJDA: So be it.

1 THE CHAIRMAN: Because you can say: “Actually there are other paragraphs, or you can say
2 “no”, I do not mind those. We had one here which could have gone into the reply. You
3 would want to put some written submissions in also by the 11th September?
4 MR. WISKING: There are two possibilities. One is that we could have the same date, the other
5 is we have slightly longer on the basis that we have no intention of duplicating what Ofcom
6 does.
7 THE CHAIRMAN: So what do you want – another week.
8 MR. WISKING: That would be satisfactory, thank you.
9 THE CHAIRMAN: Written submissions not to duplicate Ofcom. Is that all right?
10 MR. WISKING: Yes.
11 MR. BOWSHER: Can I raise one issue on the timing. We have put ourselves under pressure by
12 saying two weeks; given all our other commitments that will put us under considerable
13 pressure.
14 THE CHAIRMAN: I do not think we are very sympathetic about that. You have had all this time
15 to do it and you should be able to do it.
16 MR. BOWSHER: What I was going to say is this: my learned friend, Mr. Vajda, says he needs
17 five weeks because of all these other commitments, what I was going to ask was this: if, in
18 fact, the reality is because of these other commitments the reason for five weeks is because
19 people are not going to be working on it for some time, in my submission nothing is lost if
20 we have a little bit longer because it puts this team under considerable difficulty working to
21 that timetable, given the circumstances in which we are simply trying to do what can be
22 done on the resources available I would submit that if in fact what we are saying is that the
23 Ofcom team are going to be available somewhat later in August ----
24 THE CHAIRMAN: For the week of 4th September and it is going to sit on a shelf until week of
25 4th September.
26 MR. BOWSHER: I am not putting it that way, but if in fact it makes very little difference I would
27 ask for ----
28 THE CHAIRMAN: Mr. Vajda, what do you say about that?
29 MR. VAJDA: I have just been handed a note which I am just trying to understand. (After a
30 pause) I think the position is, and I will be hauled down if I have it incorrectly, if Mr.
31 Bowsher wants an extra week certainly we are not going to oppose that, it is a matter for the
32 Tribunal. But if he does we would need five weeks because different people are available at
33 different times.
34 THE CHAIRMAN: You need five weeks to consider it?

1 MR. VAJDA: Yes.

2 THE CHAIRMAN: All right, well we are not going to change 7th August then. Mr. Bowsher, are
3 you happy that we try and deal with this on paper?

4 MR. BOWSHER: Yes. I think we can deal with it in that way. Where we take it, I am not sure.

5 THE CHAIRMAN: I will not put that in the order, but it will be on the transcript that we will try
6 and do it on paper. If we cannot do it on paper, maybe if there are particular issues we can
7 do it in a telephone meeting?

8 MR. VAJDA: If it has to be done, as it were, orally, it is better that we are all in this room.

9 THE CHAIRMAN: Hopefully we can do it on paper.

10 MR. VAJDA: Yes, well let us have an aspiration to do it on paper.

11 THE CHAIRMAN: Mr. Bowsher, you have the job of trying to do it as simply as possible, so it
12 makes it simple. (After a pause) What we are wondering is whether we should make the
13 directions for a hearing now?

14 MR. VAJDA: I had an 'offline' discussion with Mr. Bowsher yesterday – perhaps Mr. Bowsher
15 would like to tell the Tribunal what he ----

16 THE CHAIRMAN: -- thought was the conclusion?

17 MR. BOWSHER: I have to say I have been thinking about it since we spoke about it briefly and I
18 think it may be difficult to fix any date, until we know, for example, what the requirements
19 are going to be for evidence it is going to be difficult to know how long a hearing is
20 required. I had not envisaged this was going to be a terribly long hearing, but I would have
21 thought that listing it for two days was sensible one would hope that ----

22 THE CHAIRMAN: One day.

23 MR. BOWSHER: -- it would not take the whole of two days.

24 THE CHAIRMAN: No.

25 MR. BOWSHER: But how one gets there in terms of all the intermediate steps are a bit difficult
26 to foreshadow.

27 THE CHAIRMAN: The only problem is if you do not get it into the timetable and into your
28 diaries and into our diaries that becomes a problem.

29 MR. BOWSHER: Well we can certainly fix a hearing and then hope that whatever then is
30 required can be slotted in in terms of subsequent involvement.

31 THE CHAIRMAN: This started to be an urgent application, and then your predecessor – or your
32 solicitor – decided it was not so urgent.

33 MR. BOWSHER: Again, I think I touched on some of that earlier on.

1 THE CHAIRMAN: When were you thinking we could have a hearing – was that part of the
2 discussion?

3 MR. BOWSHER: No. This matter was urgent in the sense that most matters before this Tribunal
4 are urgent.

5 THE CHAIRMAN: Absolutely, which is why we normally fix a hearing date.

6 MR. BOWSHER: But the specific urgency has now largely gone. Anything that might have been
7 prevented ----

8 THE CHAIRMAN: No, because that all happened last year.

9 MR. BOWSHER: -- has already happened.

10 THE CHAIRMAN: Yes.

11 MR. BOWSHER: In that sense the reason for saying that this had to be expedited has gone, but it
12 is as urgent as things of this nature are.

13 THE CHAIRMAN: So, forgetting about your diaries, when do you think that we ought to have a
14 hearing – on the basis that on 18th September we are going to get Sky's written submissions;
15 We then will have to consider what we do, and even if you are not here we still all have to
16 get together.

17 MR. BOWSHER: I would have thought ---

18 THE CHAIRMAN: November?

19 MR. BOWSHER: I was going to say the very end of October.

20 THE CHAIRMAN: November? You are on a six week trial?

21 MR. VAJDA: I had some trials in November, either the end of November or beginning of
22 December. One has to bear in mind also ----

23 THE CHAIRMAN: There are other things to do, no I assumed that, that is why I said I did not
24 think it could be before November – end of November/beginning December?

25 MR. VAJDA: Yes, certainly if the Tribunal wanted to fix that, I would have thought we would be
26 able to get the case ready by then – I do not know what my friend thinks about that. On the
27 worst case scenario that an amendment is permitted there will then have to be some re-
28 pleading by us, there may be further witness evidence; of course, there is also Mr. Wisking.
29 It depends also, I suppose, in potentially getting an expert and so on and so forth. I see the
30 force of what Mr. Bowsher says, that it may be premature to fix it now given that we are not
31 entirely sure what the steps are ----

32 THE CHAIRMAN: Well I am concerned that if we do not fix it now the date will go and this will
33 have to go off and that will not be appropriate either.

34 MR. BOWSHER: Maybe we will just have to fix the date and try and work around it.

1 THE CHAIRMAN: Why do we not try and work it on the first week of December, which is 3rd to
2 7th.

3 MR. BOWSHER: You cannot do it any earlier than that, that is not practical then.

4 THE CHAIRMAN: I am just wondering how the weeks will go by between September – we have
5 to give the decision; we have to give the decision and we will do it as quickly as possible but
6 I do not know if we can do it in a week or if it will take us two weeks, because we have to
7 get together, so that is not as easy.

8 MR. WISKING: If the Tribunal reaches a decision in early October there then are the
9 consequential steps which flow from that, possibly an amended defence, amendments to the
10 statement of intervention. There is this other question about expert evidence, which flows
11 out of that and if Rapture is to be allowed to adduce expert evidence and in what form ----

12 THE CHAIRMAN: I think we have to be very careful about expert evidence because of
13 proportionality in this case.

14 MR. WISKING: If Rapture were allowed to do that we would seriously need to consider whether
15 we ourselves ----

16 THE CHAIRMAN: I appreciate that, and that is why I am saying that I think we have to be very
17 careful in this case about expert evidence, and I suppose a single joint expert takes as much
18 work and cost as having three experts sometimes, but I think we would have to be sure that
19 we really needed the expert evidence. I am not quite sure what the expert evidence is on at
20 the moment.

21 MR. WISKING: Indeed, there are real questions as to the topic, the field of expertise, it may well
22 be that Rapture does ----

23 THE CHAIRMAN: If it goes down that line then we may have to abandon the date that we fix
24 because it is inappropriate. On the other hand, if we do not fix it then we will not have a date
25 if we do not go down that line, so I think we need to fix it. I do not think we should include
26 expert evidence. So we have an amended defence and then written submissions.

27 MR. VAJDA: Yes, but you see on the timetable as I see it, if this is being done in writing the
28 Tribunal will receive the final round of submissions ----

29 THE CHAIRMAN: Well let us hope you get something by the end of September, right?

30 MR. VAJDA: Yes.

31 THE CHAIRMAN: I do not promise, but let us hope that that is what we do.

32 MR. VAJDA: And the Tribunal will then issue a Judgment and one then has to decide what the
33 next steps are.

1 THE CHAIRMAN: Just assume that we did it by the beginning of October, then you would have
2 two weeks to amend your defence, so that would be, say, 15th?

3 MR. VAJDA: I am not entirely sure it would be right to give us just two weeks ----

4 THE CHAIRMAN: All right, three weeks, 20th October.

5 MR. VAJDA: The normal period is six weeks and one has to see the scope of ----

6 THE CHAIRMAN: But you have already ----

7 MR. VAJDA: No, not at all. The people who are here today from Ofcom have many other things
8 to do apart from Rapture, and if there are going to be whole swathes of amendments allowed
9 in I will be submitting that we will need six weeks, and we would be entitled to six weeks.
10 If there is no amendment allowed in or just one amendment, obviously one can do it within a
11 shorter period

12 THE CHAIRMAN: If it is six weeks we would be into the middle of November.

13 MR. VAJDA: We would be, and then we would have ----

14 THE CHAIRMAN: Written submissions, or skeletons, whatever one calls them?

15 MR. VAJDA: Yes, yes.

16 THE CHAIRMAN: You do not think the beginning of December is feasible then?

17 MR. VAJDA: It may be, I do not want to pre-judge what is going to happen, but if no
18 amendments are permitted, and then there is going to be, say, no expert evidence, I suspect
19 we would be ready at the beginning of December, but I do not want to prejudice the
20 Tribunal one way or another, but if, for example, what is now in the substituted notice of
21 appeal is added into the original notice of appeal and say 35 to 41 grounds are allowed to go
22 in ----

23 THE CHAIRMAN: Well it is not 35 of 41 grounds because all the matters will have been in the
24 original notice of appeal, it is just a different way of putting them.

25 MR. VAJDA: Well let us see what happens.

26 THE CHAIRMAN: 41 submissions in relation to three grounds. (After a pause) What the
27 Tribunal thinks is that we should put it in the week of 10th December, and I suggest we put it
28 in 11th and 12th (Tuesday and Wednesday).

29 MR. VAJDA: That is fine. Just to record it for the transcript the position of the Office is that
30 obviously if we consider that for some reason we will not be ready for trial we will raise that
31 at the time, but on that basis we are happy to put it in.

32 THE CHAIRMAN: So we will put it in so we have all got it marked up. If it turns out we
33 cannot do it, we cannot do it.

34 MR. VAJDA: Yes.

1 THE CHAIRMAN: You have a problem, Mr. Bowsheer?

2 MR. BOWSHER: I do have a problem with that week, I am just wondering if the previous week
3 would be possible?

4 PROFESSOR STONEMAN: You had a problem with the previous week just now.

5 MR. BOWSHER: Did I?

6 PROFESSOR STONEMAN: Yes.

7 MR. BOWSHER: 4th December I did not say I had a problem.

8 PROFESSOR STONEMAN: You wanted it brought back into November.

9 MR. BOWSHER: Yes, I have a specific problem with the week of 10th.

10 THE CHAIRMAN: Is it really a specific problem, because we do not normally fix it for counsel
11 anyway?

12 MR. BOWSHER: Well there are two issues.

13 THE CHAIRMAN: I understand you are doing it *pro bono*.

14 MR. BOWSHER: The normal position of counsel's convenience to be quite honest is difficult for
15 the Tribunal to sustain where one counsel and others are acting *pro bono*, and secondly the
16 confidentiality ring. Once one has those two situations in place ---

17 THE CHAIRMAN: It has to be the counsel that is there. I am not sure about the *pro bono*, but
18 certainly the confidentiality ring.

19 MR. BOWSHER: The argument underlying counsel's convenience does not matter, it was based
20 on an assumption that there are lots of counsel ----

21 THE CHAIRMAN: Well we either put it forward one week or put it back one week? So if we
22 can put it forward to the 18th and 19th? That gives plenty of time for all these problems – we
23 should be ready by 18th and 19th December.

24 When we have seen what the amendments are, we can then make some order which goes up
25 to the trial of the hearing and possibly either we can do that in a draft and there can be
26 comments, because it will have to deal with the defence, or the amended defence; it will
27 have to deal with when submissions are to be exchanged, etc., but we do not really know
28 what we are going to do. So are you happy that we will try and make some sort of order
29 which we can send to the parties. We know you want six weeks, but we can look at it and
30 maybe the sensible thing is that when you have looked at our decision – in writing,
31 hopefully – then you can write to us and say you want five weeks, or six weeks or four
32 weeks, or whatever it is.

33 MR. VAJDA: I would have thought the sensible thing is the three of us would hope to be able to
34 agree on something and if we do agree we can then send something

1 THE CHAIRMAN: All right, then why do we not do it that way?
2 MR. VAJDA: And if we do not agree we can then point out what the areas of disagreement are.
3 THE CHAIRMAN: Right, excellent! So why do we not do it that way, that you will send us a
4 consent order?
5 MR. VAJDA: Yes.
6 THE CHAIRMAN: Which will provide the timetable to the hearing.
7 MR. VAJDA: Yes.
8 THE CHAIRMAN: Anything else?
9 PROFESSOR STONEMAN: This is something I have had sitting in front of me since we started
10 meeting this morning. It is an issue to do with what this appeal is really about. I do not
11 expect you to answer it today, I just would be grateful if perhaps you could address it in
12 some of the materials you send to us for the hearing. We know that these are proceedings
13 under a dispute resolution procedure, and there has been some discussion today that it is like
14 resolving a commercial dispute. We are not sure that it is anything like resolving a
15 commercial dispute.
16 It has been put to us by Mr. Bowsher that it is really a dispute about what is the right price
17 or what is the right charge, but there is an alternative to that and if I set this out, it seems to
18 me that the question in the alternative is something like does the failure of Sky and Rapture
19 to reach agreement on price reflect an abuse by Sky of the access regulations as specified by
20 Ofcom, which is really quite a different question. It may be that you collapse the two into
21 one, but I think there are different questions. I would really like to have some submissions
22 from you as to what is the actual question. Is this a question about regulation and the abuse
23 of regulation in respect to access; or is this a dispute about what is the right price? Perhaps
24 you could address that when you put in the materials to us
25 THE CHAIRMAN: I think that goes back to where we started as to what is the dispute which
26 was before Ofcom. I do not think we want to be addressed on it now.
27 PROFESSOR STONEMAN: No, definitely not
28 THE CHAIRMAN: But I think we ought to consider what is the ambit of what we are trying to
29 deal with.
30 MR. VAJDA: I am very grateful for that, and indeed if there is any other particular point that
31 troubles the Tribunal we would respectfully invite that the Tribunal communicates to the
32 parties by letter and then we know where we are, and that can be then dealt with in the
33 skeleton. That is certainly most helpful and we will take account of that, but if there are any
34 other points that occur, as it were, to the Tribunal ----

1 THE CHAIRMAN: It should become obvious from looking at the determination as to what the
2 dispute was; but there are two ways of looking at it. Or it may be two things.

3 MR. BOWSHER: My only hesitation – I can see the nature of the question – I would simply note
4 that it is unlikely that that is a topic we are going to be able to address in the document we
5 produce in two weeks' time.

6 PROFESSOR STONEMAN: As long as it is with us by the hearing, that is all right

7 THE CHAIRMAN: We need to know what the dispute is in order to be able to have an appeal in
8 relation to that dispute.

9 MR. BOWSHER: I will not say any more now

10 THE CHAIRMAN: You may want to think about it a bit when you do consider the new
11 document, or the amended document. Is there anything else? No? Well thank you very
12 much.

13 (The hearing concluded at 4. 55 p.m.)