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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1095/4/8/08
1096/4/8/08

Victoria House,
Bloomsbury Place,
London WC1A 2EB

11 March 2008

Before:
THE HON. MR JUSTICE GERALD BARLING
(President)
PETER CLAYTON
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH SKY BROADCASTING GROUP PLC

Applicant

- v -

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS,
ENTERPRISE AND REGULATORY REFORM**

Respondents

VIRGIN MEDIA, Inc.

Applicant

- v -

(1) **THE COMPETITION COMMISSION**
(2) **THE SECRETARY OF STATE FOR BUSINESS,
ENTERPRISE AND REGULATORY REFORM**

Respondents

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. James Flynn QC and Mr. Aidan Robertson (instructed by Allen & Overy) appeared for British Sky Broadcasting Group Plc.

Mr. Ben Tidswell (Partner, Ashurst LLP) appeared for Virgin Media, Inc.

Mr. Daniel Beard (instructed by the Treasury Solicitor) appeared for the Competition Commission.

Mr. Rupert Anderson QC and Ms Elisa Holmes (instructed by the Treasury Solicitor) appeared for the Secretary of State for Business, Enterprise and Regulatory Reform

1 THE PRESIDENT: Yes, Mr. Flynn?

2 MR. FLYNN: Mr. President, members of the Tribunal, good afternoon. I think it probably falls
3 to me to start. Would introductions assist so the Tribunal knows who is in front of it?

4 THE PRESIDENT: Well I have a note of everyone here, but it is probably just as well.

5 MR. FLYNN: I am appearing for Sky with Mr. Robertson and Mr. Bavasso of Allen & Overy.
6 In our case the respondent, the Competition Commission, is represented by Mr. Beard and
7 the Secretary of State by Mr. Anderson and Miss Holmes. Mr. Tidswell of Ashursts is
8 appearing on behalf of Virgin Media, who are applying to intervene in our case and have
9 their own application as you are well aware.

10 THE PRESIDENT: Thank you very much. Thank you all very much for the letters and
11 submissions which have been put in. You seem to have reached a certain degree of
12 understanding about how we will proceed. Is it worth my just running briefly through
13 where we see we have got to at the moment and I will obviously give everybody chance to
14 have a say, in case there is any change?

15 Dealing with the easy matters first: as far as the forum is concerned there is no issue that the
16 forum is going to be England and Wales, and sitting in London – I think that is agreed. Sky
17 have raised a point on nomenclature, that although they are referred to as BSkyB in some of
18 the documents I think the feeling is your clients would prefer to be known as “Sky”, is that
19 right?

20 MR. FLYNN: That is precisely right, Sir, it is not a point of great vanity but they refer to
21 themselves as “Sky” and that is how I propose to refer to them anyway.

22 THE PRESIDENT: Right, so we will make sure that that is the case in any documents that we
23 produce.

24 As far as the interventions are concerned, again there is no problem there, neither Sky nor
25 Virgin, nor any of the other parties oppose mutual interventions in their respective
26 applications and so obviously the order that emerges from today’s case management
27 conference will grant permission to each of Sky and Virgin to intervene as appropriate.

28 The only point that arises there is in relation to what will follow on from that. I am not sure
29 whether or not we have now received a redacted version of Virgin’s application. We have
30 one from Sky, so there will be no problem serving that on Virgin. Is that in the process of
31 being finalised?

32 MR. TIDSWELL: Yes, it is, Sir. The position is that we have identified the confidential
33 information – as the Tribunal will see from the confidential version that has been shaded

1 – and we are in a position to deliver a non-confidential version to Sky within the next day or
2 so.

3 THE PRESIDENT: Good, so we will therefore make an appropriate order about service on each
4 other of those, so that need not detain us.

5 I will come to timetable, if I may, in a moment, in some respects that is usually the most
6 important and difficult part. So if we leave intervention and turn to the issues in the case.
7 Sky make a number of points about Virgin's request to intervene, I do not know whether
8 you want to expand on anything at this point, Mr. Flynn, in relation to that?

9 MR. FLYNN: Well I do not think I really need to expand on it, we just noted from the tone of
10 their intervention that there were issues which in our submission go beyond the scope of
11 what is in issue between us and the respondents in our case. The Competition
12 Commission's decision is the Competition Commission's decision and the Competition
13 Commission's reasons for finding that there is a material influence, or a significant
14 lessening of competition, are their reasons and it is those reasons which are at issue in these
15 proceedings and not other points which Virgin Media might wish to raise. So we were
16 really signalling in advance that if some of the lines mentioned in the application to
17 intervene were to be pursued in a statement of intervention we would be saying that they
18 were not, as it were, on point. I do not think I need expand on them because it is partly a
19 question of how they expand on what they have already indicated to the Tribunal.

20 THE PRESIDENT: You are putting down a marker basically.

21 MR. TIDSWELL: Sir, it may be helpful if I indicate that we quite understand the role of
22 intervention and there is perhaps some confusion, maybe caused by us to some extent,
23 between establishing sufficiency of interest and the subject matter. Of course, we have not
24 seen Sky's Appeal, or application for review, so we do not actually know – other than in the
25 broad outline – what it is, but I can certainly assure the Tribunal that Virgin Media
26 understands the proper scope of intervention and the proper way to approach that.

27 THE PRESIDENT: All right, well it did seem to me that it was possible that the points being
28 made were being made in terms of establishing the right to intervene rather than necessarily
29 foreshadowing the way you were going to approach your intervention if granted. Anyway,
30 we can leave that to one side now.

31 Perhaps the next thing that could helpfully be dealt with is the question of consolidation of
32 the cases – does anybody want to particularly press for consolidation? We have had a
33 chance to discuss this and we are basically not minded to unless someone wants to persuade

1 us. Clearly they are going to be heard together, we cannot see any particular merits in a
2 formal consolidation, but I am happy to hear anybody on that.

3 MR. BEARD: Sir, the only comments in relation to consolidation rather than hearing together is
4 simply the organisation of the final hearing potentially. As long as the Tribunal is happy to
5 remain flexible and the parties are willing to remain flexible about the order in which
6 matters are dealt with then perhaps it amounts almost to no more than a semantic
7 distinction, apart from the potential that the Tribunal ends up having to write two
8 Judgments, but other than that ----

9 THE PRESIDENT: We are not convinced we do have to write two Judgments.

10 MR. BEARD: Well that is obviously a matter for the Tribunal. The Court of Justice in the CFI
11 occasionally see these things differently when they treat matters of joinder in that way, but
12 as long as there remains flexibility it is no part of the discussion today precisely how that
13 final hearing should play out and it would not be sensible to engage in it, but we would
14 want to make sure that it did not have to be two completely discrete hearings; that would
15 seem to us not an efficient way of dealing with matters.

16 THE PRESIDENT: I think you are pushing at an open door there.

17 MR. BEARD: I am grateful.

18 MR. FLYNN: Sir, we would agree with that. Mr. Beard's observation just reminded me that the
19 practice in the CFI quite often is to join cases after the hearing solely for the purpose of
20 Judgment, and you may or may not think that that is an unnecessary refinement in this
21 jurisdiction, but that is always a possibility and obviously I think we are all in favour of an
22 efficient hearing when we come to it.

23 THE PRESIDENT: Thank you for that. Possibly the other matter to deal with before we get on
24 to timetable is confidentiality. Again, there seems to be a measure of agreement here and
25 everyone seems to be happy that there should be – so far as necessary – a confidentiality
26 right.

27 MR. FLYNN: Might I address you on that, Sir, because we have not actually said anything on the
28 subject of confidentiality?

29 THE PRESIDENT: Well now is your chance.

30 MR. FLYNN: In that case, I will take it. Very shortly, you have had a letter from ITV and it
31 seems to us that that is neither fish nor fowl, nor good red herring because they are not
32 applying apparently to intervene in these proceedings, and while they refer to Rule 53 it is
33 quite plain that someone who is not a party, and certainly someone who is not submitting a
34 document cannot be claiming confidentiality, so they are, shall I say "a little previous" in

1 writing in those terms. It seems to us that you have a choice, namely, either you take
2 representations on confidentiality from the parties, including those who have intervened, or
3 you treat the ITV letter as notionally an application to intervene although it is not expressed
4 in those terms; subject to that they are strangers to these proceedings and it is really for the
5 respondents to ask for the necessary protection for the information that they have received
6 in confidence in the course of the administrative proceedings. That is what we have to say
7 about ITV in short compass.

8 THE PRESIDENT: You say it is up to the respondents?

9 MR. FLYNN: Yes.

10 THE PRESIDENT: The Competition Commission and the Secretary of State.

11 MR. FLYNN: Yes, they say they are broadly happy with the ITV proposals. If I may make two
12 observations on that? First, we are not in favour of a general confidentiality ring under
13 which everything that is confidential or redacted in the report or its appendices will be made
14 available even to external counsel, to all parties including the interveners. We would
15 suggest a halfway house based on relevance. If there are particular points that are not, as it
16 were, available to Sky in the version of the report and its appendices that we have so far
17 seen on which the respondents wish to place emphasis, in that case the veil should be lifted
18 so far. If they wish to say “In making this point we had in mind, amongst other things, this
19 particular element of confidential information which you have not so far seen, and here it is,
20 under the terms of the confidentiality ring for external advisers.” We would be happy with
21 that but the idea that everything is currently redacted, simply because there are proceedings
22 on foot and interventions being made, be handed over to the external counsel of all parties
23 seems to us to be unnecessary and going too far, so there should be a test of relevance or
24 reliance on the particular item of confidential information before that is released into such a
25 ring.

26 THE PRESIDENT: So equally you would look at the redacted versions and decide what parts
27 might be of interest to you in your case?

28 MR. FLYNN: No, I am saying that if, in their defences, either of the respondents wished to say
29 “In meeting this point in your application we wished to draw attention to a particular item of
30 information which so far has been withheld from you” then that information can be handed
31 over on the terms of a confidentiality ring.

32 THE PRESIDENT: I see, that yes. What about the other way around? The same would apply?

33 MR. FLYNN: The same would apply for us if indeed we were handing over anything in response
34 to that, but, there is no particular reason for the entire veil to be lifted off even if the

1 particular point covered by confidentiality there is not at issue in these proceedings. So it is
2 a slightly narrower version.

3 THE PRESIDENT: So you are saying there should be an *ad hoc* approach to each bit of
4 information rather than dealing with everything?

5 MR. FLYNN: Yes.

6 THE PRESIDENT: I see the point you are making.

7 MR. FLYNN: That is the point and I would just remind the Tribunal that we did mention this in
8 our observations for the case management conference, namely that we are in litigation with
9 Virgin Media in the High Court where some of these issues may have some part to play. It
10 will be the same advisers on the Virgin Media side – I believe Mr. Tidswell, certainly Mr.
11 Green – are involved in that action, and I should say so am I. I have the highest regard for
12 my opponents and their standards of professional integrity, but the problem is that when one
13 receives a piece of information it is very easy to remember the information two or three
14 years down the line; it is not always possible to remember: “I must keep that well
15 segregated”. We would say it is an unnecessary step to reveal every aspect of what has so
16 far been kept confidential, simply because these applications are on foot.

17 THE PRESIDENT: Irrelevant material you say should be ----

18 MR. FLYNN: Yes, material that is not relied on by the person putting it forward and saying
19 “Although it is confidential in the report, it is germane to these proceedings”, that is the
20 scope of the submission.

21 THE PRESIDENT: I follow that.

22 MR. FLYNN: The last point only is also to reserve the position that if we are in receipt of such
23 information on a confidentiality ring for external advisers only, of course, it may be difficult
24 to know how to advise the client in those circumstances, and we may have to apply to the
25 Tribunal for an extension to the ring so that someone who can actually give us instructions
26 in relation to that information can be brought into it. But I think that again is a bridge to be
27 crossed when we come to it.

28 THE PRESIDENT: Certainly, but I hope that the first port of call would be to try and reach
29 agreement, obviously, because I am a great believer that a pragmatic approach normally
30 with these kind of cases is to do it by sensible agreement.

31 MR. FLYNN: That is quite so, Sir, but normally these confidentiality rings are for named people
32 only so it would be a question of varying an order even if we can reach agreement on it.

33 THE PRESIDENT: Who would like to go next on this?

1 MR. TIDSWELL: It may be easier if I do, just to get the applicants straight from the start before
2 Mr. Beard has a go. We have not had the opportunity to discuss this with Sky so the
3 situation is possibly not as advanced as it might be. But we struggle a little bit with the
4 conceptual point that is being made, because it appears to us that there are various
5 categories of material in front of the Tribunal. There is material that has gone into the
6 applications and it seems by definition that must be relevant at least in part in order for it to
7 be there, and according to Mr. Flynn's categorisation it should be available to the ring.
8 Similarly, we expect the Competition Commission and the Secretary of State will not be
9 making disclosure as such in these proceedings and the material that would be available
10 would either be in the defence, or attached to the defence, and likewise therefore must be
11 thought to be relevant.

12 THE PRESIDENT: It might be in the report too.

13 MR. TIDSWELL: It might be in the report, but of course one would say that it may well be that it
14 is in the report and not relevant and I can quite see the point there, but we cannot really
15 make any observations on that not having ----

16 THE PRESIDENT: As I understand it what Mr. Flynn is saying is "Let us not just assume that
17 everything is relevant because it has been redacted", on the basis that there might be stuff in
18 the end that really does not matter and no one is particularly relying upon or challenging
19 and wanting to make an issue of, and therefore one should adopt a minimalist approach to
20 this kind of information.

21 MR. TIDSWELL: Subject to the question of the report it does seem that the presumption is that it
22 will be relevant if it is in front of the Tribunal, and we are not really in a position to make
23 any observations about whether or not it is helpful in relation to the report. It does seem
24 quite intricate to be trying to deal with the report with bits of it missing for all of the parties,
25 especially if some parties have seen bits of it and others have not.

26 In relation to Mr. Flynn's point about the litigation, he is absolutely right about the
27 existence of it of course, and there are points of relevance in both proceedings that are
28 similar, but having said that, of course if the material was relevant to the litigation it ought
29 to be disclosed in the litigation. If it is not relevant to the litigation then it ought not in
30 principle matter that people conducting the litigation see it. So it seems to us that that is not
31 a point of real concern to the Tribunal.

32 We would say that a confidentiality ring is a tried and tested mechanism, and has worked
33 perfectly well in this Tribunal on many occasions. We are certainly comfortable to give the

1 undertakings that would normally be given and it is the simplest way to make sure this case
2 proceeds swiftly.

3 THE PRESIDENT: I may have misunderstood it, but as I understood Mr. Flynn he was not
4 saying that there should not be a confidentiality ring, he was just saying that the information
5 in the documents that goes into the ring should be subject first to some suggestion that it is
6 relevant, and the material that no one claims to be important or relevant would not
7 automatically be disclosed – it may turn out that it is relevant, in which case it might have to
8 be disclosed later, but I was not sure he was criticising the concept of having a ring.

9 MR. TIDSWELL: No, Sir, and perhaps I have not been clear. The point I am making is that a
10 ring carries with it great simplicity, it provides protection without complication. Mr.
11 Flynn's proposal has some considerable complication built into it, as perhaps to timing and
12 also to substance, and we say it may make these proceedings very difficult.

13 THE PRESIDENT: Well there is the point – as you rightly say – that it means there has to be a
14 certain amount of interchange between the parties as to what they want to see and what they
15 claim to be relevant, and if that is the way it is done I agree; that is a point, certainly.

16 MR. TIDSWELL: That is all we had on the subject, Sir.

17 THE PRESIDENT: Thank you very much. Mr. Beard?

18 MR. BEARD: The Commission obviously has a concern about confidential information in this
19 sensitive area where we have two parties who have plain interests in understanding what the
20 other is up to, receiving information. The Commission is always concerned about these
21 matters in relation to these sort of merger inquiries. It recognises, however, that the system
22 has to be designed to accommodate the ability of this Tribunal properly to look at the report
23 which is under consideration and under challenge here, and in particular the Commission
24 considers that the report has to be considered as a whole, and it does not see how properly
25 this Tribunal can simply look at the edited highlights of the report. There are undoubtedly
26 sections within the report – they may not be long but they may be salient – where material is
27 being disclosed to the Commission by Sky or Virgin or, indeed, ITV, that are material to the
28 overall assessment. In those circumstances, although it may be sensitive information, it is
29 clearly information that this Tribunal must see.

30 In the circumstances, if the Tribunal is to see this information in order properly to be able to
31 assess the decisions that are under challenge here, we recognise that it is necessary to reach
32 some sort of accommodation to enable the appellants to be able to see what the Tribunal is
33 relying on and what the Commission and the Secretary of State are relying on in these
34 matters.

1 We do not think that it is going to be easy to try to select out bits and pieces of information
2 when it is the Commission's position that these reports must be read in the round. So in
3 relation to the report and its appendices we see a real difficulty where the challenge is being
4 brought to the report and its conclusions, that the Commission should set about trying to
5 extract particular parts of it, and suggest that some parts are not relevant.

6 In practice, furthermore, and this betrays no confidence, the sensitive material about which
7 we would be concerned, and about which we anticipate the parties would be concerned, and
8 ITV might be concerned, is likely to be the sort of material that is of direct interest in
9 relation to these applications. In other words, even if it were a sensible route to go down,
10 trying to engage in this sort of editing process, in practice it is not going to offer the sort of
11 protection that Mr. Flynn perhaps anticipates. That deals with the report and appendices.
12 The situation in relation to documentation might be rather different, because it is anticipated
13 on behalf of the Commission that it may be appropriate to append certain documents to the
14 defence. It is not anticipated that there will be a wholesale disclosure of material that came
15 before the commission. If there are arguments about those matters they can be dealt with in
16 due course.

17 If there are particular documents that the Commission considers it is appropriate for the
18 Tribunal to see then of course that selection will be done on the basis of relevance. To that
19 extent those fears that Mr. Flynn expresses can be allayed. But it is in relation to the report
20 and the appendices that particular concerns arise, and it is not understood how these matters
21 can be dealt with.

22 Just picking up one point, there is sensitive material that has been disclosed by ITV to the
23 Commission which is referred to in the report in its full version and is redacted from the
24 versions that have been seen by the appellants. For Mr. Flynn to suggest that ITV is an
25 entire stranger to these proceedings is perhaps striking a tone of form over substance. Of
26 course, ITV has not sought to intervene, it has read the Commission's report and apparently
27 has no issue with it, at least not such as requires it to intervene and take points before this
28 Tribunal. But since the subject matter of the report concerns ITV, and necessarily the
29 Commission obtained material from ITV, to suggest that confidentiality concerns pertaining
30 to ITV are not relevant is perhaps putting it too high if Mr. Flynn was going that far.

31 What the Commission has done is that it has indicated to ITV that it anticipates the need to
32 put the full report before the Tribunal and that if ITV has any concerns, and wishes to raise
33 any issue, it could do in relation to those matters. The response from ITV was that so long
34 as there was a confidentiality regime in place that involved a confidentiality ring covering

1 external counsel and external legal advisers it was content for that sensitive material to be
2 circulated. In the circumstances that seems to the Commission to be the only sensible way
3 to deal with these matters. It is happy to discuss particular issues that may be troubling Sky,
4 if Sky raises them with the Commission but its principal position is that the report must be
5 before this Tribunal otherwise the Tribunal really is not in a proper position to be able to
6 analyse the consideration of the Commission in the round, which is the subject of challenge
7 here.

8 Unless I can assist the Tribunal further on that matter?

9 THE PRESIDENT: Thank you. Mr. Anderson?

10 MR. ANDERSON: If I could just say very briefly, there is only one aspect of the Secretary of
11 State's decision which has not been disclosed and that is the divestment period; it does not
12 appear to be relevant to any issue in the case and therefore we propose that that remains
13 confidential.

14 THE PRESIDENT: Yes.

15 MR. ANDERSON: In relation to material information or documents on which the Secretary of
16 State may rely for which confidentiality has been claimed, it seems to us it does not require
17 any order from the Tribunal on relevance, merely an order as to limitations on the disclosure
18 of that material, but until such time as we are further down the road in preparing our
19 defence and identifying what documents we rely on, including documents supplied to us by
20 ITV, we would suggest that insofar as we intend to rely on such information that that
21 information be limited to the confidentiality ring but, as I say, it does not require this
22 Tribunal to introduce what might be a cumbersome concept of relevance at this stage. It is
23 really for the parties to identify what is relevant and to claim confidentiality in respect of
24 any material on which they rely.

25 THE PRESIDENT: Thank you very much. We had obviously discussed this beforehand, and we
26 formed the view that we would much prefer that the parties sort this out. I hear what you
27 say about needing to deal with each and every item, but it seems to us, and at the moment
28 we have only the report and the applications, we do not have the full range of pleadings, if
29 there is material that has obviously been redacted and someone thinks is not relevant, then
30 that issue can be raised. But it is quite difficult to see how material in the report is not
31 relevant. I would prefer that we simply make an order – this is something we have already
32 looked at – that the parties formulate and agree between themselves the appropriate
33 arrangements for disclosure of documents and information. Of course, there is the ITV
34 complication but we would also like the parties to include the ITV information in those

1 arrangements. I think it is perhaps slightly unfortunate that ITV is not here to underline its
2 submissions, but we have all seen the submissions that they have made; they obviously
3 want their confidential information to be protected, to the extent that it is compatible with
4 the proper resolution of these applications.

5 Obviously, if you are going to tell us that it is impossible for arrangements to be agreed that
6 will give, as it were, Mr. Flynn's clients some comfort that irrelevant material is not going
7 to be just disclosed for the sake of it to the confidentiality ring, which is what I assume will
8 emerge as the mechanism, then obviously we will have to bite the bullet and decide it. But I
9 would have hoped that it would not be necessary for us to do that, it is much better that the
10 parties reach a sensible accommodation.

11 MR. FLYNN: Well, point taken on that, Sir, it is early days and Mr. Tidswell as already said in a
12 sense of course we have not seen each other's applications. When we have the redacted
13 versions of those served on us it may be easier to resolve this. I just note that both Mr.
14 Beard and Mr. Anderson referred to the issues in the case and to what is material in the
15 case. Our submission is that what is material in our case is what is put in issue in our
16 application. Of course, we have supplied you with the report in full so far as it is available
17 to us, but that does not mean that every bit of material that was excised in relation to Sky,
18 which is all we know about, is material to this case, and that is the point which I was trying
19 to make. I think when we have the versions which will be available to us in the next couple
20 of days then it may be easier for us to have a discussion and with any luck not need to
21 trouble the Tribunal.

22 THE PRESIDENT: I think that that is the best approach here, that when you get the documents
23 the problem may go away – this particular division between you may go away – and you
24 will be able to put in place proper arrangements for a confidentiality ring. Does anybody
25 want to say anything more about whether we can simply wrap up the ITV documents in the
26 same way? The information is actually in the hands of the Competition Commission and to
27 some extent the Secretary of State.

28 MR. BEARD: The Competition Commission was obviously the first body to receive this material
29 (leave aside the Office obviously in these matters) for the purpose of these proceedings, so
30 the Commission has it. As I say, without disclosing what the material relates to it is likely
31 to be pertinent to the Tribunal's overview of these matters and, of course, as Mr. Anderson
32 has already flagged, it is the material as part of the report that goes to inform the Secretary
33 of State in making his decision and in those circumstances again it reinforces why
34 extracting bits and pieces from the report is not going to be a productive exercise here. But

1 I hope that the indication that I have given already about documentary material and the way
2 that we will approach documentary material which we understand to be confidential, gives
3 some comfort to Sky and, indeed, to Virgin and – although they may not be here they may
4 have people taking notes – to ITV as well. We do not intend simply to disclose material
5 which may have a passage in it which is germane to the findings in the report, but the
6 remainder of the material is not. It may be possible for us to redact certain documents if
7 necessary, but principally we will try and avoid disclosing original material unless we
8 consider it is particularly important.

9 THE PRESIDENT: ITV have indicated that on certain terms they are happy with the
10 confidentiality ring approach. I think the ball is rather in your court in a sense, is it not, if
11 you can to honour that arrangement, or come back to the Tribunal.

12 MR. BEARD: I think everyone anticipates that there is going to be a confidentiality ring of sorts.
13 I think what Mr. Flynn is saying you should not treat this as a wheelbarrow full of stuff that
14 can simply be tipped into the ring, you should actually sift it more carefully. Our point is
15 that whilst we accept that that may be generally sensible, the biggest item that is being
16 carried is the report and appendices. That is not something we think is appropriately sifted.

17 THE PRESIDENT: I follow the point. Is anybody here from ITV or does anybody want to hold
18 their hand up? As a watching brief, and there is nothing you want to say about this?

19 MR. PRIDDIS: If it assists the Tribunal at all, Sir, we are very happy to participate.

20 THE PRESIDENT: It seems to me the sensible arrangement would be if the parties in their
21 agreement of the arrangement, which I hope will emerge, for this confidentiality, would
22 include ITV, albeit you have not applied to intervene – you could have applied to intervene,
23 simply to protect your documents, that might have made it slightly simpler. But one would
24 hope the parties would include you in the discussions about the arrangements, and what
25 would emerge is a formulation which can be put to us to look at in draft which has your
26 blessing as well.

27 MR. PRIDDIS: Yes, indeed, Sir. ITV is very happy to participate in those conversations.

28 THE PRESIDENT: I hope the parties are willing to include ITV, otherwise things become
29 impossible, I think.

30 MR. BEARD: We have already anticipated this by communicating with them we are happy to do
31 so.

32 THE PRESIDENT: So we will leave that then. We were going to suggest that these draft
33 arrangements should be put in place as soon as possible, agreed as soon as possible as a
34 proposed way forward, and in any event by the date which everybody seems to have agreed

1 – I hope everybody – for the defences, with a three day extension to 28th March. If that
2 could also be the cut-off point for us to get some kind of draft agreed arrangement or by all
3 means sooner – the sooner the better – for that. Unless anybody else wants to say anything
4 else on confidentiality we will leave it at that. We will include something in the order that
5 emerges from today along those lines.

6 That takes us then to the all important issues of timetable, and we shall sweep up skeletons
7 and so on and so forth. The defences – Mr. Beard, Mr. Anderson, you are happy with 28th
8 March for that?

9 MR. BEARD: Yes.

10 MR. ANDERSON: Yes.

11 THE PRESIDENT: I will just tell us what we were minded to propose – subject to hearing you –
12 by way of timetable and documents. We are in two minds as to whether actually we need a
13 statement of intervention as such - it could be called that or it could be called a “skeleton”
14 on the intervening matters, limited to the matters to which each of Sky and Virgin want to
15 intervene in the respective applications. Obviously we will hear you in a moment on
16 whether you think it is better as a skeleton or as a statement of intervention. We thought
17 that limited to those issues first, 11th April would be an appropriate date.

18 Then the respondents, the main skeletons for the Commission and the Secretary of State we
19 thought 2nd May would be a fairly decent period in which to do that; that would be the
20 respondents’ main skeletons dealing with the matters raised in the interventions and indeed
21 reiterating as far as you want to in the form of a skeleton your main points of defence.

22 Then we could enable the applicants to put in their skeletons on 16th May. We would like to
23 have a bundle of authorities and a core bundle, both agreed by the same date (16th May) –
24 that is probably the latest time that we could have that and it would be very useful. When I
25 say “core” if you could exercise a bit of discretion and have just the documents that are
26 going to be referred to rather than putting in everything for the sake of caution; so as slim a
27 bundle as possible for the core bundle.

28 Then as far as hearing dates are concerned, taking account of what various parties have said
29 in their various submissions to us, we would like to have the hearing over the three days,
30 21st to 23rd May, that would be our preferred period. If we can fix that now that would be
31 ideal. We have got fall back dates – Mr. Beard is about to stand up and say he does not like
32 those!

33 MR. BEARD: Well without going into the other issues on the timetable, the Competition
34 Commission has Jon Swift QC leading in relation to this matter and I know he is not

1 available on 21st and indeed the Chairman of the Commission, who it would perhaps be
2 sensible to be able to attend the hearing, is not around from 21st to 23rd precisely, but any
3 other time ... (Laughter) ... I have been informed is fine. It could not have been a more
4 direct hit in date battleships' terms.

5 THE PRESIDENT: The other dates would be 3rd to 5th June. First of all, shall we work
6 backwards and start with the date of the hearing? Does anybody else want to address us on
7 that.

8 MR. TIDSWELL: Just to say that would suit us very well, 3rd to 5th June.

9 THE PRESIDENT: What about Sky?

10 MR. FLYNN: Without wishing to be unhelpful, the previous date came as rather good news to a
11 few of our members.

12 THE PRESIDENT: Do you want to elaborate a bit on that, if we have to take a ----

13 MR. FLYNN: Sir, since Mr. Beard raised what I take to be holiday arrangements, it is holiday
14 arrangements in June as opposed to holiday arrangements in May, but I may be misquoting
15 him there.

16 THE PRESIDENT: For counsel?

17 MR. FLYNN: Not for counsel, Sir, no.

18 THE PRESIDENT: For people who are going to be active in the hearing?

19 MR. FLYNN: People whose presence we judge essential, but I know the Tribunal does not do
20 this by majority votes. We would much prefer 21st to 23rd May if that could be
21 accommodated.

22 THE PRESIDENT: Anybody else want to say anything about the hearing dates?

23 MR. ANDERSON: Between those two options the Secretary of State would prefer 21st May. The
24 concern is to get the case heard as quickly as is reasonably practicable, having regard to the
25 fact that it is a big case, well two cases, so of those two dates we would prefer the 21st, but I
26 am not saying that the 3rd to 5th June is not possible, just of the two we would prefer the
27 earlier.

28 MR. BEARD: Looking at the diary information I have, it appears that on 5th June there may be a
29 difficulty for Mr. Swift as well. So Mr. Swift is managing with two particular dates, neither
30 of which are holiday, according to the accounts in his diary, and neither of which are court
31 appointments, I should probably stress to the Tribunal.

32 THE PRESIDENT: So when you say "neither of which", which is the other one?

33 MR. BEARD: 21st May and 5th June.

34 THE PRESIDENT: Is it a problem on 21st?

1 MR. BEARD: It is a problem on the 21st, the other dates around then for Mr. Swift are available.

2 It is Mr. Freeman, the Chairman ----

3 THE PRESIDENT: He cannot do any of the three?

4 MR. BEARD: He is not around for the three days. I should stress it is not anticipated that any
5 evidence will be provided by him it is merely a matter of his attendance would be preferred,
6 but the Commission quite recognised that these listing difficulties inevitably arise.

7 THE PRESIDENT: There is never going to be a perfect solution. They are not court dates?

8 MR. BEARD: No, they are not court dates, it is proper to indicate that.

9 MR. TIDSWELL: Just to make it even worse, I should indicate just for completeness that Mr.
10 Green could not do 21st to 23rd.

11 THE PRESIDENT: Mr. Green cannot?

12 MR. TIDSWELL: He could not, and those are court dates as presently listed, just so the picture is
13 complete.

14 THE PRESIDENT: I think we will have to have a discussion because I have to consider the
15 availability of the members as well. Do people just want to give me their reactions, as it
16 were, to the other directions that we were proposing, dealing with the – Mr. Beard got to his
17 feet first.

18 MR. BEARD: I do not know whether that is what counts – that could set a terrible precedent!
19 (Laughter)

20 THE PRESIDENT: It will do for now.

21 MR. BEARD: Apart from the schedule of dates, the only observation that the Commission would
22 make, this is, of course, a s.120 appeal and therefore it is to be dealt with as a Judicial
23 Review, or Judicial Review principles apply. Now, obviously this Tribunal has a discretion
24 to vary how it deals with matters in relation to procedure, but of course in Judicial Review
25 proceedings the ordinary course would be for a serial exchange of skeleton arguments with
26 the appellants (or the claimants as it would be in Judicial Review) going first and the
27 respondents finishing with the final skeleton. At present, the arrangements suggested by the
28 Tribunal rather reverse that process, that does not to the Commission seem necessarily the
29 most effective way of ensuring that the Tribunal has before it the fullest account dealing
30 with the various points raised in the appeals, and in those circumstances would suggest that
31 a modification to deal with that would be appropriate. Whether or not that means that the
32 appellants' lodge a skeleton argument on 2nd May and the respondents on 16th May, that
33 would perhaps be the most sensible way of simply modifying the suggested procedure, and
34 would ensure that there was a proper exchange between the parties in relation to these

1 matters, because of course what we have is the appeals, then we have the defences which
2 will of course engage with the appeals. We will then have the appellants' responses
3 engaging with those defences and therefore it does make sense for the respondents at the end
4 then to be engaging with those skeleton arguments. At the moment what we have are
5 defences, then statements of intervention or skeletons in intervention, but at that stage there
6 will not be anything engaging with the respondents' defence directly. Some of the points
7 raised in relation to the interventions may engage with the defence, but what we will not
8 have is a full skeleton argument. So the current programme is the main argument from the
9 respondents coming forward, a partial argument from the appellants, but not engaging with
10 the defence, and then we are expected to put skeletons in. That does not necessarily seem
11 the most efficient way of ensuring that what might be termed a "dialogue" between the
12 different sides – certainly an engagement – is most efficiently played out in the written
13 proceedings for this Tribunal and therefore we would suggest that, as a Tribunal, you should
14 order that the ordinary order in Judicial Review proceedings is maintained and that has a
15 certain logic, given the other steps that are proposed here. We are not trying to keep anyone
16 out of saying anything and if there are particular points that later come up just before the
17 hearing, and a note needs to be put in we are not taking objections about that sort of thing.

18 THE PRESIDENT: What about the other dates?

19 MR. BEARD: No, I think the dates suggested by the Commission were slightly tighter if
20 anything in the submissions that were put forward and anticipated that statements in
21 intervention or skeletons by the 11th, which is along the lines that the Tribunal suggests, then
22 the Commission and, indeed, I believe the Secretary of State suggested skeleton arguments
23 from Sky or Virgin, therefore dealing with the defence issues, to be lodged by 25th April;
24 and essentially by moving to 2nd May the Tribunal was giving further leeway. Then the
25 respondents' skeleton arguments would be 14 days thereafter on the 9th, and that would
26 mean that you got that exchange, otherwise there is a real danger that the respondents'
27 skeletons – not having had anything else from the appellants in between – really are not
28 fulfilling the function that perhaps the Tribunal might hope they would fulfil, and clearly it
29 is anticipated in the JR Rules that it is fulfilled by the order of skeleton exchange.

30 THE PRESIDENT: I do not think we are bound by the ----

31 MR. BEARD: No, no, I was not for a moment suggesting that, and you of course have the
32 discretion as would the Administrative Court to vary that. I was merely emphasising that is
33 the ordinary rule and there is a logic behind it and it is a logic which clearly applies here in

1 order to ensure that you get a full exposition in writing, or as full as of course lawyers ever
2 permit in exchanges of written material.

3 MR. ANDERSON: On behalf of the Secretary of State I would agree with everything Mr. Beard
4 has said, because obviously the arrangement proposed by yourself, the applicants' skeleton,
5 which is served after our skeleton, will be the first and only time that they will have engaged
6 with what the Secretary of State and the Competition Commission have said in their
7 defences. We think the most sensible course is for there to be statements of intervention on
8 11th April and skeletons from the applicants/interveners which will then engage with both
9 what the Competition Commission and the Secretary of State have said in their defences,
10 and what each of them are saying in their statements of intervention and then the Secretary
11 of State and the Competition Commission put in their final skeletons before the hearing and
12 in that way every party will have had an opportunity to engage in debate on all the issues,
13 and will best place the Tribunal then to see the full scope of the dispute.

14 THE PRESIDENT: It will not be quite the first time, because in their statements of intervention
15 they will be engaging no doubt with things in the defences, but I understand that they
16 certainly will not have seen the rest of it. Who is next?

17 MR. FLYNN: We are having a race to be the last to the microphone! (Laughter) Our suggestion
18 would be, given that what you have is two unconsolidated appeals with cross-interventions,
19 that the Tribunal probably would be assisted by statements of intervention, because those
20 are, as it were, pleadings. Then you will need the appellant in each appeal to respond to
21 those statements of intervention as well as the defence. That is why we suggested in our
22 outline that it might need to take the form of a reply which is, of course, a pleading, whereas
23 a skeleton is simply an indication of what you might say at the hearing.

24 THE PRESIDENT: We tried to avoid a procedural step; it may not have worked entirely.

25 MR. FLYNN: I take the point that in a sense it does not really matter what it is headed, unless of
26 course there is (and no one can say at this stage) any need for reply evidence to respond to
27 what is said by either respondent, or the intervener in our respective appeals. That is
28 perhaps unlikely but it would be unfortunate to derail the timetable should it be needed.
29 Our suggestion was that it should be formal statements of intervention, followed by replies
30 if so advised, that is what we put in our letter to you. In the alternative there would be
31 skeletons if there is no need for a formal document, because of course replies are not usual
32 in this jurisdiction but occasionally can be useful.

33 THE PRESIDENT: Assuming we did not make express provision for a reply, do you go along
34 with Mr. Beard's suggestion that we simply reverse the order of the skeletons?

1 MR. FLYNN: Yes, Sir, I do not object to that, that does actually seem sensible, so long as we
2 have an opportunity to respond with formality if necessary, both to the defences, and to the
3 Virgin statement of intervention. It may not be necessary for a reply; if not, it will be a
4 skeleton and we have no rooted objection to those skeletons being sequential. In terms of
5 timetable, if we are working towards a hearing at the end of May then there is always a
6 liberty to apply if we run into difficulty. So I think those dates seem like a sensible first
7 start.

8 MR. TIDSWELL: Sir, we have nothing to add to that. We are very happy with the way Mr.
9 Flynn has put it and agree with that.

10 THE PRESIDENT: In a minute we are going to need to go out and discuss some of those points,
11 and in particular the hearing dates. Is there anything else? That seemed to us to have dealt
12 with the issues. Mr. Tidswell, did I understand you correctly to say that the dates 21st and
13 23rd May your leading counsel was unavailable for?

14 MR. TIDSWELL: That is right, Sir.

15 THE PRESIDENT: But is available for the June dates?

16 MR. TIDSWELL: 3rd to 5th he could do, yes, Sir.

17 THE PRESIDENT: Any other issues that we need to deal with before we go and have a think
18 about that? Right, we will be as quick as we can, but I am sure you will be safe until quarter
19 past.

20 (Short break)

21 THE PRESIDENT: We have some Gordian knots, I am afraid – we can never make everyone
22 happy in these circumstances. As far as the timetable is concerned, we have come around to
23 the suggestion that we reverse the order of skeletons, so the order that we will send to you
24 will be a draft order for comments over a very short period. It will be defences by 4 pm on
25 28th March, statements of intervention by 4 pm on 11th April, both applicants' skeleton
26 arguments for the hearing by 4 pm on 2nd May and the respondents' skeleton arguments by 4
27 pm on 16th May. We would like an agreed core bundle, and an agreed bundle of authorities
28 by the same time, 4 pm on 16th May. Both the applications will be heard on 3rd to 5th June.
29 As I say, I am sorry to those who are inconvenienced by that, but unfortunately we cannot
30 please everybody and we have done the best we can.

31 I should just say that at some appropriate time we will ask the parties to send us their
32 proposals for a running order of the submissions and issues to assist us but I do not propose
33 to make any order about that; I am sure that can be dealt with by correspondence.

1 As far as confidentiality is concerned, the order that we propose to make is along these lines:
2 that the parties formulate and agree between themselves – and so far as applicable ITV –
3 arrangements for disclosure of confidential information and documents relevant to these
4 proceedings and submit the agreed arrangements to the Tribunal in the form of an agreed
5 draft order as soon as possible and, in any event, by 28th March – draft directions
6 incorporating these and no doubt the other easier points that we have discussed will be sent
7 in the usual way. Mr. Beard?

8 MR. BEARD: Mr. Flynn whispered to me a particular sweet nothing about the 16th May – core
9 bundles and authorities. Just as a matter of practicality if respondents’ skeletons are going
10 to be lodged on that date, given that they may include additional authorities, actually getting
11 the core bundle and the authorities on that date may just be practically difficult.

12 THE PRESIDENT: We can always add to them, but could you send us something?

13 MR. BEARD: We can certainly send you something, Sir, yes. (Laughter)

14 THE PRESIDENT: I think you can probably predict, and you will probably have most of the
15 relevant authorities referred to anyway in the earlier skeletons – just leave a few tabs free.

16 MR. BEARD: As long as some additional authorities can be slipped in.

17 THE PRESIDENT: Yes, I am sure there will be many additional authorities, although I am not
18 inviting them. Anything else? Well thank you all very much for your help.

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