**IN THE COMPETITION APPEAL TRIBUNAL**

Cases 1171/3/3/10
1172/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7 March 2011

Before:

VIVIEN ROSE
(Chairman)
STEPHEN HARRISON
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

– v –

**OFFICE OF COMMUNICATIONS**

Respondent

- supported by -

**EVERYTHING EVERYWHERE LTD**
**HUTCHISON 3G UK LIMITED**

Interveners (Case 1171)

**VIRGIN MEDIA LTD**
**EVERYTHING EVERYWHERE LTD**
**TALKTALK TELECOM GROUP PLC**
**BRITISH SKY BROADCASTING LTD**

Interveners (Case 1172)

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# H E A R I N G (DAY 1)

# APPEARANCES

Miss Sarah Lee (instructed by CMS Cameron McKenna LLP) appeared for the Appellant.

Mr. Pushpinder Saini Q.C. and Mr. Hanif Mussa (instructed by the Office of Communications) appeared for the Respondent.

Mr. Philip Woolfe (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr. James Segan (instructed by Olswang LLP) appeared for Virgin Media Limited.

Mr. Alan Bates (instructed by Herbert Smith LLP) appeared for British Sky Broadcasting Limited and Talk Talk Telecom Group plc.

Mr. Richard Pike (of Baker & McKenzie LLP) appeared for Hutchison 3G UK Limited.

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THE CHAIRMAN: Good morning ladies and gentlemen. Thank you for the letter of 4th March setting out the timetable for today's proceedings. I note from that letter that there is an issue about whether ground 3 of the Ethernet appeal is going to be covered today, that ground being whether Ofcom erred in deciding that it was appropriate to handle these disputes rather than using alternative means, namely, the SMP condition enforcement procedure under the Act.

As we understand it, the position is that similar arguments were raised in the PPC appeal, they were dealt with in the preliminary issues judgment in June of last year and in that judgment the Tribunal decided that the enforcement procedure and the s.185 dispute resolution procedure provide parallel jurisdictions. However, we also understand that at the main hearing of the PPC appeal last October further submissions were made on that point and that judgment is awaited in that appeal. That judgment may or may not say something further on the issue and it is likely to be handed down before we hand down judgment in this appeal. So we will hear what you have to say on whether or not we need to cover ground three today. I would say our initial inclination is to deal as far as we can with all points raised in these appeals today if that might avoid the need for further submissions, certainly the need for further oral submissions once the PPC main judgment is handed down. So we would be open to receiving written submissions on the relevance of the main PPC judgment once it is handed down, and so anything that was said today would not necessarily have to be the last word on the topic, but it seems to us that if we do not hear anything about it today then there is inevitably going to be the need for further submissions but that might be avoided, I do not know if we hear submissions today.

So, Miss Lee, are you kicking off then?

MISS LEE: Madam Chairman, members of the Tribunal, if I can begin with the parties' representation today it is as follows: I appear for BT, Mr. Saini QC and Mr. Mussa appear for Ofcom, Mr. Woolfe appears for Everything Everywhere, Mr. Pike For Three, Mr. Bates for Sky and TTG, and Mr. Segan represents Virgin Media in substitution for Mr. Jones who became unavailable at the last minute. Subject to the Tribunal I was proposing to proceed in the following way beginning with a few preliminary comments relating to the hearing, including the point on ground 3 that you have just raised, madam, and a couple of preliminary comments about the case. Then I was going to outline very briefly the relevance of the related appeals before the Tribunal to the NCCN 1007 and Ethernet matters respectively, and the approach that Ofcom took in its decisions regarding the acceptance and handling of the case in each of those matters. Then I was going to look at the

Directives and the Act and make my submissions in relation to each ground by reference to the statutory materials with brief reference too to Ofcom's 2004 Guidelines.

Can I deal first then with matters affecting the hearing. First, the scope of the issues of this hearing and the second concerns the timetable and, as you said, madam, we sent a letter on Friday setting out the position in relation to that. Regarding the questions we say arise for decision at today's hearing they are outlined in paras. 3 and 4 of my reply, and perhaps I could ask you to turn that up as I am going to be looking at that reply and skeleton. That is at the core bundle 1007 at tab 7, p. 90. As para.3 explains, and I am sure the Tribunal will already have seen from the papers, in general terms the case requires consideration of the application of the Act to a particular set of circumstances, namely where there are already related appeals before the Tribunal which we say make it difficult for meaningful negotiations to take place.

Paragraph 4 of that reply set out the broad questions that we say arise in our view. I should point out in the first line of (v) there is a "not" missing, before exceptional – the elusive "not" that I am afraid has escaped notice before now.

Paragraph 5 deals with grounds 3 and 4, and if I could deal with ground 4 first. This is a ground that was included very much as a precaution and since the remainder of the notice of appeal was being submitted in any event, the matter in ground 4 was connected with Ofcom's decision that there were exceptional circumstances in the Ethernet case .It laid the ground effectively to challenge any requirement that Ofcom made over the intervening period requiring BT to take active steps if there were to be any considerable matters, or considerable amount of work to be undertaken by BT because when the notice of appeal was submitted last November it was unclear what steps, if any, Ofcom was going to take to progress the matter requiring involvement for BT pending the handing down of the PPC judgment. The position now is obviously as of today's date none have been taken and we consider that if there were to have been any we would really have expected them to have happened by now. We assume again that the judgment in PPC is due to be handed down relatively shortly and therefore we are happy not to proceed with ground 4 in those circumstances.

It seemed prudent to us to reserve the position in our reply since that was a full month before today's hearing but in the event, as we say, nothing has happened between now and then. It may well have been premature to include the ground, but there was a certain nervousness surrounding the decision over what to include in the notice of appeal. The question of protective notices of appeal is something that the Tribunal has dealt with before

in the Orange matter. Whilst we thought the matter had been laid to rest effectively with that judgment there were some comments made by counsel for Ofcom in the PPC case that caused us to wonder whether there might be further treatment of the matter in the PPC judgment. The reference to Ofcom's counsel's comments is day 6, p.1, lines 17 to 32. In short, one did not want to go from the position where the challenge was premature to suddenly finding that it was too late to make it. The continuing reservation of the position in the reply did provoke some comment in the skeletons, but we submit that it was not unreasonable, given that it was not clear what would happen in the interim, and also the fact that we have made plain from the outset that if nothing happened it was very much protected ground and so, in short, I wish to withdraw the point.

Ground three in relation to the Ethernet case is the other point that I need to refer to. In the light of the indication, madam, that you have just given that it will be most likely that the PPC judgment will be handed down before the Tribunal's judgment in this case, and that there would be an opportunity to make written submissions based on the PPC judgment, it may be very convenient if I make my submissions on that point shortly. I know that previously BT has indicated that we would rather it all be adjourned and then dealt with, possibly only in writing anyway, following the PPC judgment, but I can make very short submissions and then pick it up in writing once the PPC judgment has been handed down. That may be the most convenient way of dealing with that. I do not know whether Mr. Saini wants to make any comments.

MR. SAINI: As long as any points on the facts in relation to Ethernet are made at this hearing we are content with written submissions to follow to raise any points that arise out of the PPC judgment.

MISS LEE: The second point is the timetabling. I have one point that I would like to make because Mr. Woolfe has asked me to make it. The Tribunal will have seen the letter sent by my instructing solicitors on Friday with the proposals as to the time allocation for submissions. There is one further point about the fact that there is no cross-examination of witnesses to be conducted at this hearing. Mr. Woolfe for Everything Everywhere wanted me to make clear that his decision not to cross-examine Mr. Best, who made a witness statement on behalf of BT in the NCCN 1007 case was based on the way that BT had shaped its case, and that was set out in para.63 of my reply, namely that BT no longer pursues its argument that the parties could have entered into discussions about the principles of ladder pricing prior to the appeal judgment leading to a settlement of the 080 and 0845, 0870 disputes, and that that argument is therefore withdrawn. I confirmed to him for the

avoidance of doubt that we are not, in this hearing, relying on a submission that BT was willing to negotiate prior to the delivery of judgment in the related appeals on that question of whether the charging structure in NCCN 1007 should apply at all.

Could I now turn to some overarching preliminary comments on the substance. The first point that I wanted to make is that we submit that there is a need for the Tribunal's guidance concerning the position which arises where there is a substantial overlap between a matter which Ofcom had been asked to accept as a dispute and an existing determination of a dispute by Ofcom which is in the course of being appealed to the Tribunal. It seems to us that the effect of the position taken by Ofcom, supported largely by the interveners, is that Ofcom is in a form of straitjacket mandated by the Act, particularly where the relevant appeal judgment may take a little time to be handed down.

That position gives rise to practical problems which should be capable of being avoided if the Act is construed properly as we say it should be construed. There are essentially two aspects of the effect of the Act that need to be looked at: firstly, whether Ofcom is obliged to open the dispute; and secondly, if it does it has the latitude to use its powers to extend the time to make a determination or to adopt alternative means, and to allow negotiations as opposed to judgment.

The effect of the Act on these points comes into the sharpest focus it seems where the related judgment is going to be some months away as I have mentioned and there seems to us to be a point of principle that arises about the effect of time and delay on Ofcom's powers. In short, we submit that the Act should operate in a particular way where the matter is already moving forward because related disputes have been determined by Ofcom and they are being addressed by the Tribunal.

Another way of expressing the same point is that the perspective through which Ofcom views these matters must be different if it is appreciated that even if the most recent dispute is pursued and determined within the four month period that is not going to be the end of the matter because the point, the dispute, is plainly affected by the related appeal which has reached Tribunal but which has not yet been the subject of the judgment.

It does seem to us to be a rather odd result if Ofcom is indeed placed in such a straightjacket under the Act, indeed if that is right we submit that guidance is necessary and is something that needs to be clearly understood for the future.

The practical disadvantages of Ofcom having to proceed to consider and determine a dispute in these circumstances are perhaps obvious, but I nevertheless wanted to outline them briefly.

First, there will be considerable time spent duplicating submissions and materials sent to Ofcom instructing experts perhaps where the correct framework for Ofcom's determination is very likely to be affected by the outcome of the appeal and so points may be made and taken which turnout not to be relevant, and points that are not addressed may turn out to have to be addressed at some stage during the appeal process.

Ofcom will, not in all but certainly in many cases, spend approximately four months considering the matter and may well issue a lengthy determination deciding the point. Testament to that we say are the length of the related 080 and 0845 and PPC determinations themselves, all of them are in the respective bundles, there is no need I think to turn them up but the 080 is in file 1, tab 2 of the NCCN case. 0845 is in file 2, tab 7, and the PPC is in the Ethernet bundles, file 2, tab 9.

As I explained in my skeleton, para. 8(iii) p.92 the determinations are lengthy, 080 is 138 pages including annexes, the 0845 and 0870 call termination charges is 301 pages, and the PPC is 232 pages long with annexes.

To make the point about the complexity and length of these proceedings, the PPC hearing that took place in October took six days and the 080 and 0845 dispute, which is now listed for April is listed 13 days, and I should also say that in that case, the 080 and the 0845, the total number of experts' reports is now into the high teens, and there are a considerable number of complex matters to be determined. If Ofcom makes a determination in these circumstances the unsuccessful party is obviously faced with having to lodge an appeal within two months to comply with Rule 8 of the Tribunal Rules. Though that party might apply for an extension of time, as the Tribunal will be aware it is not always easy to extend time, and a party would be well advised to commence work on its notice of appeal on the basis that an extension would not be forthcoming in any event. Again, it might be possible to serve a skeleton notice of appeal but again there may be potential difficulties and dangers in doing so. In other words the whole procedure commences, there have to be notices of appeal and so on, and it is difficult to see that there is an easy way to pause the procedure until perhaps such time as the Tribunal might consider an application for a stay.

We submit that proceeding in that way does not avoid at least a considerable tying up of resources and cost that may prove to have been unnecessarily deployed.

The problem generated by such overlap we say is obviously one faced by courts and regulators in a number of different situations, and the matter that I referred to on p.93 of my reply at (iv) *BSkyB v Competition Commission* is a particular example. That case is at tab 14 of the authorities bundle – I am not sure it is necessary to turn it up but the point I simply

wanted to make is that there are instances where courts and Tribunals and regulators have to consider whether it is proportionate and efficient to deal with the matter when there is a related appeal judgment waiting to be handed down. It was a slightly different point about when it was appropriate to lodge a notice of appeal and whether time could be extended in circumstances where two decisions were going to be taken, the first was a report of the Competition Commission and the second was going to be the decision of the Secretary of State under s.54 of the Enterprise Act. We simply rely on the comments at paras. 32 and 33 as we have referred to in the reply, to show that there are cases in which it is necessary to take a pragmatic and sensible view as to what is appropriate and proportionate in the circumstances. We say that cuts against the approach that we consider Ofcom has taken in this case which is much more that it is constrained by the dispute resolution process to accept a dispute than to refuse to deal with it by alternative means.

A further and separate undesirable consequence we submit is that once the dispute has been opened the parties will in all likelihood feel under less pressure to negotiate than before. We submit that this is a matter of common sense. If parties are under an obligation to show Ofcom that they have negotiated on specific points and those negotiations have failed before a dispute will be accepted, then it seems to us that concerted efforts are likely to be made to negotiate. However, once a dispute has been opened, and a judgment in a related appeal has been handed down the parties are, it seems to us, more likely to await the determination than to resume negotiations with any vigour.

Ofcom has said in these proceedings that there is nothing to stop parties negotiating after a dispute has been opened and that disputes can and do often settle in those circumstances. Even so, we submit two things: first, such negotiations may indicate, depending on the facts of particular cases that the decision to open a dispute was premature in the first place. Secondly, and even more importantly, the opening of the dispute and the energies devoted to dealing with it and the dispute resolution process, particularly in circumstances as apply in these cases where matters are really so complex and long, that the energies devoted to dealing with the dispute process will undoubtedly reduce the time and the incentives to negotiate if you are focused on dealing with the dispute and with the appeal and so on.

It is suggested against me that the approach advocated by BT will give rise to practical problems the other way. There may be regulatory paralysis or a stymieing of the dispute resolution process such that those who rely on that process to ensure that contracting terms are fair and reasonable despite any lack of bargaining power on their part will be placed at a disadvantage.

However, it seems to us that these fears are somewhat exaggerated. First, there needs to be we submit, and on our particular case is in these particular matters, a substantial overlap between a matter which is being appealed to the Tribunal and a matter which Ofcom is being asked to resolve as a dispute and so if there is no such substantive overlap the problem does not arise.

Secondly, we say in para. 60 of our reply that there are good reasons why cases should be treated as we say they should, and that is the appropriate result, and the fact it might happen in more than one case does not necessarily make it wrong or inappropriate.

We also point to the fact that Ofcom has agreed that it should extend time for making its decision in relation to Ethernet until after the PPC judgment, so the time in that case has now in fact been extended from 1st October of last year until March, going on for some six months, certainly by the time the PPC judgment has been handed down. That does not seem to us to have led to any regulatory paralysis, and we also note in this regard that I think in late spring 2010 Virgin Media was prepared to withdraw its complaint about the Ethernet matter - its letter is at Ethernet volume 3, tab 20, which I do not think needs to be turned up particularly – on the basis that the PPC case was going to be heard at the end of October. That was again a period of some months away and then judgment would be delivered thereafter. We submit that the paralysis and the length of time actually is not as significant a point as my opponents contend.

A few final points, madam, if I can deal with them, are made against BT in general terms. It is suggested in some of the interventions and skeletons that it is ironic for BT to refer in the submissions to the tying up of resources when BT has commenced this appeal which has involved the parties in time and expense too. Our response to that is that this appeal is short and self-contained and will hopefully provide the guidance that we say is necessary one way and another in relation to the Act. Secondly, of course, this appeal has not involved in-house and external economists and accountants in the way that the 080 and 0845 and the PPC cases have and then the way that these determinations on the NCCN and 1007 and Ethernet are likely to do. Therefore, we say the scope of this appeal is actually much more limited and self-contained than if we were having to go through the process of dealing with a dispute in relation to both of those matters. It would actually be more costly and time consuming.

THE CHAIRMAN: I thought, Miss Lee, the point that was made against you, particularly by EE, was not so much the launching of the appeal, but the service of the NCCN 1007 that if BT had chosen to wait until the matters had been resolved through the other means before

serving the NCCN then one would have avoided the tie-up of management time and the expenditure of resources in the negotiations and then in the dispute. I am not sure it was just the appeal that they were ----

MISS LEE: Madam, I think it is probably both, and you are certainly right to say that that is a point that EE has made. In relation to that, as you say, the submission is that BT has brought the problems on itself, but can I say that our answer to that is that if BT had not issued – I will go in a moment to explain why NCCN 1007 was issued – if we had not issued it at a particular time and the CAT subsequently in the 080 case had made a finding that the pricing ladder in the 080 case, which is NCCN 956, was not adequate, but that another one would have sufficed and been adequate. It seems to us very unlikely that the MNOs on the other hand would have said, or would have permitted BT to backdate any modifications to NCCN 956, and therefore it was appropriate to take that step at that time. Further, and this is a point by Mr. Best in his statement, para.8, BT believed that by modifying the NCCN, the objections that Ofcom had put forward in relation to the original one, NCCN 956, might be overcome, and it is possible, looking forward, that agreement could have been reached. So, in those circumstances it was appropriate to issue, we submit, a fresh NCCN. It is also, we say, then appropriate for Ofcom not to deal with the matter given that there are two very lengthy cases now. I know Ofcom make the point that only one appeal was on foot at the time that it made its decision. The matter will be considered exhaustively in April, and so we submit it is appropriate to report matters at that stage.

There is similarly a related point – so forgive me if I overlap slightly – that really BT has showed a lack of restraint in making the challenge. In our submission, that is not a particularly strong objection. One can look at it the other way in that it might be said, for example, that in relation to Ethernet certainly there could have been restraint in not lodging the dispute, or not referring the dispute to Ofcom, in the circumstances where the PPC judgment was obviously going to affect matters and the matter was going to be heard in October. Again, we point to the fact that Virgin Media took the approach of referring an initial dispute to Ofcom and then withdrew it, I think it was, April or May of last year. We submit that that was a much more measured approach.

We also point to the fact that Everything Everywhere in its response to Ofcom in relation to 1007 – and again I can give the reference, this is Ofcom's defence bundle N, tab 16, and this was Everything Everywhere's response to Ofcom's inquiry about exceptional circumstances and the parties' views about that – did, in fact, point to the overlap in relation to the case as a factor in favour of exceptional circumstances. There was a measured

approach although it also set out factors that it contended were against the approach. It might have been said that the parties could have agreed that there should have been exceptional circumstances or, in the case of Ethernet, should have agreed not to lodge their dispute to Ofcom. In other words, the lack of restraint point is, in some ways, I think a neutral one.

I have made the point, and it is probably obvious from what I have submitted so far, that BT, in lodging these proceedings, was very concerned about the impact of having to deal with NCCN 1007 dispute at the same time as the 080 and 0845 appeals. The point that I think is taken is that, "Well, BT is a well resourced company and has the capacity to cope with multiple appeals". The point is that the difficulty with these matters is you need to involve the same personnel in related appeals, both in-house and external experts, and they have been very heavily engaged in dealing with the 0845 timetable in particular. We say that the proof that this is a genuine concern, if there were any doubt about it, is shown by the fact that Ofcom itself has relied on resource constraints in 1007, so in fact what has happened is that Ofcom wrote on 8th December after our notice of appeal was lodged saying that it would not meet the four months' deadline for dealing with 1007 because it was concerned that the same Ofcom economists and staff were committed to dealing with the disputes in 080 and 0845. It followed with the letter on 13th December saying that its main resource constraint was in relation to economic resource where there is direct overlap with cases and that it would review the position after 7th January deadline for serving Ofcom's defence in the 0845 case. In fact, nothing has happened since and both BT and Ofcom have evidently been very involved in dealing with the 0845 case which is listed for hearing in April.

Can I just say this: the point about tying up of resources applies not just to Ofcom, it also applies to BT. Whilst, of course, it can be said that regulators have finite resources and deserve special consideration, we submit that some consideration when dealing with matters such as exceptional circumstances also has to be given to the other parties in disputes, appellants in lengthy disputes.

It is said against me that the 1007 dispute has been proceeding very slowly, and that is a point made by Three and, as I have just outlined to the Tribunal, that is, in fact, true, and therefore the proceedings were unnecessary. As regards that point, it is a point that arises with the benefit of hindsight. When BT made its appeal it was not to know that Ofcom was going to take that view, and it is not really to have been taken to have known what Ofcom was intending to do throughout this period. Obviously, if we withdraw the appeal and then

steps are taken and we find that we are in difficulties if we carry on with the appeal, then people say it is unnecessary. We are in a bit of a bind there, but we have proceeded with the appeal, and, in our submission, it is not unreasonable to have done so.

Finally, and it is a point that I have already made, no matter how well resourced it is still wasteful to have to deal with points that turn out, when there is a related appeal, to have been unnecessary to have been dealt with, particularly in cases that are so heavy and expert dependent as these.

Lastly, I just wanted to make one or two points before coming to my submissions on the facts and on the law, just to explain the scope of my argument today. In relation to both 1007 and Ethernet, BT does not contend in this application that the parties were going to be likely to reach agreement before the decision in the related appeals. We approach this application on the basis that the position is that the negotiations had stalled because of the related appeals.

It is also accepted in both cases that related appeal decisions would not necessarily determine the appeal, but I lay emphasis on the word "necessarily". The 0845 and 080 judgment could do so in relation to 1007. If, for example, it is found that the NCCN 956 should have been upheld by Ofcom as fair and reasonable, then there would have been no need as it will have turned out, for BT to have served its later NCCN. But, as is often the case, there are different ways in which the appeal can be resolved, and so we do say that it does not necessarily determine the matter.

In relation to Ethernet, there are differences between the products. The distinction between 1007 and Ethernet is that 1007 deals with the same issue, it is just an adjustment to the pricing; whereas in Ethernet obviously it is a different product and different markets from PPC. But, we do say in relation to that the legal issues and the issues relating to the accounting tests in PPC are still very similar matters. Whilst the PPC judgment would be unlikely to determine the Ethernet matter because of that difference, there is nevertheless a strong overlap, as I shall explain in a moment. And, just in relation to that, if the particular accounting test used in PPC, it is called the "DSAC" test, were found by the Tribunal to have been unsuitable in the PPC case, or if it were found that the test should not have been applied to BT's pricing on an historic basis, then that would have an effect, we say, on the Ethernet matter and the parties' responses to it.

So, if I may then turn to some brief points that I wanted to deal with on the facts, and then go on to the law. First, I wanted to deal with NCCN 1007. NCCN, as is explained in the pleadings, stands for "Network Charge Change Notice", and what it is essentially is a notice

issued by BT changing its charges for termination of 080 calls on its network. 080 calls form part of a category of calls known as "number translation services", or "non geographical services", "NTS" or "NGS", using telecoms acronyms. But the essential feature of those calls is that callers call a non geographic number which is a number that does not have a prefix code identifying the recipient's location, and the net work operator then translates the call into a call to a geographic number operated by a service provider. The background is that Ofcom has a policy that 080 calls should be free to callers because of the importance, for example, of being able to access charitable or essential services for free. It also has a policy that retailers of 0845 and 0870 calls should treat those calls in the same way as they treat their geographic calls and make similar charges. However, mobile network operators disregard both those policies and charge relatively high prices for 080 and 0845, 0870 calls. Thus, BT issued its first NCCN, which is NCCN 956 in relation to 080 on 3rd June 2009. I have actually, it is not a central point, but I have prepared a very short one page note of what happened when, just because it is easier to look at a page probably than work the matter out from the pleadings or from my oral submissions.

You should see from that, that in the table I have deal with the date on which the NCCNs were issued and you will be able to look across and see what had happened in relation to other NCCNs by the same time. BT issued its first NCCN on 3rd June 2009. Essentially NCCN 956 sets BT's termination charges according to where on a ladder of bands the retailer sets its own retail charge. The NCCN, therefore, will have one of either two effects: either — and this is BT's predominant case — the MNOs will act on the incentives that the ladder pricing brings and reduce their retail charges or, if that does not happen, then some of the excessive charges that MNOs have collected in relation to the calls will be passed along to BT and then with the potential of passing them on to service providers.

BT then issued two further NCCNs, 985 and 986 in relation to the 0845 and 0870 numbers on 2nd October. And then, following Ofcom's first determination of dispute in relation to ladder pricing, in relation to the 956 and you will see on my little sheet that that occurred on 5th February 2010, on 4th March two things happened. Firstly, BT issued its NCCN 1007 which was also in relation to 080, and also on the same date Ofcom accepted a dispute in relation to the 985 and 986. So, NCCN 1007 altered the ladder steps in relation to 080 and it removed the ceiling on the pricing scale which applied to the previous NCCN. It was introduced in response to Ofcom's 080 determination, and I should also point out that other TCPs have also introduced ladder pricing replicating BT's approach since these NCCNs have been applied by BT.

I do not want to ask everyone to turn to it, but can I just read out an extract from para.6.8 of the 080 final determination which dealt with the question of whether BT's charges provided benefits to consumers or add to any distortion of competition.

THE CHAIRMAN: That is the 5th February determination.

MISS LEE: It is the 5th February one, yes, madam. Ofcom applied three principles and principle 2 was whether or not effectively there were benefits to consumers or distortion of competition as a result of the NCCN, and para.6.8 says this:

"As regards termination charges in general, we consider that if there were changes in the structure of termination charges and if other TCPs were able to match BT's termination charges, then there would be different circumstances and our confusions in relation to principle 2 would not necessarily apply".

At para.6.9 it then goes on to make a finding in that case that there is likely to be an incentive to raise 080 call prices because of the structure of the NCCNs. That is a conclusion that BT has rejected, and continues to resist in the appeal that is in April. But Ofcom in fact moved away from that position itself in its 0845 determination, and the references to the 0845 final determination on this point are set out in para.9 of my notice of appeal. And, further, if I could also ask you to look at para.21 of my reply, which is on p.98 of the bundle that I think you have in front of you, you will see there at paras.21-22

I explain the position in relation to the introduction of 1007 and put in an extract from para.5.188 of the final determination in 080. The point, really, in para.22, is that BT changed its pricing ladder in relation to 080 to remove a ceiling and to make increments steeper and to alter the size of the steps. As I pointed out, the 080, the final determination, did suggest that a different structure might lead to a different result. So, in those circumstances BT submits that it was perfectly reasonable to introduce a further NCCN and to do it now, and that the reason for doing so was to counteract concerns that Ofcom obviously had that BT thought were incorrect, that there was an incentive to raise prices under the ladder adopted. On any view, and this is really the point made in para.23 of my reply, we submit there is very plainly — and I hope it is obvious from the exposition that I have just made — an overlap between the matters in the 080 determination and NCCN 1007. In particular, I do not actually think it is controversial, although obviously the parties will have an opportunity to make submissions, that the two points in para.23 are right, in other words, that Ofcom will when it considers NCCN 1007, have to weigh the same arguments for the parties in relation to ladder pricing, and there are voluminous arguments about the points of principle, as the Tribunal will have to look at in its 080 and

0845 case. But the difference about 1007 is that it raises a particular question as to whether the alterations to the structure will affect the result in any way, but if the Tribunal upholds BT's original NCCN then it will turn out to have been unnecessary. So, we submit that the rulings that the Tribunal is going to give in the related cases are likely to have a significant impact on the consideration of 1007.

THE CHAIRMAN: But, as NCCN 956 has been superseded in any event by NCCN 1007, is that right?

MISS LEE: 1007 is obviously later NCCN, so it cannot have superseded it for the period prior to the issue of 1007.

THE CHAIRMAN: No, but if, for example, if the Tribunal did uphold 956 and 956, I do not know whether this is right, but resulted in higher revenues for BT than 1007, what you were saying originally was that "Well, yes, we would still have foregone those revenues, but we will have made a little bit back by having introduced —

MISS LEE: Yes, I think the way that I was trying to explain it was that in fact if it turns out that 956 did not work because Ofcom is right that actually the incentives under it are to allow for the raising of prices.

THE CHAIRMAN: Yes.

MISS LEE: Then the advantage that BT has in serving 1007 is that even if it does not have an NCCN at the prior point, from the point of 4th March 2010 it will have something which does actually deal with Ofcom —

THE CHAIRMAN: Yes, but perhaps what I am asking is —

MISS LEE: But I do take your point, madam, about what charging would apply under the two NCCNs, assuming that they are both subsequently found to be permissible. And obviously the period prior to NCCN 1007 would obviously have to be governed by 956. Subsequent to that I do not know, and I will check the position, but I would have thought it would be 1007, and I do not know whether it is one or the other.

THE CHAIRMAN: I suppose that is what I was asking, was 1007 expressed in some way to be conditional on 956?

MISS LEE: I am afraid I do not know, is the answer to that, but I will certainly check and let you know. Again, we submit that the 0845 FD has a substantial overlap with the matters in 1007, although it is a different type of call, obviously, 080 differing from an 0845, and a different policy principle, in fact the issues are very similar, which is why they have been heard together. The significance in relation to 0845, one point of significance, is that Ofcom changed its view, effectively, about the incentives and whether there was an incentive to

raise prices caused by the NCCNs, and in 0845 it decided that actually there was likely to be an incentive to reduce prices, but what it was not sure about was the magnitude of that incentive. So, that raises a wholly different question. Nevertheless, the same points of principle that arise in 0845 about whether or not ladder pricing is appropriate at all, will affect 1007, and EE have themselves lodged an appeal saying that, and in fact Ofcom's approach, although the results that Ofcom reached in 0845 was right, the principles that it applied were wrong, and that it should not have allowed ladder pricing at all has various objections in the matter of principle to the whole notion. And so the point that I wish to make is that there is going to be a substantial attack on the whole question, not just the detail, but also the principles, and the Tribunal is going to consider that matter.

THE CHAIRMAN: So was the effect of the final determinations then for both 956 and 985/986 that the NCCNs were set aside or overturned or not allowed to take effect so that ladder pricing was therefore "removed" – if I can use a neutral term – but not because it was considered that ladder pricing was of itself inappropriate but just because the ladder pricing contained in those NCCNs was 'around the edges' – if I can put it like that. But the effect of those determinations was not that some other form of ladder pricing prevailed, but that ladder pricing did not prevail at all – is that the effect?

MISS LEE: I think the "FDs" are obviously long and complex and no matter how I try to summarise them I will no doubt miss out some points. But the point I think answers your question, madam, is that in the FDs Ofcom took the view, it obviously had its policy preferences about pricing if it felt – and this is certainly the case in the 0845 case – that the effect of the NCCNs was that pricing was going to reduce down to the bottom tier of BT's NCCN that that would be net beneficial to everybody and in those circumstances it is likely that they would have approved the NCCN as a whole. It did not object to the idea of introducing ladder pricing totally. It said that it is uncertain about the magnitude of the reduction and therefore it did not feel confident enough to pass ----

THE CHAIRMAN: My point was slightly different, which is that if one can look at it this way what is the order that is made as a result of the final determinations? Is it that the NCCNs do not have effect so that actually the pricing that has prevailed all along has been the pre-956 pricing?

MISS LEE: Madam, I think that is right but may I check it and just confirm with you later.

MR. WOOLFE: If I can be of assistance, madam, it is in tab 2 of BT's appeal bundle in the NCCN 1007 matter and it is p.90 of that tab that contains the declaration of rights and obligations which Ofcom issued: "It is hereby declared that the parties should revert to the

trading conditions that applied before NCCN 956 came into effect", that was the order that Ofcom made on 4th February 2010. There were some other provisions but that is the material one.

THE CHAIRMAN: I see, so that is why you say that EE got what they wanted in the sense that the NCCN was set aside ----

MISS LEE: Yes.

THE CHAIRMAN: -- but their basis of appeal is that it was set aside not because Ofcom objected to the whole ladder principle, but because the result of them objecting to certain more peripheral aspects – I do not mean to denigrate them like that – has meant that the result was the same really as though the ladder principle had been rejected.

MISS LEE: Quite so, and for example EE say that it is not appropriate to have these sort of changes made to their effective pricing retail policies through a commercial NCCN and that it would have been a matter for Ofcom to regulate on or else it should have simply rejected the NCCNs because they are seeking to achieve a quasi regulatory result. It is that sort of point of principle that EE takes.

THE CHAIRMAN: Does the same situation pertain in relation to 985 and 986?

MISS LEE: Yes, madam, I think it does. Of course, BT challenges the determination in its notice or applies to set aside the effects of Ofcom's decision by its notice of appeal before the Tribunal.

THE CHAIRMAN: Were there also orders to make good over payments and under payment as a result of the ----

MISS LEE: Madam, I think there were, but I think in fact there has been to a large extent withholding of the payment anyway. I am not sure that many parties did actually pay. I have a feeling – and this can be checked – that Orange may have done, but I am not sure that the other parties did.

THE CHAIRMAN: Yes, thank you. I am sorry, I have taken you rather off your course, but that was helpful.

MISS LEE: Can I just deal with a particular point that Ofcom makes, which is that there was no appeal of the 0845 final determination at the time that it accepted its dispute on 11th September 2010 and that is obvious from the one sheet that I have handed to you. It is, of course, true that Ofcom could not have known for certain that there would be an appeal of the 0845 final determination, but we submit that given the appeal in relation to 080 and the amount of time that BT had spent responding to points in relation to 0845 dispute proceedings, including providing modelling of incentives, various expert reports and so on,

and the fact that the 0845 decision obviously went against BT as well, Ofcom must have thought it more likely than not that BT would appeal. In fact, as I have said EE appeals as well so there are two appeals dealing with the principles and the facts in relation to ladder pricing. We also say in relation to this point that in any event it would have been sensible for Ofcom, if it was really uncertain, to have deferred the decision of whether or not to open a dispute in order to see whether there would be an appeal if it thought there was material doubt.

I am coming on now to address in broad terms the possibility of future negotiations following judgment. It seems to us that either the appeal judgments will remove any argument that ladder pricing could be introduced by BT, or it will remove the MNOs complaints about ladder pricing by upholding BT's appeal in which case there may be no need to consider NCCN 1007 further. Alternatively, there may be points in the middle dealing with the particular structure of the pricing ladder. So alternatively there may be some further negotiations in light of the appeal. We submit that those would take place against a background that BT would be aware that parties want to refer a dispute quickly, but we say the advantage of negotiations at that stage is that they would be much more structured, in other words, they could take place against the background of knowing what it is that the Tribunal has said about ladder pricing and about the structure of the incentives and so on.

Of course, in one sense the shape and the outcome of further negotiations is always going to be a matter of speculation and anything can happen. The point against me is that BT is raising points that are just speculative and so on, but in my submission there are only a limited number of possibilities and there will be a strong incentive to negotiate, so we submit that negotiations are likely in the sense that there is a reasonable prospect they will take place and if they do not take place then there will be a short referral and a much more focused approach from Ofcom in the light of what the Tribunal has said in the related appeals.

We also submit (and these are important points in the way I put my case) the following, that negotiations have proved very difficult in the shadow of related appeals does not mean necessarily that they will also prove difficult following a Tribunal judgment on the related matter, because once the Tribunal has expressed a view on related points that is likely to concentrate the minds considerably and to enable the parties to assess how subsequent determinations are likely to be decided by Ofcom and the merits of any possible appeals to the Tribunal and so on.

Somewhere in the points made by the interveners is the point that the Tribunal decision itself may not produce finality because there are further appeals possible. In answer to that we say those are only appeals available on a point of law so it may be that they are unlikely. It does also seem to us unlikely that the possibility of that sort of appeal would prevent negotiations or a dispute being accepted at that point in time, and we pray in aid a slightly different point that Ofcom has made itself in relation to exceptional circumstances in the Ethernet case, when it decided that there were exceptional circumstances in that case, it expressly said that it did not consider the possibility of further appeals from the Tribunal on the PPC to be a relevant factor, and the reference to that is in the Ethernet bundle, bundle 3, tab 28, p.1910, and we say that point is right and it applies by analogy to the point that I just made.

Next I was going to show you briefly what happened in relation to the dispute reference in these cases, and Ofcom's responses to the points that were being made at the time that it accepted the dispute. I think probably the most convenient place to pick this up in relation to 1007 is at tab 9 of Ofcom's defence bundle, the correspondence is in a run following that. So it is DF/N tab 9 ----

THE CHAIRMAN: That is the request to resolve the dispute?

MISS LEE: It is. Madam, there are obviously a lot of documents and in the two hours available to me I am going to have to be inevitably very selective about the points that I go to. I just wanted to make a couple of very short points which I say underline the point that I have made about the overlap in these cases. At tab 9, p.1, para. 1.3 you will see that EE talks about the dispute following on from two previous closely related disputes each of which have been determined and then 1.11:

> "Further, while EE does not entirely agree with Ofcom's analysis in the First 080 Dispute and the 0845 Dispute …"

You will notice it has referred to both –

> "… EE considers nonetheless that the application of that analysis to NCCN 1007 would lead to the same conclusion …"

Again just a quick flavour, at paragraph 2.93, p.22. You will see there that the point I make simply is that T-Mobile talk about the fundamental questions of principle and we say that those are the same in relation to the NCCNs.

Moving on, and I will try to deal with this quickly, at tab 10 you will see that Ofcom wrote to BT asking for its views about the referral. At tab 12 is BT's response of 27th August, picking it up at the third paragraph, the point made there is that BT considers it –

"… unnecessary to conduct a formal investigation at this point, since the substantive issues will be considered by the CAT within the next few months. I n our view it would make sense to put any potential investigation on hold until the CAT's judgment is known."

THE CHAIRMAN: But you were also making the point in the previous paragraph that it was premature.

MISS LEE: Madam, yes, although that is a different point from the point that I make today, in other words we have confined our case to this specific point about related appeals and post-judgment negotiations in relation to tender. It is true that BT made that point that it seemed premature to it. I do not think we necessarily need to go to it, but tab 13, Ofcom's letter asking for views from everybody about exceptional circumstances on 31st August and receives views from other parties, but from BT at tab 17 on 3rd September. Again, the first paragraph is out of the previous letter. The second paragraph makes points about the difficulties of opening a second appeal, the points that I have tried out outline to the Tribunal in my earlier submissions.

THE CHAIRMAN: It is tab 18.

MISS LEE: It is tab 17 in my bundle. It is a letter from BT of 3rd September.

THE CHAIRMAN: I have got a letter from Vodafone at tab 17. I think yours is at tab 18, the September letter.

MISS LEE: I am sorry about that, but this is the letter. I hope this reference is right. Tab 20 is a letter from Ofcom of 11th September, which is the decision letter which the Tribunal may well have seen. I do not want to take much time with it. You will see in the third full paragraph that it states that they do not consider there are appropriate alternative means. Then in the last paragraph on that page they talk about the overlap and BT's submission on that. Then going over the page it refers to the fact that BT have suggested that it would be appropriate to put the matter on hold. A couple of paragraphs further down, we have taken it as a suggestion that we should not determine the dispute because of exceptional circumstances. Then it goes on to explain that they do not think it is appropriate. They talk in the following paragraph about the fact that at that time the 080 case was scheduled to be heard in January 2011. In fact, it has moved since then to be in April, and "we consider that delaying it would cause unreasonable delay". That is the really the gist of this response.

Can I turn to Ethernet. I am sorry it seems rather quick I hope it does not seem too quick, but I was going to move on to Ethernet and outline the facts in relation to that. Madam, in

relation to Ethernet, I just want to make a few general comments about the facts. The underlying issue dividing BT from Sky, TTG and Virgin is the issue of whether or not BT has overcharged its wholesale customers for things called Backhaul Extension Services and Wholesale Extension Services, and whether sums should be reimbursed.

In broad terms, the background is that Ofcom has found that BT has significant market power in relation to both products and it imposed an SMP condition in 2004 in respect of both of them requiring BT's charges to be cost-orientated, and also that BT should be able to demonstrate that fact to Ofcom.

Thus, one of the key questions that arises in relation to the matter is what is meant by cost orientation and how that test should be applied, and in particular does it have consequences which BT says are retrospective, can you look back at charging over past periods? Also how you aggregate products in order to say which costs are being covered by which charges.

These are matters on which we say fairly detailed accounting views and lengthy legal arguments have been addressed to the Tribunal in the PPC case, although I do stress in relation to different products and different markets. I do not think it is necessary to turn it up but the PPC determination and appeal are described by Mr. Nicholson at para.13 and following of his witness statement, which is at core bundle, tab 2. In the PPC case, Ofcom issued a determination in October 2009. Ofcom held that BT had breached its cost orientation obligation because it had charged essentially above a level found by applying a DSAC (distributed stand-alone costs) test, and that test limits the products which are allowed to make a contribution to certain common costs under the relevant accounting treatment. Thus, charges for other products cannot be based on a share of those costs. The issue in PPC was whether the DSAC test was a first order test to provide a rough view as to whether or not there had been compliance or whether it was the actual test and what the relevant tests should be.

Similarly, this is para.17 of Mr. Nicholson, whether it was too simplistic a test to cope with allocating common costs amongst the multiple products and whether it was difficult or inappropriate to apply it retrospectively, because it applies, I think, once the charges have been set and paid.

We submit a decision on the question of whether Ofcom was right to apply the DSAC in PPC will have a considerable impact on the Ethernet issues. We say Mr. Nicholson explains this very fairly in paras.21 and 22 of his first witness statement. Again, I do not ask you to turn it up, but it is at core bundle, tab 2. He anticipates that the PPC judgment

will provide considerable clarification and will encourage BT and the parties to negotiate a settlement. It is quite possible, he says, that not all of the PPC judgment will apply in the Ethernet context, but there is nevertheless considerable overlap. We say that last point must effectively be common ground because Ofcom has accepted in this case the overlap in relation to its decision as to exceptional circumstances, and decided that it would not be deciding the matter before the PPC judgment was handed down.

That is to be found in Ofcom's letter of 1st October 2010, which is bundle 3, tab 28.

Actually, if you have my notice of appeal in Ethernet, and I can probably just read it out, it is also set out in para.10 of the notice of appeal. It is on p.6 of my notice of appeal.

THE CHAIRMAN: Which tab, I am sorry?

MISS LEE: Are you in the Ethernet core bundle? It should be tab 1, the notice of appeal. We refer there to that extract from the letter of 1st October, because we say it is relevant to the way we put our case on the other limbs as well as to the exceptional circumstances point. The passage says:

> "We consider that there is significant overlap between the issues raised in the imminent PPC case in the Competition Appeal Tribunal and the disputes. We highlight two particular issues here. It has been put to the CAT that Ofcom has taken the wrong approach to both the appropriate test for cost orientation and the application of that test. The appropriate level of service aggregation for the purposes of assessing whether charges are likely to be cost orientated is also at issue. These and the other issues before the CAT are likely to be highly relevant to our approach to resolving the disputes and form the basis of dispute submissions referred to us."

I wanted then to make the point that Virgin Media, through its initial dispute reference, because of the overlap with the PPC judgment, is referred to in my reply in Ethernet at para.12. Can I simply give the cross-references. In Mr. Nicholson's first statement for BT it is described in paras.37 to 40; and Virgin Media's letter of 19th May is at Ethernet bundle 3, tab 20, saying in effect that Virgin Media had decided to withdraw the dispute as it recognised that the ultimate outcome of the dispute may be potentially impacted by the outcome of the PPC appeal. Thus, we say that, whilst Sky and TTG in their submissions, play down the overlap, we say that it would be appropriate for the Tribunal to approach the matter on the footing that there is a considerable overlap.

Could I ask you to look at bundle 3, tab 23, of the Ethernet bundles just quickly to look at the correspondence in relation to Ethernet. Whilst I am there, tab 20 has the letter of

19th May 2010 from Virgin Media which I have just referred to in relation to the Virgin Media referral. I should have made clear that although Virgin withdrew its submission it did reserve its right to re-submit it, and what actually happened was when Sky and TTG put theirs in. It re-submitted its own submission.

THE CHAIRMAN: I was just wondering – you may be going to clarify it – what point the submission on withdrawal of the appeal goes to. Is it a point about the overlap?

MISS LEE: It is a point about the overlap, madam, and I also, I suppose, the point about the restraint that I made in my opening that that was a pragmatic and sensible approach notwithstanding the amount of delay that there would be until resolution of the PPC judgment. We say that the four month imperative is not always the appropriate way to look at things.

Taking this quickly, I hope, you will have seen that the letter of 3rd August invites BT's comments, and the response to that is on 10th August at tab 24. Can I ask you to look at the second page of that letter, the point that I want to rely on in relation to this application. The second full paragraph beginning, "As such this is not an issue which is capable of appropriate resolution through the use of dispute resolution", and it makes the compliance point, in effect, and refers to the fact that that matter is being dealt with in the PPC case. Then it goes on to say in the paragraph beginning "Although BT accepts", we say that BT says there the similarities are such as to prevent the full and effective resolution of any opened dispute until the outcome of the PPC appeal is known, and explains the cross-over.

The next letter I wanted to refer to is the letter of 20th September, which is at tab 27. You will see on the second page of that there is a heading "Exceptional circumstances", and the letter writer sets out a number of reasons, and I will not dwell on them since Ofcom decided there were exceptional circumstances, but the reasons why it would be sensible to await the PPC judgment.

Then at the bottom of the next page there is a paragraph saying:

> "In the interests of transparency and of understanding how Ofcom reached this conclusion, BT would welcome an explanation of Ofcom's rationale for concluding that negotiations have broken down rather than, as BT would maintain, simply stalled pending the resolution of the PPC appeal."

Then at the next tab, tab 28, we have the letter of 1st October, which is the letter containing the extract I showed you in my notice of appeal.

Those were the documents that I wanted to show you very briefly. There is one further point that it might be sensible for me to make now, which is this: in fact, judgment has not

been delivered within five months of the date of Ofcom's decision on exceptional circumstances on 1st October in PPC, and one might expect it would presumably be some time this month, so a period of about six months.

It seemed to us that that if some of the interveners' arguments are to be accepted, if Ofcom had known this or appreciated the risk that it was going to take this long, it should not have been prepared to extend time and they would also say, and do say, that that would militate against the use of alternative means allowing for negotiations post the judgment and the related appeal. We suggest that the PPC experience shows how unsuitable such an approach would be, that there is too much emphasis specifically on the length of time it takes to deliver a judgment. That the matter is to be dealt with in a related judgment and it takes five months, not three, we say that that actually the more appropriate thing is to take a sensible approach to the nature of the issues involved, the nature of the overlap. We also make the point we have made in our reply, paras.70 and 78, the fact that appeals sometimes take a long time to resolve and judgments to be drafted, and so on, can often be indicative of the complexity of the points at stake. So, actually, if it is going to take a little bit of time it may well reinforce the need not to have duplicative decisions in the interim.

Can I turn on to the directive and to the Act? This, I think, madam will be in the authorities bundle. I will start at tab.1. As the Tribunal will be aware, the relevant statutory provisions are those in s.185 and following part 2 chapter 3 of the Act. It is necessary to look first at various provisions in the framework and access directives which the dispute resolution procedures in s.185 implement. These are set out at various places in the pleadings, but if I just show you briefly, and I know you will be familiar. Tab.1 contains the framework directive of 2002. It sets out the common regulatory framework for electronic communications services. Could I ask you to look at recital 32, which is some pages in, it is actually at p.37 using the OJ numbering in the top right corner. It is obviously a point that we lay emphasis on in our appeal. That refers to what should happen in the event of a dispute between undertakings. It says there:

> "An aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties".

And it goes on. It is a very short reference, but that is often the way in relation to recitals, and we say that it helps to show when it is that dispute resolution procedures should be used. Our position, as you will have seen from our pleadings, is that it is not every agreement that has to be accepted and investigated as a dispute by Ofcom, and that there has

to be a threshold, namely that the parties have negotiated in good faith, and that those negotiations have failed, and I will come on to explain how we make those submissions. We see that point reflected in the recital that I have just read. We accept that it is not a very detailed reference, and nor indeed is Article 20, but we say that that is really in the nature of a directive that establishes a set of procedures to ensure a harmonised application throughout the community. Further, we also say that we do not think that those requirements, negotiations in good faith and negotiations have failed are unreasonable ones, otherwise Ofcom could be flooded with disputes. The policy reasons are those that we refer to in paras.43-44 of our reply. We also make the point that in the light of the 2004 guidelines, it seems to us that Ofcom recognises the need for some threshold as well. Sticking with the directive, just very briefly, Article 1-1 sets out the scope and aim of the directive, I do not think anything specific turns on it, and I just wanted to draw attention to Article 8 as well, which is on p.41, since that is referred to in Article 20 and also in Article 5-4. Again, I do not think anything specific turns on it and Article 20 itself is on p.46 using the internal numbering. That Article simply says, in 1:

> "In the event of a dispute arising [it explains what the dispute is] the national regulatory authority concerned shall at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances".

And then, leaving the last sentence and going on to 2, para.14 of our reply makes the point that in the Orange case the Tribunal looked at the types of disputes covered by Article 20. It found that Article 20 covered all disputes arising in connection with obligations under the directives without distinguishing between disputes relating to network access and disputes relating to other matters; but it found that Article 5-4 of the access directive covered disputes relating to access and inter-connection. It also upheld that s.185 implemented both Article 20 and Article 5-4. So, I do not think there is any dispute over the fact that both Article 20 and Article 5-4 are relevant here. Article 20-2 talks about alternative means or alternative mechanisms. It says:

> "Member states may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8. The national regulatory authority shall inform the parties without delay. If, after four months, the dispute is

not resolved, and if the dispute has not been brought before the courts by the party seeking redress, the national regulatory authority shall issue, at the request of either party, a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months".

So, Article 20-2 is of course relevant to the arguments on s.186 of the Act and the ability of Ofcom to decline to resolve a dispute in limited circumstances.

Many of the submissions against me rely on the second sentence, and particularly the fact that if the matter has not been resolved within four months the NRA shall, at the request of either party, issue a binding decision to resolve within the shortest possible time, and in any case within four months. It is, we say, imperative from these —

THE CHAIRMAN: A further four months.

MISS LEE: It is a further four months, yes, madam. It is obvious from these provisions that there is in general an imperative for all decisions to be made within a short time frame and, madam, as you have just picked up, if a decision has not been made within four months, if alternative means have not led to resolution within four months, the appropriate mechanism if either party wishes it, is for the NRA to issue a decision within four months from that time. Sub paragraph 2 does not include a reference to exceptional circumstances as Article 21 had done in relation to the four months. Our submission in relation to that is, we submit, that it must have been intended that exceptional circumstances will apply to both and can be treated as being read across from Article 21 because, we say, exceptional circumstances can always arise and should be catered for. I have yet to come on and show you how it is treated under the Act because in fact under the Act exceptional circumstances applies to both.

THE CHAIRMAN: To both what, sorry?

MISS LEE: Sorry, to both the, subject paragraph 1 requiring decisions to be made within the shortest possible time frame, by Ofcom in this case, except in exceptional circumstances. And then in relation to the referral back if the alternative, the second point, is the referral back if the alternative means have not led to a resolution within four months, and Ofcom then has to make a decision within a further four months. The point that I am making is that that further four months, not in the directive have the —

THE CHAIRMAN: The potential to extend —

MISS LEE: The let out, exactly, exceptional circumstances, but in fact in the Act it does, and we simply say that you can read it across from Article 20(1).

THE CHAIRMAN: Do you think that the four months in the end of 20(2), is that four months of the request by the party?

MISS LEE: Yes — that is certainly how it has been interpreted in the Act, madam, and I think that is probably sensible. If I can come on to the submission when I look at s.186, but can I just flag up that we do not agree with the submission that it would be unlawful for Ofcom to treat as alternative means negotiations following a judgment which might take or seem likely to take more than four months, simply because the judgment is not anticipated for a while. It may be, for example, that neither party actually requests Ofcom to take back the dispute if they can see the sense in waiting for the related judgment to be handed down. But I will come back to that point if I may.

That is what the framework directive has to say on the matter. It is very short. The access directive is at the next tab, tab.2, and I just show very briefly Article 1 which is on p.11 using the OJ numbering. It sets out the scope and aim of the access directive, establishing,

> "rights and obligations for operators and for undertakings seeking interconnection and/or access",

and sets out objectives for NRAs with regard to access and interconnection and access and interconnection are defined in (a) and (b). I think the only relevant passage is Article 5-4 which is on p.13 and this simply says that:

> "Member states shall ensure that the national regulatory authority is empowered to intervene as its own initiative where justified or in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 … (Framework Directive) in accordance with the provisions of this Directive and the procedures referred to",

and then it refers to Article 20 of the framework directive which I have shown you. I think I am right in saying that the amending directive, directive 2009 140 EC removes Article 5-4 and is due to be implemented by May this year.

If I can then move on to the Act, which is at tab.3, and it is really the second, there are two clips within tab.3, but it is the second one that appears after p.13 of the first, if you can find s.185.

THE CHAIRMAN: As far as Article 20 is concerned, this requirement about having had commercial negotiations appears in the recital rather than in the Article itself. But then in 5-4 there is in the Article the reference to "in the absence of agreement between undertakings".

MISS LEE: Yes.

THE CHAIRMAN: Is it your case, then, that in effect that reference to "the absence of agreement between undertakings" in 5-4 and the reference to "having negotiated in good faith but failed to reach an agreement" in recital 32 set the same threshold, whatever that threshold is.

MISS LEE: Madam, I do not think it is entirely clear in Article 5-4 whether the absence of agreement is referring to the position, if you like, in relation to commercial negotiations or whether it is agreement about referring a dispute, because it then goes on to say, "in the absence of agreement at the request of either party".

THE CHAIRMAN: Is it, then, that, you say that the threshold of having negotiated in good faith but failed to reach agreement is imported into 5.4 because it is part of the procedure referred to in Article 20?

MISS LEE: Yes, that was certainly the way I had envisaged that it applies because there is a reference there to Article 20, and the absence of agreement is a thing that you do not have to both agree before the dispute.

But it may be that actually in the absence of agreement about matters relating to access to information, it is not entirely clear.

THE CHAIRMAN: Let me just be clear, as far as a dispute that comes within a 5.4, that the threshold in terms of what negotiations are going to have taken place and failed or stalled, you say is the same because it is part and parcel of the procedure in Article 20.

MISS LEE: Yes, in Article 20 in which the recital in Article 32 applies.

THE CHAIRMAN: Yes.

MISS LEE: So turning, if I may, to s.185, which is headed: "Reference of disputes to Ofcom", that section explains in our submission to which disputes the section applies, it does not give a definition of dispute. As to which disputes apply it is I think here common ground that this is a dispute relating to the provision of network access between different communications providers and the parties agree also, I think, that s.185(1) is the relevant part. For completeness, subsection 8 clarifies what is included, disputes that relate to the provision as to the terms or conditions, on which it is or may be provided in a particular case.

THE CHAIRMAN: So all these disputes are 185(1)(a) disputes?

MISS LEE: Yes, as far as I am aware that is common ground. As I say, the subsection does not actually define dispute anywhere.

Subparas. 4 and 6 relate to powers of Ofcom to impose requirements as to how a dispute is to be submitted. I do not think anyone has suggested that this includes making provision as

to when a dispute arises. It is probably more likely to be concerned with procedural administrative requirements.

Ofcom and the interveners of course rely on the fact that the Act has no specific wording requiring that negotiations have been exhausted. Our first submission on that is that the Act must be construed consistently and the references to a dispute have to be construed in a particular context, taking into account all the provisions of the chapter. One point we rely on is the fact that under s.186 there are obviously constraints on the circumstances in which Ofcom can decline to handle a dispute, similarly in s.188 there is reference to exceptional circumstances about extending the time for making a determination. Obviously we do not contend those provisions are as narrowly interpreted as Ofcom and the interveners do, but if their submissions are right it seems to us it must follow that the dispute itself has to be construed in a more limited way in order to avoid nonsensical results. In other words, if it is very broadly construed you end up on a conveyor belt with very limited powers of flexibility for Ofcom to take a sensible approach. We submit that that should have an impact on the way you construe the meaning of 'dispute' in the first place.

We also submit that the context of a formal dispute resolution process must mean that there must be some threshold as to when a dispute comes into being, otherwise Ofcom would simply be obliged to consider every disagreement which a party refers to it, and we do not think that a requirement that all commercial negotiations have been exhausted is therefore an unreasonable one. In other words, if it can be triggered too easily, it does not really make sense of the purpose of the section, so it is a point about the purpose.

We pray in aid the fact that I think Sky and TTG does appear to agree that there must have been negotiations in good faith first, but I am not sure whether they submit that that is the result of the Act as interpreted by the Directive or whether it comes from the guidelines. In other words, if they are submitting that it is in relation to the Act we say that actually that is an instance of the recital 32 working its way forward and affecting the way in which you interpret the Act and we say that actually that does make sense, and for the same reasons we also say that the bar should be set at a level at which commercial negotiations have been exhausted.

We do not contend, and I cross refer here, although I do not ask you to look at it, to para. 24 of our reply, that Ofcom is expected to carry out a minute examination of what has happened in relation to negotiations to date. We do say that the threshold for intervention by Ofcom cannot be too low otherwise Ofcom would have to intervene prematurely in matters which are capable of being resolved by negotiation.

I will come back to the Act and the later sections in a moment, but I want to follow this point through by looking at the 2004 guidelines because they do affect my submission on this point. Those are at tab 4 of this bundle and I think if it is not too inconvenient I would also ask you to have my reply which was at core bundle 1007, tab 7 starting at paras. 35 and 36. It seems to us that Ofcom, at least in its 2004 guidance, and also in its submissions that it made in *Orange*, and these are referred to in para. 35 of my reply, considered that a requirement that parties had effectively exhausted or negotiations had failed was a reasonable one and that it did apply under the Act. It seems to us, actually, that there is a dissonance between Ofcom's suggestion in Orange and its comments in the guidance and its current position that the Act properly construed does not require that all commercial negotiations have failed.

The point I want to make is set out at para.36 of my reply, and it is really this, that Ofcom I think suggests that it can require parties to demonstrate that negotiation had failed, but if that is so how does that sit with its interpretation that actually there is no such requirement under the Act.

THE CHAIRMAN: Because then they would be contemplating a situation where they refused to take jurisdiction over something which is a dispute within the meaning of the Act, and you say they do not have that discretion?

MISS LEE: Yes. Obviously, we say that they do have a discretion because the Act should be interpreted appropriately to allow it, and we actually say that we consider Ofcom must agree with us because they do consider, it seems ----

THE CHAIRMAN: Well they cannot have a discretion about the meaning of the word "dispute", that must have some meaning which is a matter of law, and whatever "dispute" means they have an obligation, subject to 186 to resolve that dispute. But what you are saying is that by saying in their guidance "we are not going to take something on until all commercial negotiations have failed", they seem at that point at least to have been agreeing with your definition of the word "dispute".

MISS LEE: That is all the point is. Various people have suggested I am trying to use the guidelines to interpret that Act. It is not that, it is simply that it seems to us as a matter of logic and from the recital and also from Ofcom's own practice, that actually there is a threshold requirement in this case and so I point to the guidelines in order to say "yes", here is Ofcom making this point, and actually they do make a very specific point in para. 48 of the guidelines, as I will show you in a moment, where they seem to be saying that they only

have to accept matters that are disputes under the Act, and consequently "we will not look at things where commercial negotiations have not failed". That is the point.

I do not want to lose the points in my reply. In para. 37 I make the point that we are not contending that you interpret the Act by reason of the guidelines. At para. 38 I make two points and I am not sure how far these are still pursued by Ofcom but I am sure they will explain.

First, they have sought to say in their defence that the guidelines are not binding on Ofcom, they are only good practice and so on; secondly, they make a point about *Orange v Ofcom* having decided this point. I have made submissions about both of those in my reply and I think I will probably wait until my oral reply to see how it has developed and respond to those, but I am conscious of the time. We do say in para. 39 that the guidelines do positively require parties to provide evidence of the failure of meaningful commercial negotiations.

If I ask you to look at para. 3 of the guidelines – you see there what Ofcom is talking about, it says it is going to set out submission requirements. It talks about "dispute" meaning a matter that Ofcom may resolve using its dispute resolution powers under s.90 of the Communications Act. "These powers are limited in scope and do not cover all the subject areas within Ofcom's remit." There was a point made on that wording by Virgin Media which are responded to at para.41 of our reply. I think we say that what Ofcom is intending to do is to say that certain subject matters are not covered and that is all in that paragraph.

In paragraph 4, Ofcom rely on the fact that it says the guidelines are not binding, but would give reasons for departing. There is a required format for a request to resolve a dispute, para.6. I do not want to spend too much time stressing the requirement point and I will leave that to reply, if necessary.

In paragraph 13 you will see that Ofcom has deliberately sought to set out a minimum standard that submissions will need, and then Ofcom will not accept a dispute without evidence of the failure of meaningful commercial negotiations and it requires various backing to show that that is the case, then in para. 14 it may waive the submission requirements in very special circumstances, e.g. when the complainant is an individual consumer. So it is, we submit, a requirement.

Then if I may briefly draw your attention to para. 16 which refers to declining to resolve a dispute because alternatives to regulatory intervention exist. It says:

> "Ofcom will be reluctant to resolve a dispute unless one party is dominant and/or failure to agree would result in detriment to competition or consumers. In the

absence of these circumstances, Ofcom may consider that alternative mechanisms for dispute resolution would be more appropriate and may decline to resolve a dispute on that basis."

So it seems there it envisages a reasonably wide use of alternative means.

The next paragraphs I wanted to go are really 44 et seq. At para.44 in the last two bullets there is reference to commercial negotiations and a statement that a company uses its best endeavours to resolve a dispute through commercial negotiations. Similarly in 46 :

"… demonstrate that it has taken reasonable steps to engage the other party in commercial negotiations."

The main point on this document is the one on the next page which is actually headed: "Dispute resolution and commercial negotiation", and this is the point I made orally a moment ago. You will see that s.185 of the Act:

"only applies to matters which are in dispute, consequently Ofcom should only be asked to resolve a dispute between parties when all avenues have failed."

We submit that that shows how Ofcom itself approaches the Act. Those in effect are our submissions on s.185 and the Directive. I do want to stress just two points. Although we submit that all avenues in commercial negotiation must have failed, we sympathise in general with the position that Ofcom finds itself in. It obviously has to depend on statements by the two sides, and it cannot conduct a minute investigation into the state of negotiations. It would not be right, for instance, as the Tribunal has held in the *Orange* matter, and as BT submitted there, for Ofcom to have to see what the contract between the parties says about negotiations, and whether those have been exhausted.

There is also a particular problem about without prejudice correspondence and how that is submitted to Ofcom. It may be that particular problems can be dealt with by redactions or by chronologies and so on, but the way we put our case does not depend, we say, on an examination of the parties' positions in negotiation prior to the related judgment, because we consider the circumstances would be so different after the judgment that actually in a way the fact that hey have stalled is the starting point of my argument, and so the fact that the parties ----

THE CHAIRMAN: And is that the same in relation to both the 1007 and the Ethernet appeals that you are not ----

MISS LEE: Yes.

THE CHAIRMAN: -- relying on ----

MISS LEE: Yes, that was always the case in relation to Ethernet but following my reply and skeleton it is the case in 1007 as well.

THE CHAIRMAN: You say that the reason why negotiations have not failed was not because they were still talking meaningfully about it but because there was the prospect of further negotiations once the appeals had been resolved?

MISS LEE: And that is why I have focused my submissions very much on this point. It is a special case really, it is a particular circumstance we say was not addressed in *Orange* and for the reasons I have tried to outline as a matter of common sense there must be that sort of flexibility under the Act and you have to construe the Act so that it will apply sensibly in these circumstances.

We say it should not be too hard also to start a dispute, and that one party should not on its own be able to frustrate the ending of a dispute. But we say where there is a clear case either that points have not been covered in negotiation, or as in a particular case here that meaningful negotiations never really get off the ground because of the overlap with a matter in which battle lines had already been drawn and there were cases before the Tribunal, then the threshold that commercial negotiations had failed is simply not passed, and that therefore on that basis there is no dispute within the meaning of s.185. I fully accept that there is not very much wording in s.185 but we say the context requires you and the recital to interpret it in that way.

THE CHAIRMAN: So your arguments on that point and on the point which you are presumably about to come to on the question that future negotiations would count as alternative means, those two arguments are really in the alternative?

MISS LEE: Yes.

THE CHAIRMAN: If we are with you on those potential negotiations meaning that there is no dispute then one does not need to get to the question of whether they would constitute alternative means.

MISS LEE: Yes. There are a number of other points made against me and I have listed them in para. 29 of my reply and tried to respond to them, so I will not return to them further. The only one I am going to return to in a minute is the question of whether – and this is a point made, I think, by Three – problems caused by referrals being made in circumstances when they should not really be made can all be dealt with in costs and I was going to come and look at that when I come back to looking at the sections on costs.

I just wanted to look very briefly at paras. 66 to 70 of my reply because I am very conscious of the time.

THE CHAIRMAN: So we are now on 186?

MISS LEE: Still on 186 – sorry, I am moving on to 186 in a moment, but just to round this point off in relation to ----

THE CHAIRMAN: Meaning of dispute.

MISS LEE: Yes, the meaning of dispute. I think the point made against me is that it is simply a matter of assertion that there will be negotiations following judgment and it is all too speculative and difficult, and therefore on the facts in relation to both 1007 and Ethernet the relevant question of whether – perhaps I can put it this way, perhaps the question is whether or not negotiations had failed at the time and I perceive that what is said against me is that they had failed at the time and the fact there might be some in the future does not actually mean that there was no dispute at the time Ofcom came to consider it. I look at that in a different way and say the fact that there would be post related judgment negotiations is really self-evident because of the overlaps, because of the fact that the parties will know that everyone is waiting in the wings waiting to refer a dispute.

THE CHAIRMAN: How does it affect the ability to sort things out retrospectively? With the NCCN point you serve your NCCN and you say: "Although there is no point, we have stalled our negotiations now because everybody is waiting to find out whether ladder charges are appropriate, so there is no dispute at this stage" so no dispute is referred, I am just trying to think whether that puts the recipients of the NCCN, the NCCN comes into effect on the date that you have said so that the charges change. Now, if there is a dispute, and that is referred and resolved, then we know that Ofcom has a power to order a balancing up of charges paid or not paid at the end of the day.

If there is no dispute at that stage, or perhaps even at all because the thing does get resolved once the CAT appeals are disposed of, how then does the reckoning of that intervening period get sorted out?

MISS LEE: This may be something that has been touched on in the PPC case and I was not in the PPC case, so I shall wait to be corrected if I am saying something that is not right. I do not apprehend that the start date of the dispute has any particular significance in itself in relation, for example, to the powers of Ofcom to determine a dispute in a particular way and to order prepayments and so on.

THE CHAIRMAN: Those can always be backdated to the NCCN coming into effect.

MISS LEE: I would have thought so.

THE CHAIRMAN: But what if this is the scenario, that you had served your 1007, you then convince everybody else that there is no dispute at this stage because of these potential

future negotiations. Then the CAT disposes of the appeal and says: "No, laddered pricing is not permitted in respect of the different NCCNs", what is it then that entitles the parties at that stage to recover from BT the payments they have been making for the charges covered by the 1007 NCCN from the period when that came into effect. I do not say they have been withholding, but assuming that they do not withhold how do they get that money back?

MISS LEE: I suppose if they could not agree it they could start a dispute at that stage, but I am conscious there are certainly points in PPC about very stale overcharging and so on, but I do not think anything specific turns on the date when the dispute was accepted necessarily, it may be that it is all so stale and that nobody has done anything about it and it is not appropriate for Ofcom in its determination to make these points but I think if the situation were as you posited it, I would have thought if there could not be agreement then there would be a dispute started and I do not think the fact there was not a particular dispute opening date would prevent Ofcom from looking at the position going back.

THE CHAIRMAN: So that after the CAT had handed down judgment, if BT refused to give back the money, there could then be a dispute in which the only power which Ofcom is being asked to exercise is the backdating power.

MISS LEE: Well it may be similar, and again the PPC and the Ethernet, it is a sort of overcharging point in those cases and I am very conscious there are complicated arguments in PPC about that, but it is a similar point in a way, there has been an overcharge, something that is not fair and reasonable.

THE CHAIRMAN: Yes, looking at a slightly different point, you say that the existence of related appeals being disposed of, or being argued in front of the Tribunal is an event which can prevent a dispute arising because one can foresee that after it has been resolved there will be further negotiations, are there other events which would have a similar effect? I am thinking particularly if there was an SMP condition being considered or being challenged in front of the CAT and one of the parties wanted to protect its position over the interim period pending the decision of the CAT about whether and SMP price condition had been set at the appropriate price. We have wrestled in this Tribunal with this question of how far our powers extend to putting right the position in the interim period. I think in one ruling it was suggested that the parties could protect their position by lodging a dispute under 185, and that resting whilst the SMP appeal takes place. I am wondering whether the consequence of argument is that that could not because the existence of the SMP condition appeal is a similar future event which effectively prevents there being a dispute arising. It may be something you want to think about rather than ----

MISS LEE: Madam, you are certainly right. I think it was suggested – it may have been Vodafone – that actually BT should have protected its position by issuing a dispute at an early stage. I am not sure that BT's solicitors thought that was necessary – I do not quite remember, but it may have submitted it was unnecessary at the time.

THE CHAIRMAN: I am just trying to explore what the ramifications of that kind of finding would be.

MISS LEE: I do not think any of the parties have actually relied on the necessity of having a dispute in order to trigger certain financial consequences. I do not think it is a point that hindsight been made. I am not sure we think it is necessarily something that would have those ramifications, but perhaps I can think further.

I did want to pick up very quickly, because it is a point that will be emphasised by Ofcom and others, the points that I make at para.67 and following of my reply. I have made the point but I just want to ensure that the Tribunal knows that they are also fair. We do say that it is not really speculative or uncertain that the parties would be acutely aware of the need to resolve all outstanding ladder pricing issues following the judgments. We make the point that they are wrong to play down the impact of the likely appeals for the reasons that I have already made. We make in para.69 the argument that if post-judgment negotiations are likely to resume, that means, we say, that all avenues of commercial negotiations have not failed. We are not relying, as is suggested, on the remote possibility of future negotiations to say there is no dispute and it is really a special case.

Then para.70 is the point that I have made before, which is that, in fact, if things are going to take a little time to resolve it may show the complexity which actually requires a certain amount of flexibility under the Act.

Can I move on then to s.186 and following of the Act, which again is at the back of tab 3 of the authorities bundle. Under s.186(2) particularly:

> "Ofcom must decide whether or not it is appropriate for them to handle the dispute."

It has to make a judgment on appropriateness. I just turn forward to sub-section (4) where you see:

> "As soon as reasonably practicable after OFCOM have decided -
>
> (a) that it is appropriate …
>
> (b) that it is not …"

So it has to make a decision either way, it has to inform the parties and give reasons.

Sections 3 to 5 contain a mechanism under which Ofcom may decide not to handle a dispute, and it obviously implements Article 20.2, which we have been to.

I wanted to make three points really about this. The first is that there seems to us to be no reason at all in principle why negotiations after a judgment in a related appeal cannot satisfy conditions (a) and (b) – in other words, that they are alternative means and that they would be consistent with Community requirements set out in full. If mediation is a suitable means, and that was referred to in Article 20.2 of the Framework Directive, then it seems to us that it allows parties to negotiate.

THE CHAIRMAN: Do you accept that "alternative means" must mean the same as "alternative mechanisms". The Directive refers to "alternative mechanisms". "Alternative means", some might say that is slightly broader, but it must mean the same thing.

MISS LEE: Yes, I do, but I submit that there is no particular formality involved in "mechanism" either. It is "mediation". It is, madam, as you pointed out, on the alternative approach that my first submission by this stage would have failed about the meaning of "dispute". Assuming that there has to be a dispute, we say that "negotiation" is a "means" or a "mechanism" for resolving the matter.

There is a point referred to in both sets of pleadings, but it might just be worth at some stage looking at tab 8 of the BT's bundle on Ethernet, file 2 (the second of three bundles lodged with BT's appeal). There is a completely different dispute which BT at this stage was trying to raise with Ofcom, and you will see it submitted a submission on 19th March, then in the footnote it talks about how matters were considered. Over the page, Ofcom has decided that it is not appropriate for it to handle the dispute on the basis of alternative means. They say there is a consultation ongoing. If Ofcom decides to set a new general condition "we consider that will constitute alternative means for resolving this dispute". In other words, an alternative resolution. It says in (c) that it is considering expediting various things. So it is a very short point but I simply submit that "alternative means" can mean all sorts of things.

THE CHAIRMAN: Including the exercise by Ofcom of some other power.

MISS LEE: Yes. I submit that it is sensible that it should be broadly construed, because obviously what may be needed in a particular case may differ.

In relation to sub-section (c), obviously there is a requirement there that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it. About this, we say that of course it is sensible and appropriate for the test to include a requirement that the alternative means have, in effect, a reasonable prospect of

succeeding, otherwise everyone would rightly complain that the matter was being kicked off to some alternative means that had no hope of reaching a solution and confer no obvious benefit.

We do submit the word "likely" cannot be interpreted as providing too demanding a test, because otherwise the mechanism would lack practical application. So we submit that something along the lines of a "reasonable prospect of success" would be appropriate. If I can give an example of this: in relation to mediation as an alternative means, there is of course no guarantee that if the parties go to ADR they are going to accept the conclusion of mediation. That does not seem to be a good reason for saying that mediation cannot be a prompt and suitable means. You do not necessarily know what the outcome is going to be and you do not have to show that the outcome is going to be that the parties will agree and the problem will go away. Nevertheless, the threshold should not be too high.

The second point I make is that (c), and it is obvious, always requires Ofcom to look into the future to see what is likely. You are always trying to assess something future – as, for example, prospects of success on appeal, or other sorts of analogies. So whilst it is said against me, "It is all speculation about what might happen", that is really in the nature of what you are dealing with when you are talking about looking at whether alternative means are suitable. You cannot be too stringent or demanding in terms of showing, "Yes, it is absolutely likely that the parties that have been loggerheads now …"

Although "speculation" and "speculative" is used against me as a pejorative term, my submission is that it is not actually that, it is just a necessary part of the way we approach this point.

Two related questions of what has been meant by "prompt" in (c) have been raised by interveners, first of all as to what "prompt" means; and secondly, this point about whether it would be lawful or appropriate for Ofcom to refuse to handle a dispute if those alternative means could be expected to last longer than the four month timeframe in which they are ordinarily required to reach a decision. I was going, if I may, to defer those until I come on to looking at s.188 and timing about referring back. I just note that for now, but we will return to it.

Lastly, there is the question under these submissions of what discretion Ofcom has if it does decide that the conditions are met. If they are not met then it is plain that it must accept a dispute and that is what the end of sub-para.(3) says.

The statute is actually silent about the converse position where Ofcom decides that they are met. It may very well be that the most plausible interpretation is that in those circumstances

Ofcom retains a discretion to decide to accept or refuse, even if the conditions are met. Obviously it has to decide, as I pointed out in sub-para.(4), what is appropriate and give reasons for that.

It seems to us that if it is found that there are prompt and reasonably satisfactory alternative means, although Ofcom has a discretion it would normally be appropriate to exercise that discretion to allow those means to come to fruition, and if it is not going to it should at least set out some reasons as to why, notwithstanding the existence of "reasonably prompt satisfactory alternative means", it is nevertheless going to handle the dispute itself.

So whilst it may well have a discretion, I think the essence of my submission is that one would normally expect them to use the alternative means and give clear reasons, if they are not going to do that, as to why, nevertheless, it is still appropriate for them to continue.

One of the points made in the defence by Ofcom is that, in those circumstances, if it nevertheless opens a dispute, that cannot be wrong because that is what it is required to do under the Act. It seemed to me that, in other words, it cannot be criticised. One of the reasons in deciding to handle a dispute is that it is therefore necessarily complying with its statutory duty, and I submit, and this is paras.83(3) and 85 of my reply, that that is not right, it actually has to look at whether or not it is appropriate and for what reason. It is not just a default position must be to accept.

THE CHAIRMAN: Was the decision of Ofcom here, remind me, that there were no satisfactory alternative means?

MISS LEE: Yes, the decision letter is quite short. It just says there are no suitable alternative means. In the defence I think Ofcom has clarified that it actually found that there were no means and therefore it did not come on to say that there were means, but we decline. I think they say that in any event they would have been decline it. I think we attack their decision that actually there were no alternative means and we say what they would have done had they agreed with BT that there were alternative means, it is difficult to hypothesise about, and therefore they did not exercise that part of their discretion and the decision should be set aside.

I am conscious that I am taking rather more than the time I had agreed, madam, but I hope that I will not be too much longer.

THE CHAIRMAN: That is partly because I am interrupting you.

MISS LEE: Then sub-para.(6) I should refer to, moving to a different point. This sets out the ability of any party to refer the matter back to Ofcom after four months. Here I emphasise the fact that this is an option for the parties, it does not have to be exercised. Nor is Ofcom,

itself, obliged to take the matter back on its own initiative. Again, I will come on in a moment to deal with the suggestion that it is unlawful to, or wrong for Ofcom to in effect select alternative means which are likely to take more than four months.

Can I move on, quickly, to s.187-3, which is a short point which I just wanted to refer to because it is referred to against me. This is a provision that refers to the situation where there are court proceedings with respect to a matter to which a dispute relates, and an order is made in those proceedings requiring the handling of the dispute by Ofcom to be stayed, and it relieves Ofcom of the duty to make a determination unless the stay is lifted and provides that the period of a stay is to be disregarded when calculating the length of time that Ofcom is taking to determine the dispute.

The reason I mention this is that Three has, and this is a point that I deal with in para.99 of my reply, and I think both Three and Ofcom actually take this point that the absence of any equivalent paragraphs dealing with the position if Ofcom want to stay proceedings on its own initiative means that Ofcom lacks power to effectively stay proceedings. In relation to that, my submissions are set out in my reply, and we are coming on to the point about exceptional circumstances, but my submission is this, it is not actually necessary to use the words stay or otherwise. I mean, really, once there are exceptional circumstances it may be sensible for Ofcom to put on hold what it is doing because of the overlap, or there may be certain things that it is worthwhile it carrying on doing until such time as the related decision is handed down. But what we do say is it is not unreasonable that Ofcom puts things on hold, and it certainly has the power to put things on hold, and the fact that there is no specific provision mirroring subject section 3 in relation to Ofcom's own decision, effectively, to put something on hold does not matter because that is all encapsulated within the extension of time that Ofcom itself carries out, exceptional circumstances. I am sorry, it is rather a convoluted point, but it is submitted in para.102 of my reply, and that is really the point, that the sub section is not a point that others may hold against me.

Moving on to s.188, you will see that subsection 1 shows that this section applies in two circumstances: first, where Ofcom decided that it is appropriate for them to handle a dispute; and, secondly, where a dispute has been referred back to Ofcom under s.186-6, and that was the case which I showed you a moment ago. Subject section 2 sets out Ofcom's duties to consider and determine the dispute; 3 explains that Ofcom should determine the procedure it considers appropriate; and 4, this is a paragraph that we rely on in relation to the point about whether or not alternative means might take longer than four months and whether it would be lawful to choose alternative means that might take that long. I think the

argument made against me is that it is not possible or lawful for Ofcom to refuse to accept a dispute on the basis of alternative means, which might take more than four months, because at that point one of the parties to the dispute could simply refer it back, and so the whole idea of going off to alternative means would be pointless.

What I submit in relation to that is this — sub section 4 must mean that the alternative means can be one that would not necessarily resolve the issues within four months, because there is the provision allowing Ofcom to allow procedure that ex hypothesi has already taken four months to carry on, and Ofcom could, if challenged at the outset about alternative means, that we are going to take longer, for example, because a judgment was likely to take five months to be handed down would be able to rely on its provisions in 3 and 4 and say it is still appropriate to consider those means, and it would allow them to continue even if the matter was referred back to them. Obviously it would have to not fetter its discretion, but the next point is that the exceptional circumstances proviso in sub section 188-5 applies to cases where Ofcom has accepted handling the matter, and also applies where it has been referred back. This was the point that I referred to earlier, that Article 22-2 of the framework directive does not include the words, "in exceptional circumstances", but the Act does. The Act has done it differently. We submit about that, as I submitted, it is not clear that the framework directive legislation is necessarily intended to exclude the exceptional circumstances proviso. It certainly seems sensible for it to apply in those situations, and so we say even if the matter is referred back to Ofcom, certainly under the Act the position is that Ofcom might say, "Well, we are going to extend time further because the related judgment is going to be handed down on X date".

THE CHAIRMAN: But, if they did extend time because of some future event, and then it suddenly appears that actually that future event is not going to happen, or is going to be much further delayed, and they say, "Well, we cannot now take that into account any more", I suppose they do not have to unwind that. They can just make the decision earlier, can they not?

MISS LEE: Yes. Yes.

THE CHAIRMAN: They do not have to wait until six months.

MISS LEE: No. I think that must be right, it can decide that the exceptional circumstances it considered applied a month or two ago no longer operate and therefore it is going to revert to dealing with the matter, yes.

I said also I would deal with the promptness point which arose under s.186-3(c) and I deal with it here because I dealt with the four months point at the same time. In the BT

submission that the meaning of "prompt" under s.186-3(c) has to vary according to the relevant context, there may be some instances where determining a dispute will inevitably take more than four months, and so alternative means that take longer than four months might still be prompt, the PPC dispute I think took 15 months or so from start to finish. So, there are disputes that are not dealt with within four months, and everything varies according to context.

I also make the point that, given the overlap with the appeals, a determination in relation to either NCCN and 1007 or Ethernet would not necessarily resolve the issues pending the handing down of the appeal judgment in any event. It is true it might lead to a determination, but if that determination is simply going to be appealed in order to preserve the position pending the related appeals it is clearly not going to resolve the matter as between the parties, and that too narrow a focus on determination and determination within four months is going to lead to odd results. Therefore I submit that in this provision in relation to the exceptional circumstances, also in relation to alternative means, it is important to look sensibly at the context, and so "prompt" will vary depending on the circumstances.

Section 189, just very quickly, it is not relevant, but I just wanted to refer to sub section 6 just to show that the time period for making a determination will be such as is agreed between Ofcom and other regulatory bodies, so there is a certain amount of flexibility of Ofcom agreeing timing in relation to other matters. Section 190 deals with the determination and the powers on a determination. Although, again, nothing specific turns on it, I draw attention to it for completeness. Sub section 5 of 190 refers to the fact that Ofcom, where a dispute is being referred back under 186-6 Ofcom can take account of decisions by others in the course of an attempt to resolve the dispute by alternative means, and it can ratify. So, presumably this may apply to mediations, or it can ratify some form of resolution by others.

And then 6 and 7 refer to the cost point, and I said I would return to this as well. You will see there Ofcom has powers when making a determination to require a party to make payments to another party in respect of costs, and to make payments to Ofcom in respect of costs and expenses incurred by Ofcom. And then 7 qualifies 6(b) in effect in (b) for present purposes the condition is that the reference to the dispute must be considered by Ofcom to have been frivolous or vexatious or the parties otherwise abused the right of reference conferred by the chapter. I think it is Three who makes points about Ofcom's abilities to control parties' use of the dispute resolution process by imposing punitive costs orders

where they make a determination for resolving a dispute. The main point we make in relation to that is it seems to us obvious that costs orders are unlikely to be imposed in general in cases where parties have referred disputes which have overlapped with related cases, and particularly if that is permitted under the Act, because the parties will simply say that their belief was that actually a different treatment was justified and that they should be able to commence their dispute and the overlap is not sufficient. So, it seems to us it is only in very clear cases which are unlikely that costs orders will be made. Even more so to trigger the frivolous or vexatious or abuse point in sub section 7(b). Moreover, it does not necessarily seem to us to cure the problem if actually you have to wait until the end of the process of determination to make a costs order if there had been, we say, wasteful and unnecessary engaging with parties in lengthy protracted dispute resolution proceedings that turn out not to have been needed because of some alternative.

Very quickly — and this is again just for completeness, s.191-4 in (a) simply refers to Ofcom's obligation to make a determination within a particular period, so there is an obligation, but we say it is conditioned by its power to extend time for exceptional circumstances. In relation to that, again, Ofcom I think decided, obviously the point does not arise in Ethernet because there was a decision that there were exceptional circumstances, but in 1007 Ofcom held that there were no exceptional circumstances, so it is not a case that it is said, "Well, there are exceptional circumstances, we are not going to exercise our power to extend time". They said "We consider there are no exceptional circumstances in the 1007 case", and I think the two reasons on which they said that, two bases, were that they did not consider it was necessarily, the related matter was necessarily going to decide the point; and secondly there was going to be a period at the time that the decision was taken in September, the 080 case was listed for January, and so there was going to be a period of at least four months, I think, that was the basis on which they held that there were no exceptional circumstances in that case.

THE CHAIRMAN: Is there really a difference between those two positions, to say —

MISS LEE: There may not be. There may not be.

THE CHAIRMAN: — there are, we decide that there are no exceptional circumstances, or will we decide that there are exceptional circumstances, but we are still not going to exercise our power to extend, I am not sure those positions would be any different.

MISS LEE: Madam, there may not be. I recall Hasbro, a case I think about extending time for notice of appeal where they seemed to be treated slightly differently, but I do not think that probably much turns on it.

THE CHAIRMAN: The only reason why I ask that is, as a related question, I am not sure whether you will continue to deal with, which is something which is floated a bit in the papers about what test we have to apply in relation to that.

MISS LEE: Yes.

THE CHAIRMAN: This being an appeal on the merits, but nonetheless that being an area where we may or may not have to confer on Ofcom some discretion or not interfere unless we feel they have gone very far off the rails.

MISS LEE: Yes.

THE CHAIRMAN: And that is a point that I would be interested to know whether the parties are agreed as to the formulation of the test that we apply in relation to each of the points that you make.

MISS LEE: I think probably not, and I was going to develop, I was going to come to that.

THE CHAIRMAN: Okay.

MISS LEE: I am not sure that we are at one with Ofcom on the point. But perhaps I can —

THE CHAIRMAN: Perhaps you will come back to that. On exceptional circumstances, is that what you are —

MIS LEE: Yes, those were the submissions. The matters I have left, very briefly, are questions of appealable decisions, standard of review by the Tribunal, and then just to wrap up a little bit on the facts on exceptional circumstances and alternative means.

THE CHAIRMAN: Yes. One point that you may want to think about over the short adjournment, and the others may as well, is that the papers that we have seen so far treat all the, treat the appellants and the interveners in the same way, even though the disputes were referred to Ofcom sequentially.

MISS LEE: Yes.

THE CHAIRMAN: And whether it would be open to Ofcom to say apropos of either exceptional circumstances or the availability of alternative means, well, we are already looking at this because EE has referred a dispute, so whatever alternative means there might have otherwise been for you H3G or whoever, we are not going to explore those because it makes sense to add you in to the dispute that already exists. So, whether the test is absolute the same for all the parties to the disputes which are now bundled together as far as Ofcom is concerned, or whether there are different factors that apply to them.

MISS LEE: Yes. We very much aimed our attack at the first decision. I suppose if that falls away then it would affect all of the others.

THE CHAIRMAN: Yes. Very well, thank you very much. We will come back at two o'clock.

(Short adjournment)

MISS LEE: Madam, if I could just deal very quickly with some of the questions you asked me earlier? The answer to the question of whether NCCN at 1007 is conditional on 956 in any way is that it is not. It takes effect from the later date. In relation to the question of whether the issue of a dispute has any particular magic in terms of what the remedies might be to try to unravel the position later on, the position, as I understand it, is what I thought it was, we do not say that there is any particular magic in having issued a dispute in order to allow for later disputes to refer to the periods that go back earlier in time.

The preliminary issue judgment in the PPC case dealt with a further point about what happened where not only was there no dispute but also no disagreement had even been raised at that time, and it deals with the position in relation to that period between the action (the original event complained of) and the period before which any disagreement has been raised and I think it makes findings in relation to that point. BT has extended its time for appealing so there may be a different situation in the circumstance where some disagreement has been raised with BT as opposed to where none is raised at all. So it might be argued that those points are stale, and there is no potential unravelling in relation to that, but I do not think that in this case obviously because disagreements have been raised with BT in relation to both, so it seems irrelevant on the facts of this case whether or not a dispute has been opened or not.

In relation to the sequencing point, I pick up the submission I made just before lunch. It seems to us that really the decisions we attack are really the decisions that Ofcom makes at the outset when it decides to accept a dispute with the first party to make decisions on exceptional circumstances. We can see at a later date if matters are already underway then it may be that it is sensible simply for Ofcom to carry on, but what we say is if the original decision was wrong then the fact that later people have joined in cannot affect our ability to attack the initial decision and set aside those points.

If I can turn to the question of appealable decisions, I do not think anyone has actually made any submissions about this. We submit that there is plainly a decision under s.186 that it is appropriate or not for Ofcom to handle the dispute, sections 186(2) and 186(4) specifically refer to decisions. We also submit that a decision refusing to extend time for making determination on the basis of exceptional circumstances is an appealable decision. This arise we say because Ofcom has the power under s.188(5) to extend time on the basis of exceptional circumstances and, although I did not show it, I should just mention s.192(7)(a)

of the Act includes references to a decision that is given effect to by the exercise or performance of the power, or a duty, and it also includes a failure to make a decision or a failure to exercise a power where there is a failure to comply with the request to make the decision. So here we would say there is a request to extend time and by rejecting that request Ofcom makes a decision. We say Ofcom acted in that way. It asked for everyone's submissions. It made the decision. It explained why so we say there is an appealable decision.

In relation to the question of the standard of review, the Tribunal will of course be familiar with the points on s.192(5) of the Act which provides for an appeal on the merits and the differences between that test and the judicial review type test are matters that have been fully argued recently in the Court of Appeal in the hearing that took place on 21st/22nd February between BT and Ofcom. This was an appeal from the Tribunal's preliminary judgment in an 080 case and one of the issues is the relevant standard of review and the admissibility of evidence, and Ofcom appealed the Tribunal's decision and there was argument in relation to that. Judgment has not yet been handed down and I do not wish to say anything that detracts the court from the submissions that BT has made on that, or to argue the point broadly.

Generally, we submit that in cases involving fact or economic assessment – there is an appeal on the merits and approach is the approach the Tribunal took in the *H3G* SMP case which is that the Tribunal has to establish whether or not Ofcom's decision is right or wrong, and not just whether it is a reasonable decision for it to have taken.

For the purposes of this appeal, as you noted, madam, these provisions involve consideration at least in part of the position where Ofcom exercises discretion about procedural matters, whether it is appropriate to handle a dispute or decline it on the basis of alternative means, or whether it is appropriate to extend time. It may very well be that is all I need to talk about for today's purposes in that very specific case, whilst it is an appeal on the merits, to succeed on the merits you may be required to show something that is more akin to the test that one would expect in other cases dealing with judicial review such as failure to take into account correct factors, or irrationality or not operating according to the correct principles. Really, the way I put my case today triggers that standard, in other words we say that really Ofcom have approached it with incorrect principles in mind, i.e. with too limited a framework as to what might constitute alternative means, and the point under s.186(3)(c) about satisfactory resolution, and also in relation to exceptional circumstances adopted too limited a time frame because it considered that effectively the

exceptional circumstances could not apply in circumstances where there was a very long period of time. So I rely on an error of principle and therefore ----

THE CHAIRMAN: Yes. The remedy that we have to arrive at in all 192 appeals is remitting the matter to Ofcom with a direction. Now, if we were to decide that Ofcom had erred in not treating potential negotiations after the disposal of the related appeals as a possible appropriate alternative means, if we were to decide that there was an error in that respect, then I suppose the question would arise: what then is the direction that we would need to give to give effect to that decision when remitting the matter to Ofcom? Is it a direction that they must not handle the dispute because they must wait until the Tribunal has disposed of the appeals or is it rather a direction that they should consider again, having regard to the Tribunal's decision that potential future negotiations could be an alternative means, that they should reconsider whether they want to handle the dispute ----

MISS LEE: Yes.

THE CHAIRMAN: -- which is more of a judicial review type of remedy, whereas us substituting our own decision as to whether that is an alternative means which is such that Ofcom should decide not to handle the dispute, is more of a substituting our own decision that may be we can cross that bridge once we have decided the question of principle.

MISS LEE: Yes, there may be differences, actually, I suppose in relation to the exceptional circumstances if Ofcom was wrong about exceptional circumstances, because for example they took a view that anything that was going to take more than four months could not be exceptional circumstances, just positing that and I managed to persuade the Tribunal that that was an error of principle and actually it is obvious, once they take into account that point and take into account the merits of the related appeals, that there are exceptional circumstances and therefore it would extend time. But in relation to the point about ----

THE CHAIRMAN: But again, even there, there is the question: do we remit it with a direction "thou shalt extend time, Ofcom", open endedly or not? Or do we remit it with a direction that they address their minds again having regard to these factors.

MISS LEE: Yes, madam, perhaps we could leave it for now.

THE CHAIRMAN: I think it may be that what I invite you and the others to consider is whether the distinctions between where you all are as regards the test that we apply, whether that is likely to matter more in relation to remedy than it is in relation to our deciding the matters of principle.

MISS LEE: Yes.

THE CHAIRMAN: It may be there are points in both camps, but let us think about that further.

MISS LEE: We submit that Ofcom erred in holding that there were no suitable alternative means in both cases. In fact, I think it formed the view that a prompt and satisfactory resolution of dispute was not likely in either case, and we also say it erred in holding there were no exceptional circumstances.

In relation to the first, the way we put it is that Ofcom erred in principle in failing to take a relevant factor into account by allowing its concern about the delay in waiting for the 080 judgment to allow it to conclude that resolution would be prompt, and I have made my points about what 'prompt' means must vary in all the circumstances, and also in failing to acknowledge the great impact of the related appeal on the post-judgment negotiations.

There is no indication to us that in relation to alternative means it approached the question of that issue differently because of the fact of the related appeal in either case. The essential point is that we consider that they did not consider properly the question that negotiations had simply stalled and would be capable of being revived or the wasteful nature of considering the matter in advance of related appeal judgments.

Those were my submissions on these points, and I was just then going to deal very briefly with the compliance in relation to PPC.

THE CHAIRMAN: Yes, that is the third ground in the Ethernet appeal.

MISS LEE: It is the third ground, yes. These are in my notice of appeal, paras. 40 to 42 in the Ethernet notice of appeal.

THE CHAIRMAN: (After a pause) It is p.18.

MISS LEE: Yes, madam. They really do mirror the points that have been argued in the PPC appeal in October of last year and were included largely in order to preserve the position depending on what that appeal decided. Although the point is made that obviously this is a matter of discretion and one looks to see what it was appropriate for Ofcom to do in its discretion.

I think the point is made that actually one has to be very specific therefore about the facts in each case. We rely on the same points because the issue is really the same as in PPC. The difficulty is the fact that the alleged overcharge is said to be in breach of the condition, and therefore the question is what is the suitable way of dealing with this. In our submission, the submission that has been made in PPC applies equally here, which is that really the dispute resolution process was intended to be swift and not to deal with these matters of breach of condition. We point to the fact that it took 15 months in PPC. We also point to the fact that there safeguards and procedures in enforcement compliance investigations that do not apply in relation to dispute resolution. There are also conditions in s.104 in relation

to pursuing recompense regarding breaches of statutory duty arising out of failure to comply with conditions. We submit that following the preliminary issue judgment which has held that there are two alternative procedures, it is still nevertheless appropriate for Ofcom to take a compliance route and not to deal with these matters in disputes.

Other than my submissions that are set out, I do not really have anything to add to those, simply the point that mirrors the point in PPC. Thank you, unless I can help further.

THE CHAIRMAN: No, thank you very much, Miss Lee. Yes, Mr. Saini?

MR. SAINI: Madam, I am going to structure my submissions in four parts. First, I am going to address the statutory framework and focus on the meaning of a dispute; secondly, I am going to draw your attention to certain facts; thirdly, I am going to consider the issue of alternative means; and finally, I am going to address the exceptional circumstances.

Can I start with the statutory framework and the meaning of "dispute", and can I take you immediately in the authorities bundle to the *Orange* decision. Then I am going to come back and deal with the Directive more specifically. The *Orange* decision is at tab 9, and could I ask the Tribunal, please, to turn to p.31. One sees at para.89 the Tribunal identifying Ground 1(b) and setting out the issue which is what is the meaning of "dispute", and then the Tribunal went on, after setting out various submissions, at para.98, if one goes three pages ahead, p.34, to say:

> "Further, it is clear that the word 'dispute' in section 185 must mean the same as 'dispute' in Article 20 of the Framework Directive and as 'the absence of agreement' in Article 5(4) of the Access Directive."

We say, with respect to Miss Lee, that this decision disposes of the entirety of her first ground because, as I understand her submission this morning, she accepts that as regards both NCCN and as regards Ethernet, there was an absence of agreement. There was a dispute. I am going to come on and address her points about good faith negotiations in a moment, but purely as a matter of fact it is common ground between all the parties today that there was an absence of agreement between the communications providers and BT.

Perhaps I can summarise in what I hope is a neutral way what the absence of agreement was. In relation to NCCN, the communications providers wanted BT to simply withdraw NCCN 1007, and one will see in the correspondence in due course repeated requests saying, "Just simply withdraw it", and BT came back and said, "We will discuss other matters with you, but we will not withdraw it". So there is a straightforward absence of agreement.

In relation to Ethernet, one can again express it simply but crudely. The communications providers said that BT had breached a cost orientation condition and asked for repayment, and BT's position was, "We have not breached the condition and we will not repay".

I believe everything I have said is common ground. There is no dispute between the parties here at least on those facts. What Miss Lee says is that because negotiations had "temporarily stalled" (in her words) there was not a dispute. We submit that the concept of "negotiations being temporarily stalled" plays no part in the scheme of the domestic or Community legislation here. All that is relevant is, is there an absence of agreement? It is common ground that there was an absence of agreement.

Negotiations may be relevant to some of the other grounds we are going to come to – issues of "alternative means" – but just dealing with the first issue, which is, is there a dispute, we say the Tribunal, with respect, was completely right, a dispute just means absence of agreement as a matter of language, and here it is common ground that there was an absence of an agreement. The fact that there may be further negotiations between the parties is not inconsistent with the existence of a dispute. One can never say that negotiations have come to an end. There is always a possibility.

If one turns in the same bundle back to the Directive, and if one turns, first of all, to the Framework Directive, please, which is in tab 1, and if one could please turn to Article 20, Article 20 itself does not define what a "dispute" is, because it starts with the words "In the event of a dispute". There is no definition there. Equally, if one keeps a finger in that and jumps over to the next tab to Article 5.4 of the Access Directive, there one does see a formative definition of a "dispute", and one sees it at 5.4 being "the absence of an agreement between undertakings". At the Community level, Article 20 does not help with a definition. Article 5.4 does help, because, as the Tribunal identified in the *Orange* case, it identifies absence of agreement as being the condition.

We say, both as a matter of Community law and domestic law, all that one has to have is the absence of an agreement between the parties. That will obviously involve, or will have involved, some bilateral communication, because one cannot tell if there is an absence of an agreement unless you have spoken to the other side. That is all that one needs – an absence of an agreement.

The whole of Miss Lee's argument is based upon recital 32, if one goes back to the first divider and recital 32 of the Framework Directive, and Miss Lee's argument changed at various points but, as I understood it ultimately, she was saying that an essential condition of a dispute – in other words, one of the definitional requirements of a dispute – is some

form of prior negotiation in good faith between the parties. If one just looks at the text of recital 32 one can see why that is obviously wrong, because if the Tribunal would look at the very first line of recital 32 it says, "In the event of a dispute between undertakings" – in other words, recital 32 starts with there already being a dispute. So the concept of negotiation in good faith and failing to reach agreement, etc, those are not conditions of the existence of a dispute. What we say recital 32 is doing is no more than explaining why a national regulatory authority should be there to resolve a dispute, and it is saying that in situations where someone has tried to negotiate in good faith they should be able to call on a national regulatory authority. That is all it is saying, no more than that. It is an aspirational provision. This is why we are going to put this provision in Article 20 and put this provision in Article 5.4, which is once someone has tried to negotiate and failed, they should be able to knock on the door of the national regulatory authority.

What one does not see in either Article 20 or Article 5.4 is some wording saying that before you can knock on the door of the national regulatory authority you have got to have met some standard of having negotiated in good faith. All that one sees is a failure to reach agreement.

One can see essentially for the reasons that the Tribunal gave in the *Orange* case that what would put a regulatory authority in a very difficult position in what is meant to be a very speedy process, if there was a collateral inquiry, first of all, as BT want this Tribunal to conduct, into whether or not there had actually been negotiations in good faith. This is meant to be a speedy process where if there has not been agreement the national regulatory authority's dispute resolution powers can be invoked.

The Tribunal may decide that this is not the case in which to resolve what the true meaning and application of recital 32 is because, as I understand it, it is common ground between the parties that, in fact, all of the communications providers did negotiate in good faith and have failed to reach agreement. There is no suggestion by Miss Lee in her skeleton argument or in her submissions that there was negotiation in good faith. Her argument is different. Her argument is that there could have been further negotiations. Again, that plays no part in recital 32. So the Tribunal may well take the view that even taking Miss Lee's submissions on recital 32 at their highest, on the facts of this case there was a negotiation in good faith and there was a failure to reach agreement, and the Tribunal should perhaps leave to another case, if it ever needs to address this issue, what negotiation in good faith means. What recital 32 does not say is anything like every step that could

possibly be taken in commercial negotiations must have been exhausted before one goes to the regulatory authority.

Our primary submission, just to make it clear, is that all that one needs, as per the *Orange* case, is a lack of agreement. If the Tribunal wants to, which it does not need to do, give some meaning to recital 32, it could say that a lack of agreement plus some evidence of good faith negotiations, but we say that the Tribunal does not need to go that far in this case. If the Tribunal does go that far then it does not assist Miss Lee because it is common ground that there were good faith negotiations. So it is essentially a non-point, this point. What she cannot do is derive anything from either of the Directives which will support her argument that all commercial means should have been exhausted.

She derives that argument, madam, from Ofcom's guidelines. I can go straight to the provision that is the high point of her case. If one goes in the same bundle to tab 4, para.13, she relies, first of all, upon the third line:

> "Ofcom will not accept a dispute without evidence of the failure of the meaningful commercial negotiations."

Then she relies even more heavily, if one goes a few pages ahead, please, to p.10, upon para.48, if I may read that:

> "Section 185 of the Communications Act only applies to matters which are in dispute, consequently Ofcom should only be asked to resolve a dispute between parties when all avenues of commercial negotiation have failed."

Then if I can emphasise the last sentence again:

> "Only where these negotiations fail should Ofcom be called on to resolve a dispute."

What is important to note, madam, is that Ofcom is not here saying that it has no jurisdiction to resolve a dispute unless all avenues of commercial negotiation have failed, it is saying what it would like to happen: "Please do not come and ask us to resolve a dispute unless all avenues of commercial negotiation have failed". What Ofcom was doing here is what the Tribunal noted in the *Orange* case. If I can show you, just keeping in this bundle, tab 9, just past the section we have looked at, if you would go to para.101, p.35, the Tribunal observe:

> "The fact that OFCOM as a matter of good practice encourages parties to a potential dispute to explore fully the possibility of resolving their differences first, is a very different matter from holding that OFCOM's jurisdiction depends on contractual dispute resolution mechanisms having been exhausted."

One can say exactly the same thing here. The fact that Ofcom, as a matter of good practice, would like the parties to do their very best before they knock on Ofcom's door does not mean that if the parties have not done their very best – in other words, exhausted all means of commercial negotiation – Ofcom does not have jurisdiction.

THE CHAIRMAN: So you are saying that the guidelines are not saying, "We will not accept a dispute unless you have exhausted all areas", they are just saying, "We would really like you to exhaust all areas, but if you do not want to and you refer a dispute to us, we still have to deal with it"?

MR. SAINI: Absolutely, and if one got to the stage where Ofcom was faced with a communications provider that said, "We have done our best, we could do a bit more, but we still consider there is a dispute", Ofcom would be hard pressed, consistently with the Directive, to say, "Actually we have no jurisdiction here". It would be very, very difficult.

THE CHAIRMAN: Where is the bit, 44, that they will only accept a dispute where complainants submit clear information on all details of the dispute, including documentary evidence of commercial negotiations, a statement by an officer, preferably the CEO, that the company has used its best endeavours to resolve the dispute through commercial negotiation; and back in 13, Ofcom will not accept a complaint without evidence.

MR. SAINI: That is no more, madam, than the fact that there is not agreement. It is no more than that. As I said earlier, lack of agreement must follow a bilateral discussion. Ultimately, as all parties accept here, madam, the guidelines cannot determine the correct legal position. The correct legal position is to be identified on the basis of the Directive and the domestic legislation. It is common ground that domestic legislation does not say anything on this because it just refers to a "dispute" without referring to what a dispute is. One can discover from both Directives that a dispute is simply a lack of agreement.

This Tribunal could well say that Ofcom's guidelines go too far in terms of what they require, but we are all agreed that ultimately what the guidelines say does not determine the legal position. The legal position is determined by the Directive.

Can I just summarise our position on that. The Directive simply requires a lack of agreement between the parties. That will necessarily involve an exchange of views. Alternatively, if one needs more than that – in other words, some evidence of good faith negotiations – we have that in this case. You have eight bundles of that if anyone wants to look at it. That is why Miss Lee does not dispute that there were good faith negotiations between the parties.

If I can turn next to the issue of the facts, and this is relevant not only to the issue of dispute, on the question of whether or not there is a dispute, where I do not believe there is that much between the parties, but also it is relevant to the question of suitable alternative means and exceptional circumstances. What I want to show the Tribunal, briefly if possible, is the nature of the dispute, just by looking at some of the correspondence. I emphasise again here that the correspondence you have is not actually all the correspondence between the parties, it is just the correspondence that they have decided to show the Tribunal. It is common ground that there was a lot of other correspondence and without prejudice discussion. Just on the basis of the limited materials I am going to show you, you will get a flavour of the nature of the dispute.

Can I show you, please, first in the Ethernet case, and if you could take up bundle 3 ----

THE CHAIRMAN: Mr. Saini, I just pause there, I know there was a confidentiality ring set up, but I am relying on you not to read out in open court ----

MR. SAINI: I am afraid a serial offender in saying things in this Tribunal which are subject to confidentiality, so my policy these days is just to show you the tab and then point to the paragraph and the Tribunal can read it. I do not believe that the parts that I am going to show you are particularly confidential. This is correspondence between BT Openreach and Sky, first of all, at tab 15, please. This is a letter of 6th January 2010, and I think I can read this part, because I believe it has actually been cited in other documents. Just to remind the Tribunal, this is in relation to the claim that there has been a breach of condition and a claim for repayment of quite substantial amounts of money. Would you go to the third paragraph, if I may read that:

> "It seems clear that we …"

this is BT's view –

> "… fundamentally disagree on how Ofcom would assess any claim for BES overcharging, based on our respective assessment of the PPC Determination …"

Then they carry on:

> "While it of course remains your right to take the case to of, my preference remains to explore whether we can avoid such a course of action …"

This is through BT's own letter. They are saying there is a fundamental disagreement.

If one carries on in this bundle to tab 22, which is then Sky and Talk Talk's submission, and I will not read this, but could you please go to the sixth page of that, it is also marked 1788, para.14. Again, I do not believe that there is any dispute on the facts that this is an accurate statement of where the parties have got to.

Those two pieces of correspondence, one from BT and one from Sky, indicate the nature of what I will call the fundamental disagreement between the parties. To the same effect, if the Tribunal, dealing with the position of Virgin, would please go back to tab 17 in the same bundle, this is a letter from Mr. Nicholson of BT to Mr. Vito Morawetz of Virgin Media. Though it is not clear from the letter he is director of Interconnect at Virgin Media. One sees the same paragraph, the second main paragraph:

> "It seems clear that we fundamentally disagree on how Ofcom would assess any claim for Ethernet overcharging …"

They go on and say:

> "It of course remains your right to take the case to Ofcom."

I am going to turn then just to show you a few documents to the same effect in relation to NCCN, but while we are in this bundle can I just show you, because it is relevant to another point, and then we can put this away, tab 11, just at the beginning, and this is a letter from BT Openreach to Mr. Heaney of Talk Talk. Again, I am conscious that it may be confidential but could I ask you, please, to go to the third paragraph, and perhaps I can summarise it. There BT are saying, putting aside the DSAC issue in PPC, there are further substantive differences between PPCs and Ethernet. Then over the page between the two hole punches, I do not believe this is confidential but I will summarise it, you will see there it is being said that there is a substantial difference in BT's mind as to whether or not Ofcom's approach in the PPC dispute is appropriate to Ethernet.

You may ask me, "Why are you showing us this?" It is for this reason: everyone thinks, and again aspirationally Miss Lee would hope, that once the PPC judgment comes out everyone is going to sit down round the table and the problem is going to go away. This is BT telling Talk Talk, "Actually there are very substantial differences between the Ethernet product and PPC". Even though no doubt everyone is agreed there are some common issues, there are very substantial differences.

THE CHAIRMAN: You did accept that there were exceptional circumstances.

MR. SAINI: Absolutely, but there is a difference between that and hoping that there will be some further negotiations and everything will be resolved. Ofcom's approach is that the PPC judgment will determine certain matters which will help Ofcom in resolving the disputes. Ofcom are not, however, convinced that that PPC judgment is going to lead to a position where the parties can sit down without intervention from Ofcom and resolve all of their differences. BT's view certainly is that the issues in Ethernet are very different in important respects to the issues in PPC.

THE CHAIRMAN: So you are saying that whether one looks at the future negotiations – the future negotiations are relied on by BT at all three of the separate stages, that they prevent a dispute from coming into existence, that they constitute alternative means and that they constitute exceptional circumstances. Are you saying that in order for any of those to be true one of the arguments which you put forward is that there have to be future negotiations which are likely to lead to a resolution without Ofcom being involved?

MR. SAINI: Absolutely, a prompt resolution without Ofcom being involved. Whether or not one puts it as a matter of discretion – in other words, was there a correct discretionary decision by Ofcom or whether this Tribunal was considering the matter afresh – it is hard to have any confidence, given the dispute, and we have only looked at Ethernet so far, we have not even looked at NCCN, and given the way that the parties have set themselves up, it is hard to imagine that these further negotiations are going to be conducted in a way which will lead to a prompt resolution.

Can you put that away and then take up briefly the NCCN bundle. I am going to show you again – it is bundle 3 of NCCN – the nature of the disagreement. Would you go, first of all, to EE's correspondence at tab 23, which is a letter of 19th July 2010. All I am going to show the Tribunal is what the communications providers were asking BT to do and BT's response, rather than going into the detailed nature of the dispute. I can pick it up at the bottom of this page at tab 23, the bottom of the 19th July 2010 letter, the very last sentence:

> "We therefore invite you a final time to consider withdrawing NCCN 1007 so as to avoid the need for a dispute reference to Ofcom."

The response is at the next tab, tab 24, the last paragraph:

> "BT will not be withdrawing NCCN 1007, BT remains willing to discuss the issues around ladder pricing …"

So EE will no doubt say that this is not the discussion they want to have, they want the thing to be withdrawn.

That deals with EE. Just to complete the EE position, if one goes to tab.25, this is a record of a meeting between EE and the representatives of BT. And if I can ask you just very briefly, just between the two hole punches "RW", who I believe is a representative of EE, he says,

> "We had reached legal impasse. We know where we stand, and understand that there is no change in position in either party".

If we look at the position of Three, one sees at tab.31, the middle paragraph, "3UK and BT discussed the issues leading" — this is the record of a conference call:

"Three UK and BT discussed the issues leading to the conference call before setting out their respective views in respect of the new charges introduced by BT. It was agreed by both parties [both parties, I emphasise] that given their respective positions to date it appeared that there was little prospect of resolving their differences, nor would there be much benefit in escalating the matter further".

And, if I can just complete this, if you look at tab.32, Vodafone, the second paragraph:

"I have still not yet received a response from BT to my previous correspondence and in particular Vodafone's request that BT's new charging structure for terminating calls to its 080/0808 number ranges be withdrawn",

and they say that the NCCN charges are unjustified and exploitative. In the third paragraph:

"[We are] left with no alternative but to conclude that BT is unwilling to withdraw NCCN 1007",

and BT's response is clear and unequivocal, at tab.34, the second paragraph, second sentence:

"BT's position remains that the approach adopted is consistent with Ofcom's three principles, and that NCCN 1007 will not be withdrawn and our expectation is that all raised invoices shall be settled".

So, although I say that it appears to be common ground between the parties that there was a lack of agreement, if I am wrong in that the Tribunal can see from just a few of these letters that both on Ethernet and on NCCN there was a fundamental disagreement between the parties. And you will also have picked up, because I have only shown you parts of the letters, that parties had exchanged views and no-one could suggest there had not been good faith negotiations.

If I can then turn, please, to the question of suitable alternative means, and it is important to focus on the statute. If you could put away the bundles I asked you to take out, please, and go to the authorities bundle, and to the legislation itself at tab.3, to the Communications Act. It is important to focus on the wording of 186-3, and we say that there is a very strong legislative indication in 186-3 that the default position will be Ofcom must resolve the disputes, and only if these rather strict criteria within 186-3 are met can Ofcom hold back on resolving the dispute and allow the other means to be used, and that is a reflection of that part of the framework directive that Miss Lee took you to this morning. I will not take you back to that now.

It is also important to bear in mind, if one looks ahead at s.188 and the procedure for resolving the disputes, the general expectation is that when Ofcom steps back and allows

someone else to resolve a dispute or allows another means to resolve a dispute, it is something which is going to happen relatively quickly; and if it is not happening relatively quickly, then it must come back to Ofcom and Ofcom must resolve it ideally within four months.

Before one focuses on the precise argument that has been made this morning, it is necessary to look at the way that BT have put their case in the notice of appeal just to be clear that certain points appear to have been dropped, so there is no doubt what this Tribunal has to deal with. Now, as I understand the position the only argument that is being pursued now in relation to suitable alternative means both in Ethernet and NCCN is that there could have been further negotiations following judgments in the PPC case and the 080 and related cases. I think that is the only argument that is being pursued in relation to both cases. Separately, in relation to Ethernet, as I understand the argument that Miss Lee mentioned just before I started my submissions, she is also arguing that a compliance investigation is a suitable alternative means. So, for both Ethernet and for NCCN it is negotiation after a judgment, and for Ethernet it is a compliance investigation.

Dealing, first of all, with the common argument which is negotiations after a Tribunal judgment, it is very important to bear in mind that there is a great danger in any administrative body deciding to defer a decision on a matter and allow there to be a further negotiation between the parties on the basis that a decision may come from another body, namely the court or the Tribunal here, at some point in the future Ofcom has no control over when the decision would come from the CAT in relation to the PPC judgment, or when it will come in relation to the 080 and related cases which are going to be heard in April. There is no certainty at all. Ofcom has no visibility as to the commitments of the Tribunal, as to what else the Tribunal has to do, what the commitments are of the members. So, one could have the position that, let us take the example of the NCCN case which is going to now be heard on 1st April, originally going to be heard at the start of this year, one may not get a judgment in that case until some point in October. One does not know. Maybe even later. The PPC judgment was expected sooner, but it is a difficult case. One does not know what the commitments are of the Tribunal that are dealing with the PPC case. So, we say as a matter of principle it would be wrong for Ofcom to wait on the decision of another body and then hope that the parties will negotiate to a fruitful solution, fruitful outcome, following that decision, because one does not know when that body's decision is going to come out.

One may have a case which this case is not, neither of these cases are, where, let us say, there is going to be a judgment next week coming out, and the CAT has announced a judgment is coming out next week. One could imagine there that, depending on what the judgment was going to resolve, depending on the nature of the dispute between the parties thus far, Ofcom could take the view that in that type of case where there is some certainty as to when a judgment is coming out, it will leave the parties to try and resolve their differences before formally engaging upon opening a dispute resolution process. So that could happen. But in this case are a million miles away from that. We had a position where there was a judgment coming out, well, there was no judgment due at all in the PPC case. One knew that there was a hearing in October, no visibility as to when the judgment would come out. And in relation to the NCCN cases, a hearing at some point in the future; and, again, no intelligence as to when the judgment would come out. So, what is being said here is that Ofcom should have waited for a judgment when there was no idea when the judgment was coming out in either case, and then hoped that the parties could resolve their differences when it was common ground between the parties, and this is a point I emphasise, that neither the judgment in the PPC case, nor the judgment in the NCCN cases would resolve all of the issues.

THE CHAIRMAN: But it is not a matter of Ofcom waiting, though, is it? I mean, is the decision whether or not to take jurisdiction under 186-3, is that, that must be a once and for all decision.

MR. SAINI: Absolutely. Absolutely.

THE CHAIRMAN: So, it is not like exceptional circumstances which can change.

MR. SAINI: Can change. Absolutely.

THE CHAIRMAN: And can wax and wane during the course of it.

MR. SAINI: Yes.

THE CHAIRMAN: But I think what is being said is that because of the potential for future negotiations after CAT's disposal of the appeals, Ofcom should have regarded those as alternative means and therefore declined jurisdiction. Now, what the position then is if it turns out that the Tribunal is going to take longer for whatever reason than was thought, or actually the Tribunal's judgment does not resolve as many things as possible I am not quite sure, because those — I am not sure whether it is open to Ofcom at some later stage to then re-open. It may be what happens is the parties just refer —

MR. SAINI: I believe they would re-submit it. But it is important to bear in mind, madam, just in relation to that, that Ofcom's decision was not that there are no alternative means, because

clearly the ability to negotiate was always in principle an alternative. The question is whether or not they are appropriate. And here it would have been irrational for Ofcom to say, and it has got to make a once and for all decision at this time of taking jurisdiction or not, it has got to say this, and I am just going to run through what it would have had to have done, and no doubt it would have been appealed by all the communications providers, it would have had to say this: "We do not know when the PPC judgment is coming out. We know there is a hearing. We have got no idea when the PPC judgment will come out, it is a complicated case. We know that there is going to be a hearing in the NCCN case on 1st April, but we do not know when the judgment is going to come out". Okay, that is common ground.

We also know as a matter of fact, because both parties agree this, that neither of those decisions when they come out will resolve all of the issues for the parties. On those facts we say it would have been truly absurd for Ofcom to say that this is a satisfactory and prompt means of resolving these disputes. In particular, how could Ofcom rationally say that waiting for these other judgments would be prompt? In order to form the view that the alternative is going to provide a prompt answer, you have to have some visibility as to when the judgment is coming out. You have no visibility, you have no control over that Tribunal. The Tribunal may have many other commitments. So, it is not a case where even if this Tribunal starts afresh and says on an appeal on the merits "We are going to consider whether or not there are suitable alternative means", we would ask rhetorically, "How can this Tribunal know or decide that there is a prompt alternative means, because this Tribunal does not know, just as Ofcom did not know in September, when those judgments would come out?"

THE CHAIRMAN: Right, but do you accept, as a matter of principle, that the potential for future negotiations can amount to alternative means that Ofcom should consider when deciding whether the 186(3) test is satisfied?

MR. SAINI: In principle, and it is going to be a very rare case because one must remember that the reason these parties – or one of them – is knocking on Ofcom's door is because the negotiations have failed. So just the mere fact of future negotiations would be a surprising factor that would permit a conclusion there are suitable alternative means, it must be something else plus the possibility of future negotiations. It might be, for example, that there may be a consultation process going on by Ofcom in relation to some particular area of regulation and Ofcom may be about to make a decision and that, together with negotiations, might be suitable alternative means, similar to the *Unicom* case that we have

seen where the factor which is said to make the alternative means suitable is a decision by a third party body where Ofcom has no control and no visibility as to when the decision will come out. We say, as a matter of principle, it would be wrong for Ofcom to decline jurisdiction in those circumstances.

In fact, one can test it this way, if Ofcom had declined jurisdiction in the Ethernet case on the basis of a PPC judgment, on the basis that the hearing was on 20th October, there may have been an expectation that the judgment would come out at Christmas or in early January but no one knows and now we are in early March, the judgment still has not come out, that is not a criticism of the Tribunal, it is a very complicated case and the Tribunal will want to take its time and we do not know what the other commitments are of the Tribunal. But it is a pre-condition of making a decision that the alternative is going to provide a prompt solution that you know that the decision of the body you are deciding to wait for is going to come out within a fixed period of time. If you do not know that you cannot form the view rationally that it is going to be a prompt alternative means.

Going back to your earlier question, madam, it is possible in another case, not this one, for negotiation to be a suitable alternative means, but it is hard to imagine that negotiation alone would be, there must be something else that is going to happen, such as a decision of another party.

THE CHAIRMAN: To revitalise the *ex hypothesi* failed discussions that have been taking place.

MR. SAINI: Potentially, or one knows that the direction of communications providers often changes completely when management changes, so something like that could happen. In this case all we have is we hope there will be a decision at some point soon in PPC and NCCN and then we will all sit down together. We do not know when the decision is going to come out in PPC or NCCN when Ofcom is making the decisions and we also know, which is very important, that in fact there is quite a substantial gulf between the parties whatever may be said in the PPC case and whatever may be said in the NCCN case; that is not just me saying that, one has seen, coming from the mouth of BT's representatives, that they regard the PPC decisions made by Ofcom, and no doubt the PPC judgment to be of limited relevance ultimately, to the resolution of the Ethernet dispute.

If I can turn to the sub-limb of the suitable alternative means argument which is now still being maintained and which has not been adjourned – this applies only to Ethernet. It has been said by Miss Lee, relying upon the points made in her skeleton, and if I can ask the Tribunal to turn those up? I have been reminded the point is in the notice of appeal, I am

so sorry. This is ground 3 and it relates to the Ethernet notice of appeal, and I believe it is paras. 41 et seq of the notice of appeal.

If I can describe what I believe the argument to be before seeking to address it. The argument is that because Ofcom could proceed against BT using the compliance processes for breach of an SMP condition that is a suitable alternative means, and the arguments that are set out 41(a), (b), (c), (d) and (e), as I understand it – and Miss Lee has made this plain this afternoon – these are all generic arguments, and by that I mean they are not arguments she puts forward by reference to the specific facts and issues that arrive in the Ethernet dispute, if one looks at each of those arguments, and I do not believe there is any dispute about it, the argument essentially is that when what is in issue is the breach of a condition, as is in issue in the Ethernet case, the uses of sections 94 and 103 will always be suitable alternative means.

If one looks at each of the arguments in 41(a) to (e) none of them are arguments that say there is something special about this particular of breach of licence condition. If I can run through them to make that point good ----

THE CHAIRMAN: Just before you get to that, is this correct – and I probably should know the answer to it – the PPC preliminary issues judgment dealt with the question of whether the existence of the compliance route ruled out the application of s.185 that they had to be considered mutually exclusive.

MR. SAINI: Absolutely.

THE CHAIRMAN: And now the question is, having rejected that the Tribunal is now being asked; "All right, we accept there are two parallel jurisdictions, but nonetheless the existence of the compliance route is an alternative means for 186(3)"?

MR. SAINI: Yes, but crucially by reference to the facts of the PPC case, there are complicated arguments in the PPC case, for example, involving the issue of how do you work out how much to refund in that particular case, because there is a particular way in which PPC circuits are charged for, so there are some very fact specific arguments as to why in that case it is said by BT that, as a matter of one could say discretion, when one comes to section 186(3) that the compliance route is the more appropriate route. But when one looks at the arguments that Miss Lee relies upon in para. 41 they are not fact specific, they are all arguments which are all based upon the inappropriateness of using a dispute resolution process to investigate a breach of condition. If I can run through them, 41(a) is a point about the need for the procedure to be swift, that is a generic point. 41(b) does not really go anywhere, it just refers to the guidelines. 41(c) the investigation is going to be more limited

in a dispute resolution case compared to a breach of condition compliance investigation. 41(d) there are human rights problems, and 41(e) that a dispute resolution only affects immediate parties and an investigation into a breach of condition under compliance processes affect the whole industry. So they are all generic arguments, but what these arguments come back to, an there is a serious echo of the arguments made in the preliminary issues judgment in the PPC case, if these arguments are right effectively it is being said that in a case of a breach of condition you can never rely upon a dispute resolution process, you have always got to find that there are appropriate alternative means. I say there is an echo of the arguments because I will show you very briefly part of the decision in the PPC preliminary issues judgment, where exactly these arguments were made and rejected by the Tribunal. One sees that back in the authorities bundle at tab 7, and if I can ask you to go to p.33 and para. 101, perhaps picking it up by looking at para. 100:

> "It was BT's case that historical disputes were more appropriately dealt with by way of Compliance Process than the Dispute Resolution Process. OFCOM and the Altnets, by contrast, contended that the mere fact that there were multiple routes by way of which the same, or similar, result could be achieved did not militate in favour of narrowing OFCOM's jurisdiction under section 185."

Then the Tribunal says, as Madam, did early this morning:

> "In our view, if it had been intended by Parliament to confine the Compliance Process to certain disputes, and the Dispute Resolution Process to other, different, disputes, then this would have been clearly stated in the 2003 Act. Instead, no such delineation between processes is evident on the face of the 2003 Act."

It goes on to say that there is a substantial parallel jurisdiction at 104, and crucially at 107 exactly the argument that Miss Lee has made at paras. 41 and following were dealt with by the Tribunal and found to have no force. So matters such as how complicated the disputes are, the fact that dispute resolution is meant to be swift. So what we see here, madam, is that para. 41, these are essentially arguments which suggest that in every case of a breach of condition you cannot use dispute resolution, but that cannot be right because, as the Tribunal pointed out in that preliminary issues judgment, there is a parallel jurisdiction. So there must be some cases in which a breach of condition is alleged and that is dealt with by the dispute resolution process.

If Miss Lee had some argument that there was some specific fact in this particular case which made dispute resolution inappropriate then we will deal with that but she has

candidly put her arguments on what I call a 'generic' basis because her argument relate to every single breach of condition.

While I am in the notice of appeal can I just make sure that I have dealt with para. 42 of the notice of appeal, and I only say this out of an abundance of caution because I do not think this argument has been pursued in writing, in skeletons or orally and I just want to confirm that it has not been pursued any further.

In para. 42 there was an alternative argument, this is a ground of appeal that effectively if Ofcom had to accept the disputes they should have summarily determined them. In other words, it should immediately have closed them. I do not understand that argument to be being pursued now.

MISS LEE : I intended to say that I was relying on 40 to 42 and those are the points that had been made in PPC including that point.

MR. SAINI: I am so sorry.

MISS LEE: Again it is a point that is going to be dealt with in the PPC judgment as I understand it.

MR. SAINI: Again, the draft of the PPC judgment has a lot to deal with, I am not sure if they are going to deal with that one as well. If the point is being pursued I can deal with it quite shortly. It would have been for Ofcom to decide that they were not suitable alternative means and to accept jurisdiction over a dispute and then to determine it without investigating the dispute, that is what is effectively being suggested there, that it should have accepted it and then just closed it on the basis it was going to start a compliance investigation.

In our submission it is not simply possible under the domestic legislation to accept a dispute and then just to basically say "We are not going to now decide it", one does not know how that fits with the legislation.

If I can deal with the fourth point, which is the question of exceptional circumstances, and one needs to bear in mind again the dates, and if I just remind everyone of the dates, please.

In relation to the PPC case, Ofcom decided in the Ethernet case to accept the disputes on 13th September, after a period of about a month of correspondence. On 1st October Ofcom decided that it would extend time for a determination pending the PPC judgment because crucially on 20th October the PPC Tribunal was due to begin. So on 1st October they knew that in about three weeks' time the PPC Tribunal would begin and therefore one could expect a judgment within a reasonable time thereafter. Ofcom's view was it would benefit

from that judgment. That was the reason why in the Ethernet case they decided they would take longer than four months.

By contrast in the NCCN case Ofcom made its decision on 11th September to accept the dispute and on that day it decided also effectively that it was not in a position to decide there were exceptional circumstances and that is because as at 11th September the O80 and 0845 and 0870 cases were not due to be heard until January 2011. It is not irrational to decide that we will wait for the judgment in a case which is due to begin on 20th October, but we will not wait for a judgment in a case which is due to begin at the start of the next year; that is the crucial distinction between the two. Whether or not one puts it in terms of a merits appeal, or giving Ofcom some form of margin of appreciation in making decisions like this, we say it is hard to impugn that decision. It is hard to impugn a decision that in September we do not really want to wait until after a judgment in a case which is not due to begin until January, but we will wait for judgment in a case which is due to begin the very same month, in October. That is essentially what happened here and that is a crucial distinction.

If the Tribunal wishes to decide this particular issue on the basis of what test one applies reviewing this type of essentially administrative decision then we would pray in aid the comments of the Tribunal in the *Vodafone* case, they are set out – I will not take you to them – it is tab 12 of the authorities bundle, and if I just may read it, para. 46. After referring to the *Freeserve* case - perhaps I will just read the paragraph:

> "As noted by the Tribunal on numerous occasions (see, for example, *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 5), the way in which the Tribunal exercises its jurisdiction is likely to be affected by the particular circumstances under consideration. What the above judgments clearly demonstrate is that the Tribunal may, depending on particular circumstances, be slower to overturn certain decisions where, as here, there may be a number of different approaches which OFCOM could reasonably adopt. There may be a variety of entirely legitimate reasons why the amendment of the current system of number portability in the UK is a desirable aim in the pursuance of OFCOM's statutory duties …"

And then I will not read any more. So in this type of case, if the Tribunal wants to apply a particular approach to the merits review jurisdiction one can see that Ofcom's approach is one which is rationally available to it, one could take different views – it is certainly not irrational or improper. I would go further and actually say that it would have been a

difficult decision for Ofcom to justify, to simply hoard off progressing in these disputes until January 2011. In fact, one knows, with the benefit of hindsight it was the right decision because in fact the hearing in those cases, which was originally slotted for January 2011 is now not due to begin until 4th April 2011. There is certainly no error of law there. And we certainly do not accept that there is any identified error of principle in the exercise of discretion.

Madam, unless there are any further issues, can I just take some instructions as to whether there are any particular further points? (After a pause) There is just one final point, which I think is worth making, and that is Miss Lee has sought to draw a distinction between the approach taken by Ofcom in relation to exceptional circumstances as regards Ethernet, compared to exceptional circumstances in the NCCN case, and the only point to make is that this Tribunal has to decide objectively whether or not exceptional circumstances exist on the facts of a particular case, not by reference to what was done in another case.

Unless I can assist you any further?

THE CHAIRMAN: On the point that I raised with Miss Lee about the different disputes that some of them came in first and others added on, and I am not sure whether it now arises given the way the arguments have been narrowed slightly, but if there is anything you want to say ----

MR. SAINI: Oddly enough this issue arose, in a way in the PPC case, because in the PPC case there were many complainants, and they did not all make their complaints at the same time and their disputes were not all accepted at the same time, and as I understand the argument madam, it is that if, let us say, by way of example, Sky makes a dispute reference and it covers all of the relevant issues in Ethernet, and then the next week Virgin makes a dispute reference, would it be possible for Ofcom to say to Virgin: "We would like you to wait, and we are not going to progress your dispute for the moment because we are going to deal with the first dispute, which is Sky"?

THE CHAIRMAN: No, that was not the point. I think it may not now be relevant, now that the point about the state of the existing negotiations has fallen away. I think the point was more if you had to show that all avenues of commercial negotiation had been exhausted, suppose that EE referred a dispute and said: "We have been arguing with BT all along for ages and we have got nowhere and so we are referring the dispute", could then Virgin come along and say: "We have only just raised this with BT, we have not had many meetings with them, so we have not exhausted all avenues, but we should not have to jump through that hoop because it is quite convenient for you to deal with our dispute which is exactly the

same as EE's dispute, and you clearly have jurisdiction over their dispute, so there is no point saying: 'You ought to be required to go away and negotiate further with BT'." It was more that, but I think the point may fall away now that the major ----

MR. SAINI: Yes, madam, I think it does fall away because everyone had reached an impasse.

THE CHAIRMAN: Yes, and everyone is not going to be able to enter into future negotiations after the CAT has opined on these various matters.

MR. SAINI: That is correct.

THE CHAIRMAN: Just wait one moment.

(The Tribunal conferred)

MISS POTTER: Just one question really about the implications of the guidelines for the ability of Ofcom effectively to decide that it will not take jurisdiction over a dispute. What I am not quite clear about on the basis of the relatively circumscribed wording of the Statute is whether Ofcom considers that in certain circumstances it would be saying there is not a dispute, or whether it is saying we would be able to say that we are not taking jurisdiction over the dispute?

MR. SAINI: I believe that Ofcom does not have the ability – if there is a dispute Ofcom has to accept it, it does not have the ability other than the alternative mean section, but that section is only engaged when there is a dispute.

MISS POTTER: I am just looking at 44 onwards and also 13, and 44 saying Ofcom will only accept a dispute where a certain set of circumstances are fulfilled. So in the situation where the company is not in a position to provide a statement that it has used best endeavours to resolve a dispute through commercial negotiation therefore Ofcom would presumably say – well, I am not sure what it would say, would it say that there is no dispute, or would it ----

MR. SAINI: If they cannot provide that statement then there may be a question mark as to whether or not there is a lack of agreement between the parties. If they cannot show there is a lack of agreement there is no dispute.

MISS POTTER: So effectively we are saying that whether or not best endeavours have been used to resolve the dispute might well go to the question of whether or not there is a dispute?

MR. SAINI: Absolutely, because it will indicate whether or not there is truly a lack of agreement.

MISS POTTER: Because I think when you were talking about the implications of recital 32 I understood you to take a slightly different position on that, but thank you.

MR. SAINI: (After a pause) Yes, thank you very much, madam.

THE CHAIRMAN: Yes, Mr. Woolfe?

MR. WOOLFE: Thank you, madam. I believe according to the timetable Three and I have 45 minutes to divide between us, I will attempt to be brief, I should think I will be in the region of 20 or 25 minutes and I will leave the remaining time for Mr. Pike.

Madam, we submit that three issues arise in this appeal which Mr. Saini has gone through. First of all, was there a dispute? Secondly, were there any appropriate alternative means? Thirdly, the issue of exceptional circumstances.

I understood Miss Lee to say there were two issues, first of all, whether Ofcom was obliged to accept the dispute and, secondly, if so were there exceptional circumstances allowing them to put it on hold in some way. We would just say the Tribunal should exercise some caution in accepting that categorisation because we do submit, and Ofcom submits as well, that even if Ofcom is not obliged to accept a dispute, if there is a dispute, even if it concludes there are alternative appropriate means, it still retains a discretion to go on and take jurisdiction over the dispute.

There is no cross-examination on this appeal. There is a considerable amount of evidence from Mr. Best and, on our side, from Ms. Robyn Durie. There are some conflicts between those points of evidence, and we did agree not to cross-examine because they were not relevant and we did not think it was proportionate to do so. I would ask the Tribunal, however, to read Robyn Durie's witness statement at paras.5 and 20-24 with some care, because there are some conflicts on the evidence. I do not think it is anything which the Tribunal will need to deal with in reaching its decision, but we are anxious that certain points which we do not accept in Mr. Best's evidence accidentally get incorporated into the Tribunal's judgment without taking account of the fact they may be disputed in some way, so it is actually to note the conflict in the evidence.

Madam, on the question of whether or not there is a dispute, I think it is convenient to deal with the facts first, and we of course would draw particular attention to the facts of our case. We say it is necessary to distinguish very clearly between two issues which the parties were negotiating over, or not negotiating over. The first was what charging structure should apply at all in the NCCN 1007 case. The first was what charging structure should apply, so what price term should there be between the parties, and the second issue was on the assumption that that pricing were to apply, where would a particular MNO sit on it? We say that the second one is clearly a logically subsequent issue. There is no point talking about where you sit on a pricing ladder until you agree that this is the ladder which will apply. Even if you do talk about it, it can only be on a hypothetical basis. It is not enough

to enable you to actually reach terms of business on which you can do business and send each other invoices which will be paid. I believe that is clear as a matter of logic.

If I can then just take the Tribunal to the dispute which was actually referred by Everything Everywhere, the dispute submission is in Ofcom's defence bundle in the NCCN 1007 case in DF/N, tab.9 and if you turn over the first page it gets you to, it is either p.1 or p.2 depending on which numbering you are using, it is the first page with actual significant text on it. At the bottom of that page, para.1.9:

> "EE's position, in summary, is that BT should not be levying any termination charges for calls to 080 numbers, that there should be no link between BT's wholesale charges and EE's retail charges"

So that is the whole principle of the ladder pricing which BT was purporting to apply:

> "And that BT's 'ladder' of tiered, variable charges … is inherently discriminatory and unfair … is impracticable and unworkable and that there are wider implications … EE contends that BT is dominant".

Further, at 1.10:

> "Rather than EE having to pay any termination charge … EE contends that BT should make an origination payment to EE for any calls to 080 numbers",

and so on. And, down to 1.14:

> "EE requests that Ofcom resolve this dispute by directing BT:
>
> 1.14.1 To withdraw NCCN 1007; and [the whole thing should go]
>
> 1.14.2 Not to introduce any similar charging arrangements …
>
> 1.14.3 To introduce an origination payment …",

and so on. I mean, it is a fairly wholesale attack on NCCN 1007. EE did not refer any dispute as to where it should sit on BT's ladder of termination charges. So, any negotiation that could take place with respect to that issue of where one would sit and the hypothesis that this would apply is simply not a matter which fell within what we say the dispute is. And so any issue about negotiation about that falls entirely outside that.

Now, at the opening of her submissions, Miss Lee said that BT has withdrawn the argument that the parties could have entered into discussions about the principles of ladder pricing which could have led them to settle the main appeals and has confirmed they will not be relying on any submission that it was willing to negotiate prior to the delivery of judgment in the main appeals on a question of whether or not the charging structure in NCCN 1007 should apply at all. So, on precisely the issue which we referred as a dispute, BT has said they are not relying on any submission that they were willing to negotiate on the point, and

the Tribunal should therefore approach it on the basis that BT was not willing to negotiate on that point.

If I can just illustrate briefly, I think in the same bundle that you have got in front of you, turn to p.42 of that dispute submission it is in the same tab, I think it is p.42 of the numbering, this has been added later on, so it is the bottom right hand side of each page. Just briefly note that this is EE's letter on 5th March, two days after NCCN 1007 was issued, and that is T-Mobile's letter objecting — this is the start of when parties begin to talk about it, it is virtually as soon as it is out. The discussion carries on for quite some time. I will take you to another document elsewhere, but it is convenient to proceed with this. Page 83 of the same bundle, so there is a considerable amount of discussion, you can read through the to-ing and fro-ing, but given the time I will not take you to it now.

So, right at the end of this process of discussion, a letter from BT apologising for the length of time to give a formal response. At the second paragraph down:

"I simply want to state that: it is not BT's intention to withdrawn NCCN 1007".

So, it is quite clear that, on the documents, that BT was not willing to negotiate. It is simply stating it is not willing to withdraw the charging structure.

Also in this bundle, just over the page on p.84, this is a note of a meeting that took place on 23rd July. Mr. Saini took you to BT's note of this meeting, which is at bundle 3 of BT's appeal at tab.25, but there is no need to turn it up now. I will just draw your attention to para.8 on the second page, and there is an agreement that further discussion of these matters would not be productive. "The parties' respective positions were well known and understood and were unlikely to change", and "both parties were awaiting Ofcom's decision in the 0845 dispute with interest".

I have taken you to all the documents in that bundle, I think, for the moment. So, if you could put that away, and ask you to take up bundle 3 of BT's documents in the NCCN 1007 case, 1171. Perhaps the first point to take you to here, madam, I referred you to it earlier on, in tab.2 of this bundle you have the determination in the —

THE CHAIRMAN: Is it bundle 3?

MR. WOOLFE: Bundle 3 of the, I am sorry, madam, in that case bundle 1. Keep bundle 3 because you will be needing it in just a moment. Keep that on one side. I apologise. And take out file 1 in that case. At tab.2 you have Ofcom's determination to resolve a dispute between BT and the MNOs in relation to 080 charges, this was the one in relation to NCCN 956. The declaration that Ofcom made, the actual determination binding on the parties

starts at p.89 and goes on to pages 90 and at 2192, the recitals, you do not need to read now. Page 90 at the bottom of that page is the declaration that Ofcom made:

> "It is hereby declared that the parties should revert to the trading conditions that applied before NCCN 956 came into effect",

And then requirements to adjustment for over payments and so on. And then just to explain what that means, BT had issued NCCN 956, Ofcom told them to withdraw it and to revert to the trading conditions which had applied previously, that being that no termination charge was payable in respect of these calls.

BT complied with that direction for all of 27 days before it issued NCCN 1007. If you look on Miss Lee's chronology this was issued I think on 5th February. And on 4th March BT issued NCCN 1007 which moved the parties again away from the trading conditions to which Ofcom had ordered that they should revert.

THE CHAIRMAN: This is resolving NCCN 956.

MR. WOOLFE: That is right.

THE CHAIRMAN: But this is not the one that EE has appealed.

MR. WOOLFE: No. BT appealed this. We appealed against the other determination, the one that was issued on 10th August, 0845.

THE CHAIRMAN: Yes.

MR. WOOLFE: Madam, if I can then take you to tab.15 which is in bundle 3 (I am sorry, that is why I had you take it out before) this is a note of a meeting between BT and Orange, which we submit is indicative of the attitude that BT was taking towards — I would ask you to look at the final page of that note, the third page of it. The third paragraph on the page, the second bullet point:

> "Orange asked whether should Orange refer NCCN 1007 to Ofcom BT would agree that the parties are in dispute. Stu [which I think from the front is Mr. Stu Murray] confirmed that a dispute exists between Orange and BT but is not sure whether discussions are exhausted. Steve reiterated that BT is prepared to negotiate on the size and shape of steps, the Orange position on the ladder, etc. etc. Orange… [felt that] any shape ladder is non compliant … Stu laid out that if that is the Orange position and Ofcom take a dispute, BT will move to stay since the Orange dispute is based on an Ofcom decision which is itself subject to an appeal".

So, BT were using, even at that stage, the existence of another, of an appeal, as an excuse to prevent the parties referring a dispute. And then, three more bullet points down:

"Discussion then exposed [I would emphasise this is BT's own note of the meeting] that if Ofcom accepted a referral and did not stay, finding in favour of Orange, BT would simply notify another pricing variation".

And we submit that is significant to the way the Tribunal should view this attempt by BT simultaneously to, having been ordered to revert to other trading conditions, simply to issue a new NCCN to force these trading conditions through and then try and use the fact that it has appealed Ofcom's earlier decision to block any attempt to refer a dispute to Ofcom. We submit that it would be wholly wrong for the Tribunal to allow BT to take that kind of approach.

Madam, I can be fairly brief on the remainder of this. As regards the questions of law, you have already heard Mr. Saini's submissions as to the meaning of the term "dispute", and we support those submissions.

We do not say, however, that it is necessary to engage in any extensive process of construction. Construction is for a situation where a term in a statute is capable of bearing a series of shades of meaning, and the Tribunal needs to decide between those shades of meaning in order to determine the case before it. We say on the facts of these cases, where BT has admitted in both cases that it was not willing to negotiate, it is plain that there was a dispute on any reasonable understanding of the law, and therefore there is no need for an extensive process of interpretation. The Tribunal should be very cautious about accepting a test that is put forward in circumstances where it does not need to engage in a process of construction. It is at risk of legislating in the abstract rather than actually being presented with a problem case on which it actually has to decide and which can elucidate the Tribunal's thinking in that regard.

THE CHAIRMAN: So you suggest that we decide this – I do not think that quite gets you home in the way that the point has now been put by Miss Lee, does it, because she now accepts that current negotiations were stalled, I think that was the word she used. She says one still has to interpret the word "dispute" to consider whether further negotiations after the Tribunal has handed down its judgment prevent there being a dispute. I do not think we can entirely interpret ----

MR. WOOLFE: On that, madam, with regard to the facts that I have already taken you to, you can see the problems that that kind of approach will lead to, and it will enable a party to block off access to the dispute resolution procedure simply by appealing against an earlier determination in these kind of circumstances. So there are problems on the facts if the Tribunal is concerned about the pragmatic points.

As regards the test put forward of all avenues of negotiation, first of all, we make the point that it is not the ordinary meaning of the term, in that one can say that the parties are negotiating to resolve their disputes. In that sense, the fact that you can still negotiate does not prevent there being a dispute.

The Directive itself, in Article 20(1), refers to mediation as an alternative means and mediation is little more than a structured form of negotiation. Plainly, if all avenues of negotiation have been exhausted, it is hard to see how mediation can constitute an alternative means to get you home. So the wording that the Directive itself contemplates, the fact of some possibility of negotiation being there, does not prevent a dispute arising. It may go to whether or not there are appropriate alternative means, but it does not prevent it arising.

We say also it would involve a very subjective test. It does involve the kind of examination of the documents and what the parties said and did, which is not appropriate to try and second-guess all the time what Ofcom decided and what the parties are doing.

Madam, just to conclude on that point, we say that on the facts and bearing in mind that some possibility of negotiation does not prevent there being a dispute, BT's case is simply unarguable on this point. Negotiation is an alternative means. It is then for Ofcom to assess whether or not that is an appropriate alternative means on the facts of a particular case, and that is a way of getting round all the difficulties which Miss Lee pointed you to.

Turning to that point, and this is perhaps the key point which you raised, madam, what happens if no dispute can be referred, and you asked does it affect financial relief which the complainants can get their hands on. The short point is that we do not know. Miss Lee referred to the PPC case on that. There is a difference here between them. In PPC the parties were relying historically on an SMP condition that always applied. So, although they are asking for relief as to the past, there is no dispute but that the condition always applied to BT and it had to comply with it.

In our case, NCCN 1007 was issued in March 2010. The charges began accruing under it, according to BT, and we referred a dispute on the point. We would say that if we could not refer a dispute until later, we could also refer it in respect of the earlier period. We do not know what BT's stance on that would be, and we do not know what Ofcom's stance on that might be as well. If we did not refer a dispute they might say we had consented to NCCN 1007 in that earlier period of time and they would refuse to go back and look at it. So, from our point of view, there was significant uncertainty as to the effect of what would happen if we could not refer a dispute, although we would say that we could always go back.

We say as regards what alternative means are appropriate ----

THE CHAIRMAN: You are saying that it may be the lowest that one could put it at is that if you do not promptly refer a dispute when you want to challenge an NCCN, when you come to then later referring the dispute, and suppose you win then, when you come to ask Ofcom to make an order under whatever section it is to backdate their finding right to the start of the charges under that NCCN, you may be in a more difficult position then to try and get that degree of retrospectivity than if you had challenged it straight away?

MR. WOOLFE: We would submit in that situation that we could go back, and I am certainly not saying that we could not. I am simply saying that we have no comfort from BT whatsoever that we could. Miss Lee said that if BT were to await the outcome of the main appeals and were then to issue an NCCN at that point, the MNOs presumably would not agree to backdating it. We would not, that is right, but the same point works both ways in that if we waited until after the main appeals to try to refer a dispute to Ofcom, there is no guarantee at all that BT and Ofcom will accept that the dispute should go back over that period. It is not the same situation as in the PPC where the SMP condition should always apply ----

THE CHAIRMAN: Yes, I understand.

MR. WOOLFE: This is a point as to why there are very good reasons why we should be able to refer it and Ofcom should resolve it. In the meantime these charges are accruing. They are being withheld, but this is a point which is a matter of uncertainty for Everything Everywhere. The charges run to millions of pounds and that does raise an issue for everybody. That is a really good reason why Ofcom should get on and resolve it quickly. We do refer to the purpose of Articles 20.1 and 20.2 of the Framework Directive. The purpose of these are to provide a speedy dispute resolution procedure to undertakings, and we say that it is important that the alternative means be prompt or timely in the different ways in the Directive and the Act. We do support the submission made by others as well that there must at least be some prospect of the alternative means resolving the dispute within four months. It does not necessarily have to be guaranteed at the outset that they will do, but if you bear in mind the structure of the provisions where if they do not produce a resolution after four months the parties can refer it back to Ofcom, and then Ofcom is under an absolute obligation to resolve it in four months thereafter. It is Article 20.2 of the Framework Directive, and it makes no provision for exceptional circumstances justifying Ofcom in taking longer than four months. That is an eight month timescale in total.

If you look from September 2010 when this dispute was accepted by Ofcom, eight months on from that takes you to the middle of May 2011. It seems to me quite unlikely that the

main appeals in that case, that judgment will be delivered by 11th May, and negotiations will take longer. You can see that the length of timescale that is being talked about is far longer than that four plus four months which you see in the Directive. That must be a relevant consideration in deciding whether there is a prompt and timely means of resolving the dispute. This disposes of the point as to whether or not negotiations later can constitute an alternative means. There is no bar on constituting alternative means, but it depends on the facts. On these facts they are not on case 1171.

There is also the point that it is not clear what the outcome would be. One of our very challenges in the main appeals on EE's own appeal is precisely that Ofcom's analytical approach has left the whole matter to be rather uncertain and the parties unable to agree on the charges that are to apply. That is why they have appealed Ofcom's 0845/0870 determination. If the Tribunal were to uphold Ofcom's approach it may well be that the parties then find themselves again deadlocked and have to refer further disputes to Ofcom. It really is not at all clear that negotiation is straightforward thereafter.

I will be very brief. Just on the exceptional circumstances point. We do say that whether or not there are exceptional circumstances only goes to whether Ofcom is compelled to resolve the dispute within a four month period. Under Article 20.1 of the Framework Directive they are still obliged to resolve it in the shortest possible timeframe. You will see there are good reasons why there is no exception to the "shortest possible", because it is possible that you can get on and do it.

Miss Lee raised the point as to whether or not there is an appealable decision in respect of exceptional circumstances. May I just point out that this is a slightly odd case. The normal case for challenging exceptional circumstances, if there were one, would be that Ofcom decides there are exceptional circumstances and it is going to take longer and somebody comes to the Tribunal wanting their justice not to be delayed and they say, "No, the circumstances were not exceptional, Ofcom should have pressed on and considered my dispute". One can see that the Tribunal would want to look at it fairly closely in those circumstances to say whether or not Ofcom is delaying unduly. It is very odd for BT, Ofcom having decided that it is capable of resolving the dispute within the four month period, to turn up and try and appeal that and say to Ofcom, "You are wrong, you cannot and should not resolve that in the four month period given the overriding purpose of the Directives". When thinking about what standard of review to apply one should have regard to the facts of this case, which is that if Ofcom is making a judgment that it can proceed, it

has got the resources to proceed and can deal with the matter, it is odd for the Tribunal to second-guess that kind of judgment on ----

THE CHAIRMAN: Are you taking a point about the existence of an appealable decision?

MR. WOOLFE: No, madam, it is simply that Miss Lee raised it in the context of whether there is an appealable decision. I just wanted to say that it is an appealable decision. How intensely the Tribunal may want to scrutinise it may depend on the circumstances. In the ordinary case where somebody is wanting their justice not to be delayed there may be good reasons to scrutinise more intensely than here when really, Ofcom having decided it can proceed, one can see why that is a decision which Ofcom knows what resources it has, what information it may need from other people, what judgments it may want to have a look at. Having decided it can proceed, it is odd for the Tribunal, in the light of the purpose of the Directive, to intensely scrutinise and say that it should not have proceeded.

Simply to wrap up, madam, BT began their appeal with an appeal to convenience and the resources available to them to respond on this dispute. We simply say that they did not have to notify NCCN 1007. They have been ordered to revert to the conditions which applied before NCCN 956 – that is no termination charges. They chose within 27 days of that to issue a change notice imposing charges. It has indicated that it proposes to ignore any further determination that Ofcom may make, and it also seeks to rely upon its appeal against Ofcom's earlier determination to stymie us in referring a dispute. We say that is wholly unattractive behaviour on the part of BT, and we would submit that the Tribunal should not allow it to behave in that fashion.

Thank you very much, madam.

THE CHAIRMAN: Thank you very much, Mr. Woolfe, that is very clear. Who is going next?

MR. PIKE: Richard Pike for Three, madam. As Mr. Woolfe said, we have agreed to split 45 minutes between us and I would doubt that I will need more than 20 minutes. I have structured my submissions in the same way as I did in the skeleton argument, so I will be covering four areas: first of all, the policy arguments that BT has raised for its interpretation; secondly, I will move on to the first ground of appeal, the question of whether there is a dispute, then the second ground of appeal, the question of whether there are alternative means available; and then, thirdly, just very briefly to look at exceptional circumstances.

Just moving on to the policy considerations, madam, you have heard Miss Lee say that her interpretation of s.185 is to be preferred because it would save resources for Ofcom and the

parties. Madam, we say that that is disingenuous and unrealistic and also fails to take account of more effective tools available to make sure that resources are not wasted.

We say it is disingenuous because, as Miss Lee noted earlier, we do say that this appeal is using rather more resources than the process that BT is trying to stop. Miss Lee says, "Well, this appeal is not involving lots of experts' reports", and in particular in the 080 appeal I think she said we are in the high teens now in terms of experts' reports. The first point to note on that is that almost all of those reports have come from BT and very few of them are from the other parties. Also, in any event it may not involve experts' reports here before the Tribunal but equally we do not have whole teams of external solicitors and barristers involved in the dispute process before Ofcom, so it is swings and roundabouts. Certainly, this is not a cheap exercise and this is evidenced I think by the number of lawyers sat here in the room today.

The other point is to address this question as to whether we should have held off as MNOs from referring the dispute until after the appeal was resolved. We do say it is a bit rich of BT to say that we should have waited until the appeal was resolved when they did not wait themselves before issuing the NCCN 1007. Their response is that: "We had to do that to protect our financial position". We do not argue with that, we say: "Fine, you have your own commercial self-interest to look after but so do we as MNOs." Mr. Woolfe has already said there is a great deal of uncertainty about how retrospectivity works in the context of dispute determinations. All I want to add to that is whilst unfortunately I do not have the judgment here today, if the Tribunal refers to the termination rates core issues judgment there is discussion in there about the idea that there should ordinarily be retrospectivity up to the point when a dispute arose. It does rather beg the question: when did a dispute arise? Does it have a different meaning there than in the context of allowing the dispute to be referred? I think the obvious point is that there is certainly a good chance it would have the same meaning. If a dispute has not arisen then arguably we do not get retrospectivity to that point.

THE CHAIRMAN: I think in that case we did back date the payment to the date when the NCCNs came into effect, rather than the date that the disputes were referred to Ofcom, and do not recall there being any debate about that, but I may be wrong, but the fact that it went by without remark may have been the product of a slight weariness at that stage in very lengthy proceedings. Yes, but I think the most one can say is that it is not clear how that provision would work if there were a period of apparent acquiescence with an NCCN followed by the referral of a dispute.

MR. PIKE: Absolutely, madam, I certainly accept that it was not the subject of submissions, but if you just look at the face of the judgment it does say that the reason it was backdated to when the NCCNs were issued was because that was when the parties were no longer in agreement. It is the same test for whether there is a dispute that can be referred to Ofcom, and a decision here today could affect that. But I take the point, madam, that at a bare minimum we say there is uncertainty there and therefore it is quite justifiable for the MNOs to refer a dispute to protect their position.

Also, madam, and I have referred to this in the statement of intervention, there is uncertainty about whether the MNOs would even be able to refer a dispute after these appeals are resolved, because there is this proposal from the Government that potentially s.185(1), which is the relevant section in this case will be eradicated in its entirety from some point in May. If that happens, then it is entirely possible that Three and the other MNOs would have no redress whatsoever, that NCCN 1007 would just remain in force indefinitely. We say certainly whether or not that does happen we are entitled to refer a dispute to protect our position on that.

In any event, we do say that BT's argument that this appeal will save resources is unrealistic because as this appeal demonstrates even if you can stop people referring disputes you are going to have satellite litigation around that, and you are going to have an investigation as to whether or not the negotiations have been exhausted. Miss Lee's response to that is that you do not need to look at it in much detail because this is a special case and I am going to return to that in a moment. But even if it is just a matter of looking at whether there is an overlap between the negotiations and a pending appeal, you still need to look at them enough to understand to what extent there is an overlap, and we say you still get into the issue there of without prejudice correspondence, and possibly shades of the meaning, interpretation of the correspondence, so we say there is still scope for dispute even on that basis.

Thirdly, we do say that BT's interpretation is not necessary to save resources, and this is the point that Miss Lee referred to about the availability of costs sanctions. Miss Lee's response was to say that Ofcom could not recover its own costs unless the dispute referral was vexatious or frivolous, and that that would not be the case if there was indeed a dispute. I think there is a certain circularity to that anyway, but what I would say is that s.190(6) gives Ofcom the power to order the payment of the other side's costs in any event, so you still have that available as a sanction. The fact that it arrives at the end of the process we say makes no difference because that is just the same as civil litigation generally and it still

has a coercive effect. The awareness that that could happen at the end, and in future disputes the awareness it has happened before is a powerful tool and we would say that there is recognition of that in the BIS proposals to give Ofcom even more powers to award costs to try to persuade people to go down the ADR route, so it all flows together.

With that, madam, I am going to move on to the second point, which is BT's first ground of appeal and whether or not there was a dispute. The first submission I want to make is regarding BT's reliance on Ofcom's dispute resolution guidelines. I am not going to say very much on this because you have already heard from Mr. Saini on this extensively, but there is one point that it is easier for me to say I think than Mr. Saini, although he has said it to some extent, which is of course that Ofcom may have been wrong in its guidelines. The guidelines had no particular legal force, and there was no incentive for any party to appeal it because it makes good sense anyway, and possibly there was no power to appeal it, it is not an authoritative document.

In any event, and I did say I would return to this, BT's efforts to get around its issues with reference to without prejudice correspondence and the idea of there being a minute examination of negotiating correspondence has resulted in BT narrowing its case even further than was the case in the skeleton argument, so I think we are now in a position where its case is not even supported by the guidelines because it is now not saying that all avenues of commercial negotiation must be pursued in every case. Miss Lee has recognised that that is problematic because it does involve exactly the kind of trawl through the correspondence that the Tribunal in *Orange* said was not appropriate. What she says is that this is a special case where there is an overlap between a pending appeal and a dispute that has just been referred. But you do not have any support for that even in the guidelines, let alone in the directive or in the Communications Act, even if you can refer to a test in the guidelines, of all avenues of commercial negotiation being exhausted or set out in the Directive about there being good faith negotiations that is an across the board test, it is not something that is narrowed down to this kind of special situation, and we say that gives a further indication that there is certainly no expectation that you would have a different test where there was a pending appeal, which we say is a clear indication that there was a dispute and this is not a basis for holding that Ofcom could not look at this matter.

With that I am going to move on to my third point on alternative means. Really what I wanted to add on this was to just look a bit more at the wording of s.186(3), so perhaps if we can just turn that up. It is behind tab 3 of the authorities bundle.

We have had a lot of discussion about whether the alternative means said to exist in this case would be capable of prompt resolution of the dispute and we support what Ofcom has said on that, but we would also like to draw attention to the exact terms of subsection (3)(a) where it says that unless Ofcom considers –

> "(a) that there are alternative means available for resolving the dispute."

And what we want to emphasise is it is "are" in the present tense, and "available" clearly means currently available. We pressed BT to clarify what it was that they said the alternative means were in this case. If we can turn to para. 87 of BT's reply and skeleton argument behind tab 7 of the core bundle. Miss Lee refers to our arguments in the statement of intervention:

> "Three contends that it is doubtful whether delay pending a decision another appeal is a 'means available for resolving the dispute'. This argument appears to be based on a misunderstanding because it is not the delay but the negotiations following that judgment that BT relies on as being appropriate means."

We would say that that is revealing because the negotiations following a judgment are not means that are available now, the present tense does not apply to that. The only thing that applies in the present tense is the delay, and we say that is a pretty clear indication that it does not meet the criteria in s.186(3). For that reason we do disagree slightly with what Ofcom and EE have said in that regard, in that we do not see future negotiations as being an alternative means in any case. We can see that negotiations can be alternative means, and we think there are in fact quite sensible circumstances where they will be where, for example, one party has refused to engage and we say that is precisely why you have that reference in Recital 32 of the Framework Directive. It is recognising there that if one party has refused to negotiate in bad faith it might well be appropriate to send the parties off to negotiate further.

What I also wanted to emphasise is that when we are talking here about alternative means, madam you picked up that it says "alternative means" in the Communications Act, but it says "alternative mechanisms" in the Framework Directive. Perhaps if we can just turn up the Framework Directive for a moment, behind tab 1 of the authorities bundle, and if we go to Article 20 para.2:

> "Member states may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms including mediation exist and would better contributes to the resolution of the dispute in a timely manner".

And what we say is that, whilst, clearly, mediation is not referred to as an exhaustive example of what the alternative mechanisms could be, that it is nevertheless an indication that what they are looking at there is alternative dispute resolution. It is not alternative means in some broader sense; and we, for example, would not accept that the availability of a power to launch into a compliance investigation would be alternative means. It may be alternative means, but we say it is not alternative mechanism as envisaged by Article 22 of the framework directive.

And so, really, the idea as well that you could just delay pending a decision, that is not something that is envisaged in Article 22, which very specifically made provision to encourage the use of alternative dispute resolution, nothing more than that.

THE CHAIRMAN: That decision that we were taken to in the Unicom case where they decided that they were going to deal with it by use of a different power of something, you may say that was not permissible.

MR. PIKE: Yes, madam, that is right, and we have also seen that in the T-Mobile appeal, the DCC appeal, where the appeal was resolved by consent, but that was on the basis that there was going to be a compliance investigation after that. To the extent that it was suggested that was alternative means that could be relied on to not have to go through the dispute resolution process, we would say that is a mistake.

Then the final point I just wanted to make on alternative means is just to emphasise what Mr. Saini said, which is that even if all the criteria were met, all s.186(3) does is give Ofcom a discretion to allow the parties, or to require the parties, to go through the alternative dispute resolution process to see if it can result in a resolution. We would say that it cannot be relied on to require Ofcom to do that.

With that, madam, I would like to move on to my final point, which is on exceptional circumstances.

THE CHAIRMAN: Is it you who in your statement of intervention made this point, the four months point, but you appear to be going rather further than Mr. Saini and Mr. Woolfe went by saying, "If you cannot be sure that it is going to be resolved within four months then it does not constitute prompt alternative means"?

MR. PIKE: Yes, I did say that, madam. I am going to step back from that position today. I do not think I need to go that far in this case. I would reserve the position to argue in the future that, if Ofcom were to say that there were alternative means that, for example, are going to take a year, it is just not necessary.

On exceptional circumstances, I would like to refer to this point about there being a power for the court to stay Ofcom's related dispute resolution processes, but that Ofcom itself does not have the same power. What Miss Lee said on this is that, "We, BT, are not asking Ofcom to stay its process, no, no, we are just asking Ofcom to put things on hold". We would say, madam, that that is just pure semantics, it really is the same. In those circumstances, the fact that there is a power for the court to stay proceedings and there is not a power for Ofcom to do so, or no explicit power, is a strong indication that it was intended that Ofcom would not be able to do so. We say there are good policy reasons for that, that the whole point of this dispute resolution process is to give parties certainty of a quick resolution of a dispute, and it is there to be able to get things resolved quickly in an industry where a delay of a few months can make a huge difference.

As regards the question of whether or not putting things on hold is encapsulated in the power to extend time in exceptional circumstances, what we say on that is that exceptional circumstances just means that it is not practical to resolve the dispute in time. It does not say that you can stop, you have to keep doing something. We would say that that is not a stay, it is not putting things on hold, it is doing as much as is reasonably practicable in the circumstances.

Then, finally, madam, just one brief point just to hold our position. I do not want to get into the underlying facts of the 080 dispute, but I did just want to pick up on one point that Miss Lee raised about Ofcom's policies on 080 and 0845. Miss Lee asserted that it was Ofcom's policy that communications providers not be able to charge more than zero for 080 calls and I think local rate for 0845 and 0870, and that the MNOs had disregarded for that policy. All we say on that, madam, is that that is an issue in the underlying appeal, that the MNOs' position is that there was no policy on Ofcom's part as regards what MNOs could charge, and that MNOs did not disregard any Ofcom policy to that effect.

THE CHAIRMAN: Can I just ask you how these quite work, because the 080 numbers are supposed to be free to the member of the public who rings it, but the company that they are ringing has an agreement to pay somebody for each call that they receive.

MR. PIKE: Yes, madam.

THE CHAIRMAN: So the service that is provided by the MNOs is a service to the company which wants people to phone that number?

MR. PIKE: No, it is not, madam, the payment would be from the 080 service provider to the hosting operator, which would, in many cases, be BT – the operator that terminates the call.

Your first statement that there is an expectation that 080 calls be free to members of the public is only correct as regards calls from fixed lines. That is the key point to understand. If you look at the national telephone numbering plan, it indicates that it only applies to fixed lines, and mobile providers can charge whatever they want to charge as long as they tell their customers that the call will not be free, so that the customer understands that they are paying something for the convenience of being able to make that call from their mobile phone. They always have the option of using a fixed line instead and paying nothing, but people value convenience and there is a cost to a mobile in originating the call and they can charge for it.

THE CHAIRMAN: Thank you.

MR. PIKE: Those are my submissions, madam, unless you have any further questions.

THE CHAIRMAN: Thank you very much.

MR. WOOLFE: Madam, if I can just record one point. Mr. Pike made certain submissions as to what the MNOs' position was in the main appeals. I think there may be some slight differences. We do not necessarily say that Ofcom had no policy. We say that Ofcom's policy, such as it was, is in the national telephone numbering plan, and that sets out what can be done with different numbering ranges. We certainly do say that we complied with everything we were required to do at all times. The national telephone numbering plan is where one should go if one wants to see what the requirements are.

THE CHAIRMAN: Thank you for that clarification.

MR. PIKE: I think I should probably just say what he said.

THE CHAIRMAN: I am glad we are all agreed about something. It is 4.20. We have now the interveners in Ethernet to go, which is Mr. Bates and Mr. Segan and then Miss Lee's reply. I am wondering whether that would be a good point to adjourn for today and start with those interventions. Mr. Bates, do you know how long you are going to be, roughly?

MR. BATES: I have not yet had a chance to speak with Mr. Segan, but we are planning to speak this evening to try and make sure we do not cover the same ground, and if we are able to do that I should not take more than about 25 minutes and he likewise.

THE CHAIRMAN: Then we will definitely rise for today and come back at 10.30 tomorrow morning. Thank you very much everyone.

(Adjourned until 10.30 am on Tuesday, 8th March 2011)

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