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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1426/3/3/21

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Thursday 12 May 2022

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14 Before:
15 BEN TIDSWELL
16 (Chairman)
17 DR CATHERINE BELL CB
18 PROFESSOR MICHAEL WATERSON
19
20 (Sitting as a Tribunal in England and Wales)

21
22
23 BETWEEN:

24
25 **CITYFIBRE LIMITED**

Appellant

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27
28 v

29
30 **OFFICE OF COMMUNICATIONS**

Respondent

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32
33
34 **A P P E A R A N C E S**

35
36 Josh Holmes QC, Jessica Boyd QC and Isabel Buchanan (instructed by Bristows LLP
37 appeared on behalf of the Appellant)
38 Monica Carss-Frisk QC, Naina Patel, Tom Coates and Khatija Hafesji (instructed by Ofcom
39 appeared on behalf of the Respondent)
40 Robert Palmer QC and Laura Elizabeth John (instructed by Addleshaw Goddard LLP
41 appeared on behalf of BT)

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Thursday, 12 May 2022

(10.30 am)

Opening submissions by MS CARSS-FRISK (continued)

THE CHAIRMAN: Yes, good morning, Ms Carss-Frisk.

MS CARSS-FRISK: Unfortunately Mr Palmer is stuck in traffic at this point and hopes to be here in about 10 minutes. But I don't think it has been suggested we shouldn't carry on in his absence.

THE CHAIRMAN: We probably just need to do two things before you get started again. I need to read my piece about the livestreaming, if you don't mind, if you'll forgive me.

Good morning, everyone. The proceedings are being livestreamed. I must start with the customary warning: these proceedings are in open court. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording with audio or visual of the proceedings, and a breach of that provision is punishable as a contempt of court.

The other housekeeping point which arises overnight, Ms Carss-Frisk, is that we appear to have lost the few minutes that disappeared in the connection and therefore the transcript yesterday afternoon. I think it was just a few minutes and I am told that it's not retrievable from a back-up recording, which is obviously a little bit unsatisfactory.

I did wonder whether one way of dealing with that, which I am sure would assist the parties and certainly would assist the Tribunal, would be if anybody had been taking notes and if the parties were able to cooperate to produce some gist -- we certainly don't expect a verbatim response to it, but if we could have perhaps just a reminder of the gist of what took place in those five minutes, that would be extremely helpful.

1 But I appreciate that may or may not be possible, depending on what was going on
2 at the time.

3 **MS CARSS-FRISK:** Of course. We will do our best of course.

4 **THE CHAIRMAN:** Thank you.

5 **MS CARSS-FRISK:** Sir, there are a couple of further references that I would like to
6 add to what we say about ground 1A, this being about our reliance on the idea that
7 Altnets generally don't or generally avoid overbuilding Openreach's FTTP footprint.
8 You will recall that this is dealt with at paragraph A4.6 of the statement and it's
9 probably worth turning that up one more time. That is page 67 of bundle 2B, tab 74.
10 As I say page 67, I realise that that can't be right, so I will find the correct page. 927,
11 thank you very much. Page 927.

12 It is subparagraph (a) of paragraph A4.6 where we have that reference to what
13 Altnets generally avoid with the footnote 283. The Tribunal sees that in the footnote,
14 there's also reference to TalkTalk's call for inputs response, which is something
15 I didn't take you to I think yesterday but I would like to add into the mix, particularly
16 as it's actually referred to in the statement.

17 **THE CHAIRMAN:** Yes.

18 **MS CARSS-FRISK:** If you would go please to bundle 2B, tab 34, page 534. It's
19 paragraph 230 on page 534:

20 "At the same time these barriers to switching [they have been referred to I noted in
21 the paragraph above] mean that Altnets will not overbuild Openreach FTTP
22 networks."

23 Perhaps I could invite you to just read to the end of that paragraph.

24 **THE CHAIRMAN:** Yes, 230.

25 **PROFESSOR WATERSON:** Sorry, who is this speaking here? Is this Ofcom
26 speaking?

1 **MS CARSS-FRISK:** This is TalkTalk speaking in their response to the call for inputs
2 by Ofcom, as one sees from page 525.

3 **PROFESSOR WATERSON:** Thank you.

4 **MS CARSS-FRISK:** Now there was a comment -- I am sorry, I should --

5 **THE CHAIRMAN:** Shall we just read that paragraph?

6 **MS CARSS-FRISK:** Yes, of course. **(Pause)**

7 **THE CHAIRMAN:** Yes.

8 **MS CARSS-FRISK:** Now there was a comment made yesterday by Mr Holmes
9 about another reference to TalkTalk in the actual statement which if you have the
10 statement handy at tab 74, it's paragraph A4.14 at page 928. The idea that it was
11 being said that the permitted overlap would last for some years, Ofcom not agreeing
12 with that and there was a suggestion, as we understood it, of some inconsistency on
13 the part of Ofcom there. We say with respect, there is nothing in that point because
14 it's perfectly consistent for Ofcom to agree with the point being made insofar as it
15 relates to short-term overlap but not necessarily insofar as it relates to longer term
16 overlap.

17 I should add that more generally, we don't follow the suggestion that somehow not
18 an awful lot of weight should be given to what TalkTalk had to say. We don't see
19 why their position in the market should lead to that, and we note that they have
20 contracts themselves with both CityFibre and Openreach.

21 There is one other reference in support of the idea of Altnets not wishing to
22 overbuild, and that is a reference to a meeting between Ofcom and CityFibre, 21 July
23 last year. You have the material at 2B, tab 35, page 540. One has a reference to
24 the meeting putting certain questions, Ofcom putting questions to CityFibre, and
25 I would home in, please, on question 2, "In what --" well, I realise that's of course
26 shaded, so may I just invite the Tribunal to read that.

1 **THE CHAIRMAN:** Yes. **(Pause)**

2 **MS CARSS-FRISK:** So this goes to the idea that Altnets might not know what
3 Openreach was intending to do and therefore would perhaps not tailor their plans to
4 that.

5 Very much the same point is made -- perhaps no need to turn it up because I took
6 you to it yesterday -- in the joint response from the Altnets. The reference is 2B,
7 tab 54, page 701. This not confidential, referring to targeting areas where BT has
8 not published its intention to build.

9 Now CityFibre also yesterday referred to a footnote to the evidence of Mr Harries, his
10 paragraph 19B, and it was footnote 23. It was being suggested that the evidence
11 referred to in the footnote didn't really bear out what was being said. Well, we say
12 the Tribunal does not need to enter into that debate. You have seen now all the key
13 references referred to in the statement itself as footnoted at A4.6, which clearly in
14 our submission do support the general idea Altnets generally avoid overbuilding.

15 **THE CHAIRMAN:** This is the point about whether Ofcom had received information
16 about the overbuilders Openreach, wasn't it?

17 **MS CARSS-FRISK:** I think it was directed at that and also at the reverse.

18 **THE CHAIRMAN:** Yes.

19 **MS CARSS-FRISK:** Yes. But as I say, no need to resolve that particular debate as
20 to the precise import of that information.

21 **MR HOLMES:** Sir, it was directed to whether Altnets would be overbuilt, which were
22 the words Mr Harries used in that paragraph.

23 **THE CHAIRMAN:** By Openreach?

24 **MR HOLMES:** Indeed.

25 **THE CHAIRMAN:** Yes.

26 **MS CARSS-FRISK:** Yes, and our response remains the same.

1 Turning then to ground 1B of the appeals, as the Tribunal, knows that has two limbs.
2 It is being said that Ofcom failed to consult adequately in relation to the overlap
3 conclusion or to make sufficient enquiry in relation to that. We have organised our
4 key submissions into five points under that heading.
5 First, about the duty of fair consultation, that it's highly fact sensitive and courts or
6 tribunals will not lightly find that a consultation process is unfair.
7 Secondly, there was no public law duty to consult specifically on the overlap
8 conclusion, which as you know emerged internally during the consultation, and after
9 it had crystallised, it did not involve any fundamental change to what had been
10 proposed by way of answer to question 1 in the consultation. On the contrary, it
11 supported that suggested answer.
12 Thirdly, the references in the consultation document to overlap, we say were entirely
13 sufficient to flag up to consultees that overlap was a relevant issue and we know that
14 some consultees did respond on that topic.
15 Fourth, turning to the Tameside duty, we say sufficient enquiries were made and, in
16 a sense, one needs to look no further than to the fact that as the Tribunal has seen,
17 there was information to back up Ofcom's view on what Altnets generally don't do.
18 But in any event, the approach to the sort of enquiries that should be made is very
19 much a matter for the regulator. This is not an area where any court or tribunal can
20 second-guess the regulator, even if it did think that it itself would have approached
21 matters differently. It's a high irrationality standard.
22 But, fifth, and in any event, and I know you have this submission in mind, even if
23 there was some error of approach here, there has been no prejudice suffered by
24 CityFibre because if they had been able to -- or I should say if they had put
25 Mr Dunn's evidence before Ofcom at the relevant time, it would have made no
26 difference.

1 Those are the five points. Can I then take you to some of the case law, not because
2 it's disputed, it isn't, but just because it's really important.

3 **THE CHAIRMAN:** I think it would be helpful, thank you.

4 **MS CARSS-FRISK:** I am grateful for that indication.

5 First, to back up our point that the court or tribunal will not lightly find that a process
6 is unfair, bundle 4B, tab 29, at page 649. That is the Help Refugees case, and these
7 are all cases we refer to in paragraph 25 of our skeleton.

8 I should just add to what I said a moment ago about courts will not lightly find that.
9 It's not saying that unfairness is a Wednesbury test, it clearly isn't. But it is saying
10 that a degree of latitude will be recognised as to how a consultation or other
11 procedural issue is addressed in terms of fairness.

12 **THE CHAIRMAN:** There are some observations, aren't there, about it being
13 a matter for the authority in question to design the consultation and to set, shall we
14 say, the levels of intensity of that consultation. That's different of course from the
15 question as to once that has been done, whether it has been complied with. So
16 when you talk about the courts not lightly finding it and talking about not applying an
17 irrationality test, would we look at that second question differently from the first?

18 **MS CARSS-FRISK:** I can see that it might be said if a public authority has said: we
19 are going to do X, Y and Z and they then don't do it. I can see that it may be easier
20 in those circumstances for a consultee to say: well, that just wasn't fair because
21 I could expect at least that the public authority would do what they had said.

22 **THE CHAIRMAN:** Yes.

23 **MS CARSS-FRISK:** In our submission, though, that does not arise as a scenario
24 here. Of course we know that we have to face ground 2 of the appeal, which talks
25 about whether Ofcom applied their analytical framework correctly, but that is
26 a different point. So as we see it, that issue doesn't arise here.

1 **THE CHAIRMAN:** Yes, that's helpful, thank you.

2 **MS CARSS-FRISK:** Page 667, paragraph 90 of Help Refugees, I don't think the
3 facts need to trouble us here. Various propositions are set out. This is the judgment
4 of Lord Justice Hickinbottom, and then at (v) at the bottom of the page -- well, first
5 perhaps at (iii), one sees the reference to how the duty is fact-specific and can vary
6 greatly from one context to another.

7 But then (v):

8 "The courts cannot lightly find a consultation process is unfair. Unless there is
9 a specification as to that matters that are to be consulted upon, it is for the public
10 body charged with performing the consultation to determine how it is to be carried
11 out, including the manner and extent of the consultation, subject only to review by
12 the court on conventional judicial review grounds. Therefore for a consultation to be
13 found to be unlawful, clear unfairness must be shown."

14 Then over the page:

15 "A conclusion by the court that a consultation process has been so unfair as to be
16 unlawful is likely to be based on a factual finding that something has gone clearly
17 and radically wrong."

18 We will see further reference to the need for prejudice in due course, but I should
19 perhaps also just flag up here that of course prejudice always comes into it as well.

20 **THE CHAIRMAN:** Because of the requirement of fairness.

21 **MS CARSS-FRISK:** Yes, as in has this been unfair because the consultee has
22 actually been prejudiced?

23 **THE CHAIRMAN:** Yes.

24 **MS CARSS-FRISK:** Yes, quite.

25 **THE CHAIRMAN:** And maybe you are going to come to this, Mr Holmes I think
26 made a point about the prejudice and whether that needs to be suffered by the

1 person complaining or not.

2 **MS CARSS-FRISK:** Yes.

3 **THE CHAIRMAN:** You may come to that in due course, but is that a point we are
4 going to talk about?

5 **MS CARSS-FRISK:** I certainly will address that point about other Altnets.

6 **THE CHAIRMAN:** Yes.

7 **MS CARSS-FRISK:** Suffice to say for the moment that we don't say that it is
8 impossible as a matter of law for that to be a relevant factor, i.e. there may be other
9 consultees who might have wanted to say something. However, we will say that
10 what we have by way of submission on that just doesn't get off the ground in this
11 case.

12 **THE CHAIRMAN:** And it would be a different point depending on whether one is
13 looking at the question of fairness or one is looking at the question of sufficient
14 enquiry as well, wouldn't it?

15 **MS CARSS-FRISK:** Yes, absolutely. So that is the point that when you look at the
16 judicial enquiry, the so-called Tameside duty, it's very important that the threshold is
17 very high. And there we are definitely talking about a Wednesbury threshold,
18 a rationality threshold, which will be, I should add, particularly high in a context such
19 as this one when one is talking technical, multifactorial, predictive analysis by an
20 expert regulator.

21 Next, then, I was going to invite you to go to the Beale case at tab 14 of bundle 4A,
22 so we have to switch bundles. This is a case which also emphasises how
23 fact-sensitive this whole area is and that what is sufficient information to be given to
24 consultees will depend on all the circumstances.

25 There is also the point you will see made here that consultation is at heart about
26 consulting on proposals as opposed to reasons. I am not saying that reasons could

1 not be significant here, but that is the fundamental starting point. It is about
2 proposals.

3 Tab 14, page 182 and it's paragraph 19 in the judgment of Mr Justice Munby. It may
4 be that it's quicker if the Tribunal were to actually read that paragraph on page 192.

5 **(Pause)**

6 **THE CHAIRMAN:** Yes, thank you.

7 **MS CARSS-FRISK:** Thank you. Then linked to this, we have next the
8 Baird v Environment Agency case, which has the very helpful, we say, sentence that:
9 "What is not required is an omniscient decision maker who will have correctly
10 identified each and every relevant factor at the outset."

11 So that is not required. That's tab 19 of the same bundle at page 297, but the
12 passage we want is paragraph 41 at page 307.

13 Again, it may be quicker if I invite you to read paragraph 41. **(Pause)**

14 Paragraph 43 helpfully links to what is said in paragraph 41.

15 So much for Baird, thank you. Then we have the Robin Murray case recognising
16 that of course matters will often evolve, almost inevitably they will, during
17 a consultation and the point being made there is that it's only if there is
18 a fundamental change between what is consulted on and the outcome, or between
19 the starting point and where the public authority then arrives at, then there will be --
20 or at least may be a need to reconsult, probably will be. But that is emphatically of
21 course not the position here, nor has that been suggested. But I will come back to
22 applying the principles to the facts in due course.

23 So Robin Murray at bundle 4A, tab 18, page 283. It's paragraph 47 on page 294.

24 Once more, if I could invite you to read that. **(Pause)**

25 Thank you. Then also the Smith case at tab 13, page 156, and the relevant passage
26 at page 166, paragraph 45, the judgment of Mr Justice Silber. He says:

1 "So I approach the issue of whether there should have been reconsultation [at the
2 bottom of page 166] by the defendants in this case on the proposals now under
3 challenge on the basis that the defendants had a strong obligation to consult with all
4 parts of the local community. The concept of fairness should determine whether
5 there is a need to reconsult if the decision maker wishes to accept a fresh proposal,
6 but the courts should not be too liberal in the use of its power of judicial review to
7 compel further consultation on any change. In determining whether there should be
8 further reconsultation, a proper balance has to be struck between the strong
9 obligation to consult on the part of the Health Authority and the need for decisions to
10 be taken that affect the running of the health service. This means that there should
11 only be reconsultation if there is a fundamental difference between the proposals
12 consulted on and those which the consulting party subsequently wishes to adopt."

13 Now Mr Holmes referred yesterday to the Devon County Council case and he made
14 the point I think that that suggests that if you have factors which are likely to be of
15 substantial importance, then they should be drawn to the consultees' attention. We
16 say simply that's exactly what happened in this case. I will come back to that, but
17 you have the submission in brief. The overlap issue was flagged up in the
18 consultation document.

19 The Devon case also endorses the idea we've just seen in the other cases that it's
20 only if there is a fundamental change that there is a duty to reconsult.

21 Mr Holmes also referred you to two other cases, the Law Society case and the
22 British Gas case. It's important I think for you to be aware of just how different those
23 cases are on their facts, especially bearing in mind that as the cases keep telling us,
24 it's all very fact-sensitive.

25 If we can go back briefly to the Law Society case first at bundle 4B, tab 31. It's
26 paragraphs 70 and 73 at 732 which are important. Just to flag up what they are

1 about, it's highlighting the fact that in that case, the relevant material, the relevant
2 information, was already in existence. The Lord Chancellor actually had that and yet
3 did not disclose it. So it's a very different situation from what we are concerned with.
4 Now the legal principles first at paragraphs 70 and 73, page 732, perhaps I could
5 invite you to just glance at those, particularly at 70:

6 "The mere fact that information is significant does not mean that fairness necessarily
7 requires its disclosure to consultees but it is a highly material factor."

8 At 73, we emphasise that the question of whether there was a good reason for not
9 disclosing the information is significant, and of course at 4 in paragraph 73, whether
10 consultees were prejudiced by the non-disclosure.

11 **THE CHAIRMAN:** -- we should take that as a test for the four matters that are
12 a reasonable test for us to apply to the question.

13 **MS CARSS-FRISK:** Yes, yes. This is of course on the assumption that the
14 information exists.

15 **THE CHAIRMAN:** No, quite. No, I understand. Absolutely, yes, yes.

16 **MS CARSS-FRISK:** Paragraphs 83, 84 and 86 then on page 735 make the points
17 on the facts there.

18 **THE CHAIRMAN:** Yes.

19 **MS CARSS-FRISK:** We don't perhaps need to go into them in great detail, but one
20 sees how it starts at 83:

21 "No explanation has been given on behalf of the Lord Chancellor for the absence of
22 any reference to the figure, 33 million, and the analysis on which it was based in the
23 consultation document ... unclear whether this omission occurred through oversight
24 or was the result of a deliberate decision."

25 At 86:

26 "In short, no reason, let alone a good reason, has been given for not disclosing the

1 analysis and its results."

2 There we are.

3 **THE CHAIRMAN:** I am sorry. Just before you move on, just coming back to 73.

4 **MS CARSS-FRISK:** Yes.

5 **THE CHAIRMAN:** A question of -- sorry, I have just lost my train of thought,
6 actually. I'm afraid I have lost my train of thought, I will have to come back to it.

7 **MS CARSS-FRISK:** Yes, of course.

8 **THE CHAIRMAN:** Thank you.

9 **MS CARSS-FRISK:** Meanwhile, I was just going to give you the paragraphs in
10 British Gas that we would refer to. It's 4B, tab 32, the next tab in fact, and it's
11 paragraphs 53 to 56, starting on page 762. One sees there was something called
12 the continuity assumption which was in existence and was not disclosed by Ofgem,
13 and also it's important that the information or the analysis was proved to be wrong,
14 i.e. prejudice was clearly established, and -- and this is of some significance in
15 relation to the argument about other Altnets -- in this case, you will see there was
16 evidence provided by non-parties to the litigation, i.e. other consultees which British
17 Gas had gathered, and they were explaining what their approach would have been if
18 they had been, as it were, properly consulted.

19 So those factors too very much distinguish this case from that.

20 **THE CHAIRMAN:** Yes, I am sorry, I think have recovered my train of thought.
21 Would you mind going back to look at the Law Society and 73.

22 **MS CARSS-FRISK:** Yes.

23 **THE CHAIRMAN:** When one is considering the question of fairness, it's plain from
24 this paragraph that prejudice is just one element of that.

25 **MS CARSS-FRISK:** Yes.

26 **THE CHAIRMAN:** Another element of course, as I understand it from the previous

1 cases, although it's not necessarily directly put here, is the benefit to the process of
2 the consulting party informing themselves. So one of the reasons why it might be
3 said to be unfair was because there was an opportunity to inform oneself -- I'm
4 talking generally, not specifically about this case -- because there was an opportunity
5 to inform oneself about a fact that might be a material fact or an assumption that
6 might be material.

7 Is that correct? Does that fit into that paragraph 73? How does that fit in?

8 **MS CARSS-FRISK:** This is looking at whether there is an opportunity for the
9 decision maker --

10 **THE CHAIRMAN:** The decision maker --

11 **MS CARSS-FRISK:** -- to inform itself as to --

12 **THE CHAIRMAN:** Yes, that's right. So if one goes back to look at some of the
13 cases we've just looked at, you see emphasis there of the process being to
14 understand what material might be available to help inform the decision maker make
15 a good decision.

16 **MS CARSS-FRISK:** Yes.

17 **THE CHAIRMAN:** So that's within the umbrella of fairness, as I understand the
18 process.

19 **MS CARSS-FRISK:** I would say that that, in the sense of focusing on the quality of
20 the decision making then, one might think would fall more readily into the Tameside
21 duty box of things as opposed to fairness. But I can equally see it could go to the
22 prejudice question as in if the decision maker has been deprived of an opportunity to
23 learn something relevant, depending on the overall picture, it could conceivably go to
24 fairness also.

25 But I say this cautiously as I do because if there's one thing that is clear, it's that one
26 can't really say: there is this, this and this that has to be satisfied. One has these

1 various principles that the cases do seek to identify, but ultimately it is a question of:
2 was this fair or was it unfair to such a degree as in clearly unfair that the court or
3 tribunal ought to actually intervene?

4 So I would only caution against trying to shoehorn too much into particular points as
5 per paragraph 73.

6 **THE CHAIRMAN:** Yes, that's helpful. Sorry, carry on.

7 **MS CARSS-FRISK:** But I would stress that prejudice certainly is an important
8 feature, however one slices it up: is there real prejudice? And there are other cases
9 we'll look at on materiality which also make that point.

10 **THE CHAIRMAN:** Yes. The point you make about the relationship with the
11 Tameside line is actually really the point I was driving at and trying to, I suppose, fit
12 that into -- or rather not fit it in, to distinguish that from where under paragraph 73
13 you might under subparagraph 2, the importance of the information for justification of
14 the proposals that's ultimately taken, whether that's driving at the question of better
15 informing the decision maker, which as we know from the earlier cases is a primary
16 objective of the consultation in the first place.

17 I think you have answered my question and I --

18 **MS CARSS-FRISK:** There is a sense --

19 **THE CHAIRMAN:** -- take your caution which I understand, so that's helpful.

20 **MS CARSS-FRISK:** Thank you.

21 That completes our tour of these cases and cases generally for ground 1B.

22 **THE CHAIRMAN:** Can I ask you one other question about the cases. There seems
23 to be -- maybe there isn't, but there certainly seems to be on Mr Holmes'
24 submission -- perhaps a conflict on the question of the sophistication of the
25 consultee. I think in your skeleton, you refer to Moseley(?) and BT case, and I think
26 actually the Law Society case is relied on by Mr Holmes in relation to this.

1 **MS CARSS-FRISK:** Yes.

2 **THE CHAIRMAN:** I wonder whether there is anything you could say to help us with
3 that.

4 **MS CARSS-FRISK:** Yes. I was going to come on to that because I thought it would
5 fit more clearly in our submissions in relation to the other Altnets in due course.

6 **THE CHAIRMAN:** Yes, please do.

7 **MS CARSS-FRISK:** If that works, then I'll do that, but there is the Rusal case which
8 in fact suggests the sophistication of consultees can be certainly an important factor.
9 I think this is again an example of an area where that certainly can be significant, but
10 it will not necessarily be because it will turn on the facts and depend on all the
11 circumstances.

12 **THE CHAIRMAN:** Yes, that's helpful. Just when you get to it but I would be
13 interested in an answer to that.

14 **MS CARSS-FRISK:** Yes, thank you. I will do that.

15 So our second headline point for ground 1B then was that there was no requirement
16 to consult specifically on the overlap conclusion as it emerged during the
17 consultation.

18 Now it's not been alleged, as the Tribunal knows, that there was any fundamental
19 change that occurred in the course of the consultation process, nor could that be
20 alleged because obviously the overlap conclusion supports, as we know, the original
21 proposal put in the consultation document. But CityFibre nevertheless say that the
22 idea that overlap might be limited should have been raised. I paraphrase, of course,
23 but that's how I understood their submissions. They are saying: we are not
24 suggesting there should have been reconsultation but it should have somehow been
25 raised.

26 We say that really is referring to reconsultation by another name, and one then

1 comes back to the point there is no legal basis, no fundamental change, to support
2 that idea.

3 **THE CHAIRMAN:** Yes, and this is really what my question about paragraph 73 was
4 about. Because as you say, you could find yourself in a Tameside discussion as to
5 whether in order to satisfy yourself as to a particular set of facts, you needed to go
6 and ask those questions.

7 **MS CARSS-FRISK:** Yes.

8 **THE CHAIRMAN:** But I think you are saying there's a distinction between that --

9 **MS CARSS-FRISK:** Yes.

10 **THE CHAIRMAN:** -- and a reconsultation as an exercise which, as we have seen
11 from the cases, is not something that's required lightly.

12 **MS CARSS-FRISK:** Yes.

13 **THE CHAIRMAN:** You say there's nothing between: it's either a reconsultation or if
14 you fall foul of the Tameside line and you should have looked at it, then you should
15 have looked at it, but there's no intermediate position.

16 **MS CARSS-FRISK:** Yes, in the sense there's no magic in the word "reconsultation".
17 "Reconsultation" means going back to consultees, whether it's one or more or
18 everyone, and say: have a look at this, what do you have to say about that? Well,
19 that's reconsultation.

20 **THE CHAIRMAN:** What happens in the sequence of events is that at the stage of
21 the consultation document, the assumption, the overlap conclusion as an
22 assumption has not been formulated, I think is the inference --

23 **MS CARSS-FRISK:** Yes.

24 **THE CHAIRMAN:** -- then obviously it does become formulated. There is also some
25 work done to create a hypothesis about what might happen between the reference
26 points. You have the current overlap and then the projected overlap, so the 3 million

1 houses, 3 million connections.

2 So you have an assumption and some workings that set the (Inaudible) for that.

3 **MS CARSS-FRISK:** Yes.

4 **THE CHAIRMAN:** What is being said I think by CityFibre is: in pursuance of getting
5 to the right answer, why would you not want to test that? You are saying that if it
6 was to be a criticism of not testing that, it's effectively a Tameside point.

7 **MS CARSS-FRISK:** Yes, we are saying that, absolutely. That's where it is
8 important, that the Tameside test is so high, which we'll come on to as well.

9 **THE CHAIRMAN:** Yes, okay. Thank you.

10 **MS CARSS-FRISK:** Our third main point then under this heading is that the
11 consultation document did make clear that the extent of overlap was a relevant
12 issue. More than sufficient, we would say, to prompt any consultee to provide any
13 information that they might have on that issue.

14 The consultation document you have at bundle 2B, tab 45, and I would be grateful if
15 we could turn it up one more time. We need to go to paragraph A8.1, which is at the
16 end of the document on page 620. It's also in particular paragraphs A8.4 and A8.5,
17 also the overall heading "To what extent will Altnets' FTTP footprints overlap with
18 Openreach's FTTP footprint?"

19 That's fairly and squarely putting the question. Of course it would have been open
20 to, and one might reasonably expect then, for any consultee who might have
21 information about that to come forward with that.

22 One sees that these paragraphs also explain what it's about and why overlap is
23 relevant. So at 8.1 in particular:

24 "In this annex, we outline evidence on the proportion of the Openreach FTTP
25 footprint where Altnets that provide wholesale access to ISPs are likely to be
26 present. This is relevant to our assessment of the order on mixed targets since it

1 | informs the potential impact ..."

2 | And the whole of that paragraph is relevant.

3 | Then one has the references to longer term at 8.4, and then short-term at 8.5.

4 | So we say it really couldn't have been flagged up very much more clearly. There's

5 | also footnote 127:

6 | "Stakeholders suggested that generally Altnets may not overbuild Openreach."

7 | There is plenty of material, we would suggest, to trigger a reaction by consultees to

8 | put something in on this topic.

9 | **THE CHAIRMAN:** What seems to be said is that that may be right, that it was put,

10 | and indeed put as being an uncertain item, but I suppose I think two things. One is

11 | the significance of it: it's not clear and that's not surprising because of course it's not

12 | yet developed in Ofcom's thinking. And the way in which Ofcom then decides to

13 | determine the uncertainty is not clear in the factual material that underpins that,

14 | including, for example, the examples. I think that is what is said.

15 | **MS CARSS-FRISK:** Yes, but that's all part of course of the evolving nature of the

16 | decision maker's thinking, and this is where it's important to have in mind the cases

17 | that say: well, you shouldn't end up in a never ending dialogue. That is in the nature

18 | of decision making that matters do evolve and it's only if there is a fundamental

19 | change that you need to go back to consultees.

20 | But the point is that the relevance of overlap, why it's relevant, is flagged up. I think

21 | Mr Holmes said yesterday that the role in reasoning of the overlap conclusion and

22 | the way it would be relied on needed to be flagged up to consultees, and we say

23 | well, that is actually what you have here in this annex. You actually do have an

24 | explanation effectively of why overlap is relevant, and then the question: to what

25 | extent will there be overlap? Well, if you are an Altnet with relevant information,

26 | please answer that question in that case.

1 It is curious to note, and I can probably just give you the reference here, that
2 CityFibre themselves observe in their notice of appeal -- for your reference
3 paragraph 51C at core bundle tab 1, page 27 -- that the fact that Ofcom made
4 a section 135 request to CityFibre during the consultation seeking information about
5 then current overlap, that that demonstrated -- and here I quote from the notice of
6 appeal -- "that it had the fact of overlap in mind as a relevant consideration". So it
7 was demonstrated that Ofcom had it in mind, but it was obviously very plainly also
8 then demonstrated to CityFibre. So all the more reason again for them to come
9 forward with any relevant information then.

10 You have the point I know that some consultees did respond on this topic, see
11 paragraph 20 of our skeleton where we refer to Openreach and one of the ISPs, and
12 of course also the joint consultation response you have seen. The relevant
13 references are given in our skeleton, I don't think there is a need to turn them up.

14 So far as the evolution of Ofcom's thinking is concerned, it's really explained by
15 Mr Matthew, particularly at paragraphs 87 and 89. One might want to add in 84 as
16 well and paragraph 90. Looking at the time, I fear it's probably better not to ask you
17 to turn those up now. But I don't think there's any dispute about how the internal
18 thinking evolved.

19 **THE CHAIRMAN:** Yes, I think that is helpful. Can I ask you a question about the
20 slides, I think the July slides. What is your submission in relation to the significance
21 of that document? Not necessarily the detail, simply what you say we should take
22 account of it for.

23 **MS CARSS-FRISK:** I have written down half a page on the slides here in my notes.

24 **THE CHAIRMAN:** If you want to come to it in due course --

25 **MS CARSS-FRISK:** I am very happy to come to it now, I was going to do it in
26 relation to ground 2. Yes, these are the slides at bundle 2A, tab 26, page 464,

1 probably no need to turn them up. But the points I make on instruction are that they
2 were a discussion document. They were not prepared by the decision maker in
3 relation to the statement.

4 At that stage, questions 1 and 2 had not been clearly separated. There was no
5 question of question 1 having been answered in the affirmative in the slides. It was
6 a document designed to assist in exploring how the offer might be assessed in
7 practice. Can I here also pick up Professor Waterson's question about one of the
8 slides, maybe no need to turn it up again. I think it's at page 473 where there were
9 two boxes that said the same thing, but the outcome at the top was said to be
10 different.

11 First of all, these are entirely hypothetical examples being discussed at this stage, no
12 actual answers were being put forward. The two boxes were intended to say the
13 same thing, that was not a mistake. But because of other factors that came into the
14 final column, the overall answer in the hypothetical discussion -- and I underline
15 hypothetical again -- the overall answer was different for that reason.

16 **THE CHAIRMAN:** Yes, thank you. For present purposes, and maybe we do need
17 to come back to them when we look at ground 2, but the point for present purposes,
18 I think, is whether there is anything in there that suggested that what was consulted
19 on and the consultation document didn't reflect Ofcom's thinking, and I don't think
20 that is suggested.

21 **MS CARSS-FRISK:** I don't think that is suggested, nor could it be.

22 **THE CHAIRMAN:** Given the evidence, really.

23 **MR HOLMES:** Sir, that's not a suggestion we --

24 **THE CHAIRMAN:** Yes, and we have Mr Matthew's evidence, of course.

25 **MS CARSS-FRISK:** Yes. I am also reminded at this point that if one looks at what
26 CityFibre themselves had to say in their consultation response, they do seem to

1 have understood perfectly well the role of overlap, and the reference here is 2B,
2 tab 59, pages 742 to 743, paragraph 1.7 (vi) and (vii).

3 **THE CHAIRMAN:** Yes, I think Mr Holmes took us to these pages as well.

4 **MS CARSS-FRISK:** Yes, and also page 751, paragraph 218. So emphasising
5 particularly the reference to -- second line of paragraph 218 on page 751:

6 "Once the alternative network is available as a choice in that area, there will be the
7 following pool of potential customers."

8 So it's just flagging up the general awareness, as one might indeed expect of the
9 relevance of overlap.

10 That then brings us I think to our fourth main point which responds to the Tameside
11 argument, CityFibre saying the enquiry was flawed. But they may seek to cover both
12 unfair consultation and Tameside there, but at any rate I am proposing to home in on
13 the Tameside duty here.

14 One simple response to the Tameside issue is: well, if it is right that there was
15 enough material to support how Ofcom proceeded under ground 1A, then it's very
16 difficult to see how it could then be said that they nevertheless failed to make
17 reasonable enquiries. That is one point.

18 But we do need to look at just how strong the cases are about the high hurdle that
19 the claimant faces. First, the Pharmaceutical Services Negotiating Committee case,
20 bundle 4B, tab 30, page 677. This is a judgment of the court involving Lord Justices
21 Irwin and Hickinbottom and Sir Jack Beatson. Paragraphs 55 to 56 on page 696,
22 under the heading "the Tameside issue".

23 At paragraph 55:

24 "The parties are agreed as to the legal test here. The duty of sufficient enquiry is
25 subject to a Wednesbury challenge only ... 'it is for the decision maker and not the
26 court to conclude what is relevant' and 'to decide upon the manner and intensity of

1 enquiry to be undertaken'. This formulation is echoed in the language of
2 section 165(9) of the 2006 Act quoted above."

3 Then reference to the Plantagenet Alliance case:

4 "The following principles can be gleaned from the authorities:

5 (1) The obligation on the decision maker is only to take such steps to inform himself
6 as are reasonable.

7 (2) Subject to Wednesbury challenge, it is for the public body, and not the court, to
8 decide on the manner and intensity of inquiry to be undertaken."

9 Importantly, we say:

10 "The court should not intervene merely because it considers that further inquiries
11 would have been sensible or desirable. It should intervene only if no reasonable
12 authority could have been satisfied on the basis of the inquiries made that it
13 possessed the information necessary for its decision."

14 Then I would invite you to carry on to the end of paragraph 56. **(Pause)**

15 I don't think we need to go -- yes, sorry. We should go to the Ross case next if you
16 have finished reading to the end of that paragraph. The Ross case is at tab 38 of
17 bundle 4B and we are interested in page 1053. This is where we have the reference
18 to the importance of context and an expert regulator, et cetera.

19 So paragraph 77 in the judgment of Mr Justice Dove, page 1053:

20 "In light of these authorities, in my view the position in relation to Wednesbury based
21 challenges to the legality of decisions which have been informed or influenced by
22 scientific or technical material is well settled. The approach is based on the
23 fundamental principle the court is not retaking the decision, it is not equipped
24 procedurally or substantively to do so."

25 Then if you would just read to the end of paragraph 77. **(Pause)**

26 Sorry, can I also then draw attention to paragraph 69 on page 1050 and

1 paragraphs 70 and 71, where the court quotes from the Mott case, a judgment of
2 Lord Justice Beatson. It's quite a lengthy passage, but also important in our context
3 here.

4 **(Pause)**

5 I should add that when the court speaks here of scientific evidence and models, we
6 say of course the same applies if you have technical, economic expert evidence and
7 that sort of context, as we undoubtedly do in this case.

8 But closer to home then, we were going to make the point that the same approach
9 undoubtedly applies in this jurisdiction under section 192(1)(b). I was going to take
10 you briefly to the Hutchison case.

11 **THE CHAIRMAN:** Is it a convenient time to take a short break?

12 **MS CARSS-FRISK:** Of course, yes.

13 **THE CHAIRMAN:** Shall we just take 10 minutes?

14 **MS CARSS-FRISK:** Sure.

15 **(11.31 am)**

16 **(A short break)**

17 **(11.41 am)**

18 **THE CHAIRMAN:** Ms Carss-Frisk.

19 **MS CARSS-FRISK:** Yes. I was going to invite you then to the Virgin Media case,
20 bundle 4B, tab 37, and the relevant passage is at page 991.

21 This is not about the Tameside duty specifically but it is, however, about the general
22 approach when you have an appeal such as our one which turns on judicial review
23 principles. It's paragraph 59 on page 991:

24 "We also agree with Mr Justice Green's comments in Hutchison that the approach in
25 individual judicial review cases will differ, depending on the decision being
26 challenged. In that case, the decision required Ofcom to make a judgement call in

1 the context of an auction which took into account a wide range of future uncertain
2 events, including a substantial degree of uncertainty about how the relevant market
3 would evolve. Those are not the facts of this case, but nonetheless it is important to
4 recognise that as a specialist regulator, Ofcom's judgement, in particular as to the
5 appropriate penalty to impose having regard to the facts of the case and to the
6 principle of deterrence, must be accorded respect."

7 So we add that into the mix of the other cases.

8 Now applying all this then to the facts here, we do say with respect that CityFibre do
9 not come near to meeting the very high hurdle of Wednesbury irrationality so far as
10 their enquiries are concerned. In summary and just to save time, perhaps I can set
11 out what we say without actually inviting you to go to the witness evidence.

12 **THE CHAIRMAN:** Yes.

13 **MS CARSS-FRISK:** It's dealt with in paragraph 49 of our skeleton. Mr Harries is the
14 person who particularly has gone into this in his evidence. So the precise degree of
15 short-term overlap was particularly uncertain. It depended on a number of factors,
16 such as speed and extent of network build by Openreach and Altnets, and their
17 respective build strategies and how they evolved, in particular whether they would
18 overbuild each other -- see Harries 1, paragraph 20, subparagraph (b).

19 Given those many variables which would come into that question of short-term
20 overlap, seeking further evidence about that was not prioritised as you have seen.
21 There was a concern that it would be likely to be unreliable. That's Harries 1,
22 paragraph 21, subparagraph (c).

23 Ofcom had in mind here, for example, that network builders' own analysis and view
24 on how overlap might evolve in the short-term would be based on assumptions about
25 rivals' build strategies, and that would inevitably introduce uncertainty. See
26 footnote 30 to Harries, paragraph 21(c).

1 So against that background then, Ofcom considered that it would instead try to look
2 at current overlap, taking into account the view, which has not been challenged, that
3 it was unlikely that overlap would increase sharply from its starting point. See here
4 particularly Mr Matthew, paragraph 90 -- I am not asking you to turn that up at this
5 point.

6 When it then came to estimating current overlap, it was reasonable, we say, for
7 Ofcom to ask both CityFibre and Openreach to provide estimates of that. Now
8 Mr Holmes I think made the point that wouldn't there be some degree of unreliability
9 around current overlap as well. But in our submission, Ofcom was certainly
10 rationally able to say there would be less uncertainty in trying to gain information
11 about current overlap. So that is what they did.

12 Then CityFibre complained that when Openreach was asked, it was also asked to
13 provide an estimate of overlap over the next three years, but CityFibre wasn't asked
14 about that. Well, that's explained at paragraphs 27 to 28 of Mr Harries' statement.
15 In short, you have the point, requesting estimates of likely short-term overlap not
16 a priority. But then importantly, in relation to this particular point about not asking
17 CityFibre, that it wasn't thought appropriate to use the formal information gathering
18 power in section 135 to request information that it was thought unlikely would be
19 contained in pre-existing documentary evidence which could then be verified in the
20 usual way.

21 It was anticipated that an estimate of short-term overlap would need to be specially
22 created for this purpose, whereas with Openreach it was anticipated that that
23 information would actually pre-exist. As it turned out, in fact Openreach was not able
24 to provide that information, which rather supports the idea that Ofcom had in mind
25 that this sort of information wasn't likely to pre-exist.

26 **THE CHAIRMAN:** Although as it turns out, we now know that CityFibre did, which is

1 of course ironic.

2 **MS CARSS-FRISK:** Yes. No, we now know they did have that in late August and --
3 well, the Tribunal has our point: whatever they had and if they had thought fit to get
4 that information, why on earth not put it forward when you have a consultation, which
5 incidentally asks in the consultation document -- I don't think we need to turn it up
6 again, but it's another reference -- it asks the very open question: do you agree with
7 our assessment of Equinox? That's 2B, tab 45, page 600.

8 Against that open question, why on earth not then put forward evidence? As you
9 have seen, CityFibre was well aware of the significance of overlap.

10 **THE CHAIRMAN:** It does seem curious that it is the one thing that could have been
11 done to even raise the subject and it wasn't raised. It was raised with Openreach,
12 I think raised with TalkTalk as well, but not with CityFibre.

13 **MS CARSS-FRISK:** I think not just with CityFibre. That is the complaint, as
14 I understand it, that it was raised with Openreach but not CityFibre.

15 **THE CHAIRMAN:** Yes, exactly, yes. It does seem curious in all the circumstances,
16 and given that there was a discussion obviously going on inside Ofcom about what
17 further work needed to be done to address the overlap conclusion as it turned out,
18 that that step wasn't taken. I know you say you are entitled, Ofcom is entitled to
19 design its process and design what enquiries it wants to make and we should be
20 very careful about interfering with that, but it's not obvious to us that the material in
21 the witness evidence adequately explains what just seems could have been an
22 obvious step which wasn't taken.

23 **MS CARSS-FRISK:** Of course with the benefit of hindsight and looking at it through
24 our lens now, obviously it has been said that it would have been sensible to do
25 something different. But putting ourselves into the shoes of Ofcom, in our
26 submission, it certainly isn't irrational for them to have taken into account their

1 approach that when it comes to issuing a section 135 request, you don't do that
2 unless you think there is pre-existing information which can be verified that can be
3 provided.

4 The view taken was that Openreach was different because it was likely to have that
5 information as part of its investment case. So that is the explanation.

6 Now one can't say that that is not a rational chain of thought, that that was
7 a distinction. Yes.

8 **PROFESSOR WATERSON:** There is also the curiosity about TalkTalk as the
9 chairman said, about why ask TalkTalk and not CityFibre?

10 **MS CARSS-FRISK:** Yes, I am sorry --

11 **THE CHAIRMAN:** Maybe we are starting a red herring --

12 **MS CARSS-FRISK:** At this end, we are not conscious of precisely what it's
13 suggested TalkTalk was asked.

14 **THE CHAIRMAN:** I think we know TalkTalk made some observations, but it may be
15 me misunderstanding the genesis of those. It may be that they were simply
16 observations in response to the consultation document or indeed the call for inputs,
17 I can't remember which. You showed us a little bit earlier, I think. So it may be me
18 starting a red herring on that.

19 **MS CARSS-FRISK:** Yes.

20 **THE CHAIRMAN:** Unless anybody else is going to correct me, I think perhaps
21 I might be ...

22 **MS CARSS-FRISK:** Yes, yes. And they then responded of their own volition as
23 they did.

24 **THE CHAIRMAN:** Yes, which can support your argument that CityFibre could have
25 done the same thing.

26 **MS CARSS-FRISK:** Yes, exactly.

1 So I think we come back to that comparison between Openreach and CityFibre
2 where it really is a question of the correct legal approach, in our submission, as in
3 even if the Tribunal thought: well, why not take a punt on CityFibre? What they
4 might have been able to say at that point, that would not be a proper basis on which
5 to interfere. If you thought it is curious -- and I think that was the word which
6 perhaps Professor Waterson used just now -- if it's curious, if it is, then that again
7 would not be a proper legal basis on which to interfere.

8 But in our submission, it isn't curious. The answer has been given by Mr Harries at
9 paragraphs 27 to 28.

10 It may just be worth going to those paragraphs as it deals with this point --

11 **DR BELL:** Sorry, before you go to that, just for my understanding: at that stage are
12 you saying that using a section 135 notice/instrument was the only way in which
13 Ofcom were then gathering further information?

14 **MS CARSS-FRISK:** I am not suggesting that they couldn't have asked for
15 information informally. What I am suggesting is that the issue arises in the context of
16 section 135 requests having been made to Openreach and CityFibre and the
17 complaint levelled against us: well, you used your section 135 power and you asked
18 Openreach for this estimate but you didn't ask CityFibre.

19 So it's placing it in that context. That's where the comparison, if you like, arises.
20 That is explaining how it worked, if you like, in Ofcom's mind that they were
21 producing two section 135 notices but there was a distinction which explains why
22 they treated Openreach in one way and then didn't do quite the same for CityFibre.
23 It's the context.

24 **DR BELL:** Thank you.

25 **MS CARSS-FRISK:** I was going to invite you to go to paragraphs 27 to 28 of
26 Mr Harries' witness statement at pages 175 to 176. It's probably best that you get it,

1 as it were, from the horse's mouth.

2 **THE CHAIRMAN:** Bundle 1 --

3 **MS CARSS-FRISK:** It's core bundle, bundle 1, tab 6. It probably makes sense for
4 the Tribunal just to read those paragraphs, and I would include paragraph 28 as well.

5 **THE CHAIRMAN:** Yes. So sorry, the reference again was paragraphs 20 ...

6 **MS CARSS-FRISK:** 26, 27 and 28.

7 **THE CHAIRMAN:** Yes, thank you. **(Pause)**

8 **MS CARSS-FRISK:** I am sorry to chop and change, but I think paragraph 25 as well
9 sets the scene about the focus on current overlap, page 175. **(Pause)**

10 **THE CHAIRMAN:** Yes, thank you.

11 **MS CARSS-FRISK:** Then I should perhaps just pick up the point about CityFibre's
12 offer during a call with Ofcom on 21 July to provide more precise numbers if
13 required. That is dealt with by Mr Harries, just for your note, at paragraphs 30 to 34.
14 In fact, it may be useful just to have had open as well. It's page 177 of the
15 core bundle at tab 6. One sees at the top of paragraph 30, a number of questions
16 were sent to CityFibre for discussion ahead of the call. The broad questions, in
17 particular the second and third:

18 "In what circumstances if any would CityFibre overbuild other FTTP networks? What
19 are you assuming about the proportion of CityFibre's network footprint where
20 Openreach will also be present?"

21 The point here is that if one looks at the whole context -- and I'm afraid the Tribunal
22 will have to read to the end of 34 -- the offer, as it were, to provide further information
23 arose in the context of a discussion of where it would end up when Openreach had
24 actually completed their programme of going to 25 million premises in the future.
25 That was the context.

26 So it was reasonably not understood by Ofcom to be a cue that there would be

1 further information about short-term overlap. But again, if one looks at the questions
2 put to CityFibre here, one comes back to the point: well, surely given what was
3 explained in the consultation document as well about overlap, one would have
4 expected them to come forward with something if they had it. They may not have
5 had it at that point, but we know they did have something at the end of August.

6 There was a suggestion also by Mr Holmes that Ofcom had in its possession data
7 which it could have easily updated to arrive at overlap or a more accurate figure for
8 that. But it's important that Ofcom did not have postcode level data for Openreach
9 and even if they had had that data, it would have been a complex and
10 time-consuming exercise to match up and to work out overlap on that basis.

11 So that is just not the kind of simple answer which Mr Holmes perhaps would have
12 you believe. Certainly Ofcom can't be criticised for not having sought to enter into
13 that exercise.

14 At the end of the day, then, if you look at what CityFibre has missed out on here, we
15 know the answer: they've missed out on putting forward the Dunn evidence sooner.
16 I say missed out now running of course with how they put their case. But the point
17 is, and I know you have it: what prejudice have they possibly suffered from that?

18 The answer is squarely: none, because of consistency between Mr Dunn's evidence
19 and Ofcom's own workings in this case.

20 CityFibre have had their opportunity now and we know that it doesn't change the
21 bottom line in any way. But even before we get to that point, we say even if you
22 think you would have done things differently, that just doesn't get them over the
23 hurdle.

24 **THE CHAIRMAN:** On the materiality point, I think Mr Holmes says -- I think I am
25 accurately recording the argument, he will tell me if I am not -- that the Dunn
26 evidence is a not complete assessment of what Ofcom might find if it were to

1 continue its enquiries, it's an example of there being evidence which it didn't have.
2 And if Ofcom were to continue with the line of enquiry, it could have and would have
3 had access to information from other Altnets and potentially CityFibre which goes
4 beyond what Mr Dunn has put in. I think that's a fair summary of what Mr Holmes is
5 saying.

6 **MS CARSS-FRISK:** Certainly on the basis that what is in issue is the overlap
7 conclusion, then Mr Dunn's evidence, just to be clear -- and I don't think you were,
8 Sir, suggesting anything to the contrary -- is the evidence that would have been put
9 forward. So insofar as CityFibre are concerned, that was the estimate they came up
10 with, and indeed Mr Dunn in his statement actually makes a reference to how this is
11 in effect what would have been put forward if, as they see it, they had had the
12 appropriate opportunity to do that.

13 So far as the other Altnets are concerned, we do say it is striking that this is the first
14 time -- in fact CityFibre's skeleton -- it's the first time that that point has been made.
15 It's not referred to in the notice of appeal. There is no evidence to back up an
16 assertion which is now made that actually maybe Ofcom underestimated overlap by
17 as much as a third. There's nothing to back that up. Nothing to suggest that actually
18 if other Altnets had come forward at that time, then they would have shown that
19 Ofcom's estimate was wrong.

20 **THE CHAIRMAN:** In terms of the burden of proof, if we are looking back at the
21 Law Society and paragraph 73, then in order to make out those points, for example
22 prejudice, you would say the burden was on CityFibre to produce evidence of
23 prejudice?

24 **MS CARSS-FRISK:** Yes, absolutely we would say that. And one would look again
25 at the comparison with the British Gas case where, as I mentioned earlier, British
26 Gas as a claimant in that case had actually obtained witness evidence from other

1 suppliers that would have wanted to say something in the consultation if it had been
2 properly conducted, or would have wanted to make particular points if it had been
3 properly conducted.

4 So here, yes, there is a burden on CityFibre to make good this proposition. Again, in
5 the fact-sensitive world we are in, one has to look carefully at what they have now
6 come up with. The fact that it's so late, and I don't say this critically, but it plainly is
7 an afterthought, and we have nothing from Altnets to suggest that they would have
8 wanted to be involved, would have wanted to say anything about overlap, or if so
9 what, and one would certainly have else expected that. If they want to say --
10 because this is the effect of it: if they want to say their own evidence as per Mr Dunn
11 is not the whole story and in fact there could have been a further worse
12 underestimate by Ofcom, they can't just assert that, that has to be backed up at this
13 stage if they are going to get home on that, we say.

14 In any event, of course we know that Ofcom did consider evidence from other Altnets
15 in reaching the overlap conclusion, and of course it would have been open to the
16 Altnets to make submissions about that if they had relevant information. So in
17 a sense, we come back to all the points we have already made about how the issue
18 was there on a plate at the end of the consultation document.

19 Secondly, so far as these four Altnets are concerned which are now referred to --
20 I think the Tribunal has this point -- none of them is actually to Ofcom's knowledge
21 engaged in wholesaling to major ISPs, which is the only basis on which they would
22 be relevant. And there is, thirdly, in any event, a high degree of uncertainty as to
23 whether their build plans will be realised.

24 Fourthly, there is no evidence as to the progress of those Altnets in relation to their
25 build plans. Fifth, you may have seen paragraph 42 of our skeleton. It refers to
26 confidential information that Ofcom does have, showing minimal overlap in fact by

1 reference to a particular Altnet.

2 **THE CHAIRMAN:** Just remind me what was the reference to the skeleton again?

3 **MS CARSS-FRISK:** It's paragraph 42.

4 **THE CHAIRMAN:** Thank you.

5 **MS CARSS-FRISK:** But perhaps the most significant point: we simply have no
6 evidence from any of those Altnets. That is why we do invite you squarely to reject
7 that submission, which means that CityFibre is then, as it were, stuck with the Dunn
8 evidence being the high water mark of what could have been said that they say they
9 would have said if they'd realised.

10 That is leaving to one side the point about the other eight conditions that would need
11 to be satisfied, which I will say something about briefly in a moment.

12 While I am here dealing with the point about the other Altnets, I know I mentioned
13 some authorities earlier on, and I think Mr Holmes mentioned a case called Wilson.
14 May I briefly take you to that to just give you a flavour of why we say it's eminently
15 distinguishable. That is a case where the same point was made about prejudice
16 because other people had not been able to say what they would have wanted to say,
17 other than the claimant. The court accepted that that could in principle be relevant,
18 which is one reason why I said earlier we don't say as a matter of law that it never
19 could be.

20 But the point is that in that case, it was abundantly clear on the facts that the other
21 people in question would have wanted to become involved and make certain points.
22 It was readily open to the court there to infer that that was so. Very different from the
23 situation here, where we have nothing to base such an inference on.

24 The Wilson case then at bundle 4A, tab 10, pages 43 to 44 of the bundle pagination.
25 It's really the middle of page 43, letter D, over the page, page 44, to letter B. It's
26 quite a long passage, so if I may just invite you to glance through that. **(Pause)**

1 On the facts there, the court was happy to infer effectively prejudice because others
2 would have wanted to get involved but weren't able to on a proper basis.

3 In the Rusal case by contrast at tab 24, one has an argument being made that
4 consultation was unfair because there were ten consultees other than the applicant
5 who had not properly understood what was in issue in the consultation, and
6 reference was made to the position of those other consultees.

7 The court rejected the challenge on appeal and attached considerable importance to
8 the fact that there wasn't evidence from those other ten consultees. So if I can invite
9 you in particular to paragraphs 49 and 53, pages 418 and 419.

10 One sees in the middle of paragraph 49, Mr Beloff for the defendant was submitting
11 that there was no evidence that consultees were misled, for example. Then at 53,
12 one gets the response from Lady Justice Arden:

13 "I also agree with Mr Beloff's submissions that it should not be assumed from the fact
14 that none of the ten consultees who proposed the rent ban referred to competition
15 law concerns that they must have been ignorant of the competition law difficulties
16 attending the rent ban option. It is striking that no consultee has filed even now
17 evidence that was it misled into thinking that there were no competition law issues."

18 Now granted that everything is fact-sensitive as I keep saying, this is a strong
19 example of the importance that the court is entitled to attach to the absence of
20 evidence and we urge you to attach to that absence in this case.

21 **THE CHAIRMAN:** Was Wilson referred to in --

22 **MS CARSS-FRISK:** Was Wilson cited in Rusal?

23 **THE CHAIRMAN:** It doesn't look like it.

24 **MS CARSS-FRISK:** That's an interesting question. I don't believe it was.

25 **THE CHAIRMAN:** It doesn't appear to be. Yes.

26 **MS CARSS-FRISK:** Yes. Of course this is the Court of Appeal and Wilson. I've just

1 | checked, it's first instance.

2 | It's also right that there is that reference in Rusal to how it can be significant that
3 | there are what was called there "highly specialist consultees", and we have seen that
4 | that again can be a factor that has greater or lesser relevance, depending on the
5 | context. But it certainly can be a relevant factor and we would suggest here that it is
6 | of some significance that we undoubtedly have consultees, like CityFibre, who are
7 | highly sophisticated and know everything about this area of activity or business.

8 | **THE CHAIRMAN:** Mr Holmes took us to the Law Society case which he says
9 | suggests the opposite.

10 | **MS CARSS-FRISK:** Yes, and our suggestion is -- that's why I say it's one of those
11 | factors where it's not an absolute binary yes/no answer, it's never relevant or it is
12 | always relevant, and the weight attached to it is no doubt one for the court or tribunal
13 | when you come to evaluate overall whether what happened here was so clearly
14 | unfair that it should be struck down.

15 | **THE CHAIRMAN:** So the facts of each case are really quite important to
16 | understanding that.

17 | **MS CARSS-FRISK:** Yes. Now we were starting to look at materiality and I just
18 | wanted to remind you there of the key authorities from this jurisdiction about the
19 | importance of that. When I say materiality, that's another way really of referring to
20 | the need for prejudice to arise from any unfairness, or indeed irrationality.

21 | Can we go first, please, to the Hutchison case. That's bundle 4B, tab 27, page 621,
22 | paragraph 239.

23 | **THE CHAIRMAN:** Sorry (Inaudible).

24 | **MS CARSS-FRISK:** Yes.

25 | **THE CHAIRMAN:** 27.

26 | **MS CARSS-FRISK:** I think actually it's as well to start at paragraph 238 on

1 | page 621 and go to the end of 239. Mr Justice Green as he then was looking at the
2 | Sedley criteria, which of course are classic consultation criteria. **(Pause)**
3 | Of course we emphasise the bit at the beginning of 239:
4 | "Importantly, the criteria do not do away with the requirement of materiality which
5 | indicates that for a breach of the criteria to be dispositive, that breach must make an
6 | actual difference to fairness."
7 | Another way of putting prejudice.
8 | That then reflects, we say, the general approach in relation to appeals under
9 | section 192(1)(b), as well as any other appeal -- see the Virgin Media case at 4B,
10 | tab 37, paragraph 58, page 991.
11 | I know you will be familiar with this, but all the passages from paragraph 52 in Virgin
12 | starting at page 989 to the end of 59 which we looked at earlier no doubt merit a visit
13 | or a revisit. But for these purposes on materiality, it's paragraph 58:
14 | "It is also worth making the point it is not enough to identify some error in the
15 | reasoning of a decision. An appeal can only succeed if the decision cannot stand in
16 | the light of the error. Errors in reasoning which do not affect the result will not be
17 | material."
18 | Of course I would add errors in fairness or in relation to the duty of fairness which do
19 | not affect the result will not be material.
20 | Now CityFibre had indicated that they might seek to rely on a couple of cases that
21 | are in your bundle but which actually go to the issue of relief. But we have agreed,
22 | subject of course to your view, that it would be sensible not to seek to deal with relief
23 | at this hearing. So I would not propose to say anything more about it unless you
24 | would ask us to or like us to.
25 | **THE CHAIRMAN:** I think we are happy to proceed on that basis.
26 | **MS CARSS-FRISK:** Thank you.

1 I think that then finally takes us to the nine conditions. We deal with those in some
2 detail at paragraphs 29 to 41 of our skeleton. I will do my best to put only the points
3 we need to put and as briefly as possible.

4 There are three sets of conditions, and I know you are familiar with this. It's
5 explained by Mr Matthew at paragraphs 51 to 54 of his statement, probably no need
6 to turn that up. Various complaints are made about our approach to these
7 conditions -- our findings, if you like -- in relation to some of them. It's right to say
8 these complaints have not been pleaded, including that there has not been a reply
9 by CityFibre to make these points. But I am not going to take a procedural point like
10 that, we are content to respond on the merits. I just note that.

11 There is a sort of overall, if I may put it that way, faint complaint that it's regrettable
12 that these nine points were not set out in the statement in the way which Mr Matthew
13 has now explained them. But three points to note there: first, CityFibre do not say
14 that there was any breach of procedural fairness because these nine points were not
15 spelt out in the statement, nor could they, but they certainly don't seek to do that.
16 Second, it's not being argued that there is some inconsistency between the analysis
17 in relation to the nine points and the analysis set out in either the consultation
18 document or the statement. Rightly so, because the analysis is consistent, even
19 though it has been separated out in the way it has into the nine points in
20 Mr Matthew's evidence.

21 Third, Mr Holmes, we respectfully say rightly, accepted that the nine-point analysis
22 did illustrate Ofcom's thinking at the time of the statement, illustrated Ofcom's
23 reasoning.

24 He nevertheless invited you, I think, to focus only on what is in the statement.
25 Ultimately, it may not matter too much because, as I say, the same analysis is there,
26 just put somewhat differently in Mr Matthew's statement. But we do say that

1 CityFibre can't have it both ways. If they rightly accept that the nine-point analysis is
2 an elucidation of Ofcom's thinking, then there is no reason to ignore that for the
3 purposes of the arguments in this case.

4 Of course they then do make, as I said, various complaints about some of the
5 conditions which I am prepared to offer a response to.

6 **THE CHAIRMAN:** Can you just step back a little bit and help us with where these
7 points go to and the significance of them in relation to the issues?

8 **MS CARSS-FRISK:** Yes. It's a very good question and it does link to the fact that
9 these points have not been pleaded in any way. It's not entirely clear to us where
10 they do go. If they go anywhere, they must, I imagine, go to ground 2 to the extent
11 that ground 2 still maintains that there was no rational basis for the decision. But we
12 say whatever complaints are made, they do not come close again to meeting that
13 hurdle.

14 Of course, ground 2 has now really transformed into a misdirection argument, which
15 I will deal with in due course. So it isn't entirely clear, but we thought it right to offer
16 some observations in response in any event under the general heading "Cannot
17 amount to irrationality".

18 **THE CHAIRMAN:** Yes. And as far as Ofcom is concerned, clearly it seems helpful
19 for Mr Matthew to explain the thinking and to set it out, no doubt that was the thought
20 process. But do these points -- it wasn't clear to me whether these points go to the
21 significance of the overlap conclusion in the wider consideration of Ofcom, that there
22 are a number of different factors, each of which is important to the reasoning. I am
23 sure the overlap conclusion was one that changed but it's not the only one, but it
24 seems to be an issue to that extent.

25 But I wonder also whether you are taking it further and making it almost a materiality
26 point because there are aspects in there where the test wasn't passed, that

1 diminishes the importance of the overlap conclusion and therefore the prejudice. Is
2 that right?

3 **MS CARSS-FRISK:** Yes, that is absolutely right. That this is the second facet, if
4 you like, of our lack of prejudice, lack of materiality argument. That's exactly right.

5 **THE CHAIRMAN:** Yes.

6 **MS CARSS-FRISK:** Because the overlap conclusion is part of the reasoning, but
7 there are these other conditions that also needed to be met and which were not met.

8 **THE CHAIRMAN:** Yes, thank you. That's helpful.

9 **MS CARSS-FRISK:** I was going to start with condition 2.1, which is the condition
10 linked to overlap. It's a condition to be precise which required evidence that there
11 would be overlap to a substantial degree. That's 2.1.

12 But there is then the further point as explained in the evidence that the overlap
13 conclusion needed to be significantly wrong to make any difference at all. So this is
14 not a point now about the other conditions, but just about this condition.

15 As we explain in paragraph 22 of our skeleton, and indeed as is set out in the
16 statement, Ofcom reached the view, and I now quote:

17 "Due to the limited overlap, placing orders with an Altnet is likely to have very little
18 effect on an ISP's Openreach orders across the whole Openreach FTTP footprint."

19 That was described as the immaterial impact conclusion. The references I have,
20 which it may just be worth turning up again, are to the statement at
21 paragraphs 3.78(e) and 3.85, 2B, tab 74. Page 879, first of all, that's
22 paragraph 3.78(e). You have that no doubt already marked.

23 **THE CHAIRMAN:** Yes.

24 **MS CARSS-FRISK:** Then paragraph 3.85 on page 882.

25 **THE CHAIRMAN:** Yes.

26 **MS CARSS-FRISK:** So in reaching that view then, Ofcom took into account the

1 overlap conclusion and also the idea that as overlap would increase over time, there
2 would be countervailing factors which made meeting the order mix targets easier,
3 such as in particular that growth of regulatory stop sell and that would mean the
4 problem would "increasingly resolve". That is paragraph 3.86 of the statement
5 making that point.

6 To test that conclusion then, Ofcom, as you will have seen, carried out some
7 illustrative calculations which demonstrated how limited the effect of increased
8 overlap would be. In the interests of saving time, maybe I can just give you the
9 references. It's tables 2A, 2B and 2C in the evidence of Mr Matthew.

10 But the conclusions are important, so we do ask you to take those on board, in
11 particular -- and if I can just give you the figures. Even assuming a 5 per cent
12 overlap, adopting the key order mix target of 80 per cent, that would have a marginal
13 effect on order mix targets, increasing the effective target by only between 1.2 and
14 1.7 per cent, where stop sell applied to 20 to 40 per cent of Openreach's footprint.
15 That's table 2C.

16 Then deriving this from table 2B, core bundle, tab 5, page 148, the growth of
17 regulatory stop sell had an effect which outweighed the growth in overlap. For
18 example, 40 per cent stop sell reduced the effective order mix targets from
19 76.3 per cent to 68.3, so table 2B. Mr Matthew explains in paragraph 111 of his
20 statement that these calculations were subject to conservative assumptions; for
21 example, that all customers in the overlap areas that would have bought FTTP from
22 Openreach switched to an Altnet.

23 If you want a summary of all this, paragraph 114 of Matthew is particularly helpful,
24 I think.

25 **THE CHAIRMAN:** Just remind me: we do see some of that in the statement in the
26 annex, is that correct?

1 **MS CARSS-FRISK:** I am sorry, Sir?

2 **THE CHAIRMAN:** We do see some of that calculation in the statement at annex 3,
3 I think, is it?

4 **MS CARSS-FRISK:** Absolutely. Yes, some of it in the statement itself. Yes, sorry,
5 and in the annex, yes. Sorry, I will just -- I have just lost my -- here is my
6 core bundle. It may be worth just going to Matthew, paragraph 114 at this stage just
7 to see how it is summarised there.

8 **THE CHAIRMAN:** Yes. I think probably to refine my question, I am just concerned
9 to understand the extent to which Mr Matthew is replicating what was in the
10 statement and explaining it, rather than creating new calculations that weren't on the
11 statement. I think the former rather than the latter.

12 **MS CARSS-FRISK:** If one looks at paragraph 113, yes, at page 147, "The tables
13 below reproduce the figures presented in the statement".

14 **THE CHAIRMAN:** Yes.

15 **MS CARSS-FRISK:** "I have extended Ofcom's method to show the implications of
16 a larger footprint overlap using the figure in Dunn."

17 **THE CHAIRMAN:** Exactly. So the first two columns in his tables are from the
18 statement and the third is new.

19 **MS CARSS-FRISK:** Yes, yes. Indeed, if one looks below or right at the bottom of
20 the figures, one sees a reference to "Corresponds to Equinox statement figure A3.5,
21 A3.6", et cetera.

22 **THE CHAIRMAN:** Yes, thank you. That's helpful.

23 **MS CARSS-FRISK:** But paragraph 114 is a lengthy passage of the witness
24 statement, so I am not suggesting that it is all digested now. But I would just home
25 in on subparagraph (d):
26 "The growing prevalence of regulatory stop sell which makes the order mix targets

1 easier to meet is likely to outweigh the increasing overlap between Openreach's
2 FTTP network and Altnets."

3 Then one has the calculation and then right at the end of that subparagraph:

4 "The effect of this growth in overlap would be entirely outweighed if regulatory stop
5 sell increased from 20 to 30 per cent which would change the order mix targets in
6 non stop sell areas from 76.3 to 72.9."

7 So the impact of stop sell is clearly important and I know you have the point that
8 Mr Matthew has tested the original calculation by reference to Mr Dunn's evidence.
9 That is also referred to in paragraph 40 of our skeleton.

10 **PROFESSOR WATERSON:** Could I just raise a question here? We have talked
11 a lot about targets for FTTP. Are the assumptions about stop sell reasonable, given
12 the experience?

13 **MS CARSS-FRISK:** Certainly no one has suggested that they are not, so yes.
14 There is of course a range of stop sell and an assumption, if you like, for the
15 purposes of this calculation as to the degree of stop sell at different points.

16 **PROFESSOR WATERSON:** It may be that BT in its evidence can answer that
17 question for me.

18 **MS CARSS-FRISK:** Yes. I think what is being said against us by CityFibre is that
19 calculations should be taken with "extreme care", I think is the phrase they use at
20 paragraph 33A of their skeleton. But they don't then go on to explain why or what
21 might be wrong with any of it. So I would suggest we take their submission about
22 extreme care with extreme care.

23 Yes. I mean, there is nothing before the Tribunal to suggest that Mr Matthew got this
24 wrong, put it that way.

25 I am reminded very helpfully of annex 2 to Mr Matthew's statement, which of course
26 has the estimate of the development of regulatory stop sell at page 164 of the

1 core bundle. The source is Openreach's response to section 135 information
2 request dated 13 September 2021, so you have the source there. Yes, as
3 Mr Matthew explains in paragraph 111 of his statement, and I think made the point
4 that these are conservative assumptions.

5 **THE CHAIRMAN:** Is that table in annex 2 at the time it's given partly estimate and
6 partly achieved, or is all of it estimate?

7 **MS CARSS-FRISK:** Can I check that?

8 **THE CHAIRMAN:** Yes, of course. I had funnily enough, I thought Mr Allwood might
9 have dealt with this at some stage, but maybe I confused him.

10 **MR HOLMES:** The answer is at the bottom of the annex. It explains these were
11 figures which were before Ofcom at the time rather than what I think has happened
12 subsequently.

13 **THE CHAIRMAN:** Yes, thank you.

14 **MS CARSS-FRISK:** CityFibre make various, if I may say so with no disrespect, little
15 points, not to suggest that the calculations of Mr Matthew were wrong, but really just
16 pointing out certain things that you could draw if you wished from the calculations
17 themselves about order mix targets and where they actually end up, not
18 fundamentally disputing the calculations.

19 We respond to that at paragraph 41 of our skeleton. We basically counter some of
20 those points and say actually that doesn't really in any way undermine the
21 fundamental point about the importance of stop sell in relation to any increase in
22 overlap. But as there has been no detailed analysis of this by CityFibre and just
23 looking at the time, I wasn't proposing to spend more time taking you through any of
24 this in detail.

25 The overall tenor of what has been said about the impact of stop sell is not, as
26 I understand it, disputed, and that's the important point.

1 **THE CHAIRMAN:** Thank you.

2 **MS CARSS-FRISK:** All of that then supports our submission that CityFibre's
3 estimate of short-term overlap, even if it is right, would have had no material impact
4 on the overall conclusion.

5 That then takes us to condition 2.3, whether ISPs served by Openreach are
6 disproportionately likely to take legacy products to a substantial degree if they
7 purchase from Altnets. Here for an explanation of Ofcom's view on that, can I take
8 you to paragraph 52(c) and footnote 50 in Matthew 1, page 123 of the core bundle.

9 At paragraph 52(c), he first describes the fundamentals of the conditions as set out
10 in condition 1.3 and we then know that condition 2.3 is basically 1.3 but to
11 a substantial extent. Then you have an illustration in footnote 50 which I would invite
12 you to just have in mind.

13 Now there are two points being taken against us here when we say we didn't believe
14 that condition was satisfied. First, it's said that Ofcom didn't rely in the statement on
15 there being uncertainty as to whether a skew, as it has been called,
16 disproportionality applied. And then it is said in any event, if there is uncertainty
17 about whether there was a skew or would be a skew, then that indicates that
18 condition 2.3 might be met.

19 We say neither of those points works. As to the first one, there is no inconsistency
20 between what Mr Matthew has explained and the statement because what you have
21 in the statement is effectively an assumption that there would be disproportionality or
22 a skew for the purposes of exploring the theoretical possibility of an impact on
23 competition under the least favourable assumptions, but not, I underline, because it
24 was believed that there would actually be a skew.

25 There are various paragraph references, if I can just give them to you for your note
26 without actually asking you to necessarily pick them all up. It's paragraph A3.44 to

1 A3.45 of the statement starting at page 924. Also at paragraphs 3.80 and 3.86 in
2 particular, the latter being at page 882. If I could just invite you to go to 3.86 in the
3 statement, tab 74 of 2B at 882.

4 **THE CHAIRMAN:** Just while we are getting that, these are points which as we
5 discussed earlier, you are making in relation to materiality in that --

6 **MS CARSS-FRISK:** Yes. Well --

7 **THE CHAIRMAN:** In a shorthand sense.

8 **MS CARSS-FRISK:** In a shorthand sense, I think -- yes, it's really two points. One,
9 exactly, it's materiality, other conditions also need to be satisfied and they weren't.
10 Then to the extent that it's now being said by CityFibre, although the precise basis
11 for it or the precise legal principle that applies has not really been articulated, but to
12 the extent they say: ah, but you shouldn't have found that these other conditions
13 were not satisfied, then we say, well, you could only challenge that on grounds of
14 irrationality and that does not apply.

15 **THE CHAIRMAN:** So in this particular case, to take an example, perhaps you are
16 going to show us, but are you saying that this point has been considered and
17 decided in the statement in the same way as Mr Matthew is now demonstrating it, or
18 is there a difference between the way the statement treats it and Mr Matthew treats
19 it?

20 **MS CARSS-FRISK:** Well, there is a difference in the sense that the statement does
21 not spell out the nine-point analysis in the way that Mr Matthew does. But we do say
22 that in substance, you have the analysis referred to. But it's not put in terms of
23 condition 1, 2, et cetera.

24 **THE CHAIRMAN:** Back to the earlier discussion about whether Mr Holmes accepts
25 this is actually a legitimate reflection of what's in the statement.

26 **MS CARSS-FRISK:** Yes, precisely that. Interestingly of course, some of the

1 criticisms are made by reference to what is in the statement as opposed to what
2 Mr Matthew says, but by reference to what is in the statement. So criticising what
3 Mr Matthew says by reference to the statement. So inevitably you see the
4 interaction.

5 **THE CHAIRMAN:** Yes, I do.

6 **MS CARSS-FRISK:** Of course.

7 **THE CHAIRMAN:** So should we be considering this on the basis that although it's
8 not in the statement so therefore not part of the decision, it's nonetheless material for
9 the purposes we are looking at -- that is to say materiality -- or rebutting the points
10 made by Mr Holmes so that doesn't matter?

11 **MS CARSS-FRISK:** It's material that's relevant because it's elucidation. It's that old
12 judicial review distinction between evidence that elucidates and evidence that
13 contradicts. As it is common ground that this is evidence which looks at Ofcom's
14 actual reasoning, it's perfectly legitimate and right to look at it even though it's not put
15 in those terms in the decision. So it's an elaboration on what is in the statement.

16 **THE CHAIRMAN:** Yes.

17 **MR HOLMES:** I really hesitate to interrupt, but I want to make sure I have
18 understood the submission for the purposes of reply.

19 **THE CHAIRMAN:** I was going to ask another question --

20 **MR HOLMES:** I am so sorry, forgive me.

21 **THE CHAIRMAN:** But if you can do a better job, then I will --

22 **MR HOLMES:** Just for clarity: the way we understand the point, and it would be
23 helpful to understand from Ms Carss-Frisk if there is any difference between us here,
24 is that some of the points in Mr Matthew's witness statement were not the subject of
25 resolution in the decision, or indeed were contradicted by the terms of the decision.
26 But it's said, as we understand it, that no prejudice arises because Ofcom would

1 have reached the same conclusion based on that reasoning, and for that reason we
2 need, as we understand it, to address the nine points to show why that's not a safe
3 conclusion to arrive at. But it would just be helpful to understand from
4 Ms Carss-Frisk whether she relies on points insofar as they are not articulated in the
5 decision on the basis that they would have sustained the same conclusion in any
6 event and that therefore there is no material prejudice to Ofcom [sic] relating to the
7 overlap conclusion.

8 **MS CARSS-FRISK:** The answer is yes. The answer is yes. We do say that to the
9 extent that any of the other eight conditions were not satisfied, as we say that they
10 weren't, that does go to materiality in the sense that the outcome would have been
11 the same, even if CityFibre had been able, which they have not, to show that the
12 overlap conclusion was wrong.

13 **THE CHAIRMAN:** And it doesn't matter, you say, for those purposes, that the
14 statement does not record a decision on those particular matters themselves?

15 **MS CARSS-FRISK:** No.

16 **THE CHAIRMAN:** Because you are saying you are imagining a hypothetical world
17 in which there has been a consultation and Mr Dunn has come along with some
18 information, you've looked at it all, and you would be entitled to revisit (Several
19 inaudible words) decision.

20 **MS CARSS-FRISK:** Yes.

21 **THE CHAIRMAN:** Is that --

22 **MS CARSS-FRISK:** Yes. I hope that answers the question.

23 **THE CHAIRMAN:** No, I understand that --

24 **MR HOLMES:** That's very helpful. I am grateful.

25 **THE CHAIRMAN:** -- view on the merits, but I understand the line of logic.

26 **MS CARSS-FRISK:** Briefly, in relation to condition 2.3 still, you have the overall

1 answer. It was for Ofcom to evaluate the evidence and to arrive at its take on this
2 particular condition. But I had asked you I think to go to paragraph 3.86.

3 **THE CHAIRMAN:** Sorry, I am sorry I had --

4 **MS CARSS-FRISK:** No, not at all. I invite you to go to that paragraph because it
5 particularly illustrates the point about assumptions being made or an assumption as
6 to a possible skew.

7 At page 882:

8 "As explained above, if an ISP uses an Altnet for orders from consumers who would
9 have taken the Openreach FTTP product had they not switched to the Altnet but
10 continues to place orders for legacy products with Openreach, this will reduce the
11 proportion of total Openreach orders that are FTTP. The scale of this effect depends
12 on the proportion of the Openreach footprint where the ISP engages in this
13 behaviour."

14 Et cetera.

15 So one sees the conditionality as explained above: if. So this is exploring matters on
16 an assumption that there may be what is being called a skew.

17 Now reference was made by Mr Holmes yesterday to paragraph 3.83 on the
18 previous page, and it was really suggested I think that that was not consistent with
19 a mere assumption. In fact, I would suggest that the way one should sensibly read
20 that paragraph is that it focuses on what ISPs had actually put forward to Ofcom as
21 being the position.

22 There was undoubtedly evidence to indicate that a skew was not in fact likely. The
23 examples I would offer are references paragraph A3.16 and A3.35(a) at pages 915
24 of that same bundle and then 921.

25 **THE CHAIRMAN:** Would you like us to look at those?

26 **MS CARSS-FRISK:** A3.16 at 915, which sets out a good deal of confidential

1 material, which of course I won't read out but invite your attention to because it is
2 evidence pointing to there not in fact being a likely skew.

3 **(Pause)**

4 **THE CHAIRMAN:** Just to be clear, I think the position is that then Ofcom doesn't go
5 on and record in the decision a finding on this point and you say proceeds on the
6 basis of an assumption set out in paragraph 3.86.

7 **MS CARSS-FRISK:** Yes, that's right. Then A3.35(a) at page 921. **(Pause)**

8 The idea of course is really that one has evidence from the ISPs indicating that they
9 would purchase Altnet FTTP products instead of Openreach legacy products. So
10 they wouldn't buy any Openreach legacy products and therefore you would not have
11 a skew.

12 Overall, we say it was well within Ofcom's area of regulatory judgement to reach the
13 view that it did on this particular condition.

14 **THE CHAIRMAN:** Which was in fact though not a view --

15 **MS CARSS-FRISK:** Yes.

16 **THE CHAIRMAN:** -- as it happens, but you are saying that they would have had
17 material on which they could have reached a view under the conditions set out by
18 Mr Matthew. Is that fair?

19 **MS CARSS-FRISK:** Yes, their thinking was, as Mr Matthew has explained, that this
20 condition 2.3 was not satisfied by ISPs served by Openreach are not
21 disproportionately likely to take legacy products to a substantial degree if they
22 purchase from Altnets.

23 **THE CHAIRMAN:** I think you are saying that they had material that would justify
24 making that, but albeit that they didn't. I think you are saying they made an
25 assumption rather than reached a conclusion in the end. The assumption actually is
26 the opposite for the purposes of the argument.

1 **MS CARSS-FRISK:** That's right, for the purpose of the analysis, exactly.

2 **THE CHAIRMAN:** You are saying they had sufficient material should they have
3 wanted to and in a hypothetical --

4 **MS CARSS-FRISK:** Should they have wanted to spell it out in the statement, yes,
5 exactly that.

6 **THE CHAIRMAN:** Yes, okay.

7 **MS CARSS-FRISK:** That then takes us I think to condition 3.1, the requirement that
8 any change in the order mix performance would need to make the difference
9 between satisfying order mix targets or missing them.

10 Now again granted that, formulated in that way, the condition wasn't expressly
11 identified in the statement, the issue certainly formed part, as you have already seen,
12 of Ofcom's analysis in the statement, and we say it's another condition not satisfied
13 that goes to the materiality point.

14 Here, I would particularly refer to the figures at A3.5 and A3.6, starting at page 924 in
15 tab 74.

16 **THE CHAIRMAN:** Yes, we are back at the tables and so --

17 **MS CARSS-FRISK:** Yes.

18 **THE CHAIRMAN:** So you are saying that there was material, sufficient material
19 here, albeit that there was no express finding about this in the statement, if Ofcom
20 had chosen to make a decision based on the sensitivity inherent in these tables,
21 particularly because of stop sell, they could have reached the conclusion that this
22 condition wouldn't have been met.

23 **MS CARSS-FRISK:** That's right, and I would also just add in a reminder of what we
24 say in paragraph 33 of our skeleton, where we say that this view was also supported,
25 and I would say strongly supported, by the modelling of one of the ISPs as set out
26 there in the skeleton.

1 But I need to just pick up one point, a new point that CityFibre made yesterday, that
2 this condition is in fact dependent on overlap. That was a submission they made, as
3 I understood it. As to that, we say this. First, that we accept that there is a link but
4 it's nevertheless an independent condition, so far as the analysis is concerned, which
5 had to be satisfied whether or not condition 2.1 was satisfied, condition 2.1 of course
6 being the one that refers to overlap.

7 Secondly, there are other factors to consider than overlap in assessing this particular
8 condition, such as the mitigating features of the offer itself. You will be conscious of
9 things like a catch up mechanism between the quarters and other features which BT
10 have mentioned in particular in their materials.

11 Thirdly, it doesn't therefore follow, if that is what is being suggested, that if the
12 overlap conclusion was wrong, then condition 3.1 was satisfied. So this goes to
13 materiality again.

14 Fourthly, we have already looked at evidence which shows that an increased level of
15 overlap, particularly given increasing levels of stop sell, is likely to have very little
16 effect on the missing of targets.

17 So we say the new argument in relation to this condition doesn't in fact assist
18 CityFibre.

19 Now CityFibre I think also have said in their skeleton that the condition should not
20 have to be satisfied to find a potential barrier, but we do take issue with that
21 because, as a matter of logic, it is clearly relevant what the effect or whether
22 a change in order mix actually has the effect that you miss the relevant targets.

23 That's at the heart of it all. If you are not going to miss, then there is no incentive not
24 to use Altnets, so it has to come into it.

25 Then there is that reference, as there has been to the other conditions too, to the
26 idea that: well, if it might have been satisfied, this condition, then wouldn't that be

1 enough and we are looking at a potential barrier? I will pick that up again under
2 ground two, but our answer is straightforwardly: well, no, we were entitled to look at
3 the likelihood of these scenarios, were they likely or not. So the fact that they might
4 be would not get you home and that was a rational view on the part of the regulator.
5 I think I am now slightly trespassing on lunch, I am sorry.

6 **THE CHAIRMAN:** No, that's been very helpful. Thank you. We will start again at
7 2 o'clock. Thank you.

8 **(1.01 pm)**

9 **(The luncheon adjournment)**

10 **(2.00 pm)**

11 **THE CHAIRMAN:** Ms Carss-Frisk.

12 **MS CARSS-FRISK:** A few words, not too many I hope, about condition 3.2 then.
13 This is the one about ISPs' strategies of responding to the threat of missing an order
14 mix target. Ofcom's approach or take on it, as you will have seen, is there are
15 various mitigating actions that could be taken and we deal with that in paragraph 23
16 of our skeleton and also paragraph 34.

17 So we are talking about things like promoting FTTP, fairly obviously, and possibly
18 when it comes to resellers offering inducements to order FTTP over legacy products,
19 the costs of which might be lower than the cost of losing long-term benefits of using
20 Altnets. That's the sort of basic idea.

21 One has reference to this in the statement at A3.35 in particular, tab 74, page 921 of
22 bundle 2B, where Ofcom says:

23 "There is also a range of things that ISPs can do to mitigate the risk of missing the
24 targets in the short-term, although these possibly involve some costs."

25 Then one sees the two subparagraphs looking first at direct sales by ISPs and then
26 at ISP resellers.

1 **THE CHAIRMAN:** So this is another example where you say the condition is that
2 they would cut volumes from Altnets and the condition here has not been met. You
3 say it's another example of the condition not being met.

4 **MS CARSS-FRISK:** This is another example of a condition not being met and I am
5 really just offering these references to give you a flavour of Ofcom's approach and
6 the evidence that Ofcom had to substantiate that view.

7 **THE CHAIRMAN:** Is there any difference in emphasis in the paragraphs you have
8 just shown us or in the statement which amounts to a decision to that effect in the
9 statement, or is that the same as the other two we've looked at, or is it actually
10 something the statement resolves? I can't quite remember where it ends up.

11 **MS CARSS-FRISK:** Right. So this is analysis that shows evidence about mitigating
12 strategies.

13 **THE CHAIRMAN:** Yes.

14 **MS CARSS-FRISK:** There is not a decision as in a reference in the statement to --

15 **THE CHAIRMAN:** A finding.

16 **MS CARSS-FRISK:** -- condition 3.2 not being satisfied, but that's what Mr Matthew
17 has explained it all amounts to.

18 **THE CHAIRMAN:** Yes, exactly.

19 **MS CARSS-FRISK:** One has his explanation at paragraphs 73 to 74, which is
20 probably worth just turning up in tab 5 of the core bundle at page 134. One sees the
21 heading on page 134 is indeed this condition as it has been spelt out and then he
22 explains what Ofcom thought, very much reflecting what we've just seen in the
23 statement at A3.35.

24 **THE CHAIRMAN:** Yes.

25 **MS CARSS-FRISK:** CityFibre argue that our view doesn't fairly reflect the ISP
26 evidence. They don't, as we understand it, make any point about the evidence in

1 relation to direct sales, but they focus on resellers only.

2 But be that as it may, we make the simple point that it was for Ofcom to evaluate the
3 evidence. We've given lots of references in our skeleton, particularly at
4 paragraph 34 -- confidential references I should say -- to the evidence. I am not
5 going to take the Tribunal through it now, but our overall point is it was perfectly
6 reasonable and rational for Ofcom to evaluate it in the way it did, which was a matter
7 for it.

8 Moving on then, if I may, to the final condition before we get to ground 2, condition
9 3.3. This is about the magnitude of any potential impacts on incentives for ISPs to
10 purchase from Altnets, that the magnitude of any potential impacts had to be
11 material. Again, that was not a condition that was found to be satisfied.

12 Here, we would home in particularly to give you again a flavour of the thinking on
13 paragraph 3.87 of Mr Matthew's statement and footnote 106 which you get at
14 page 135.

15 **THE CHAIRMAN:** So 3. --

16 **MS CARSS-FRISK:** I am so sorry. It's paragraph 74 of Mr Matthew's statement and
17 paragraph 3.87 of the statement.

18 **THE CHAIRMAN:** Yes.

19 **MS CARSS-FRISK:** Sorry about that. So that's at page 882 of tab 74. It again talks
20 about various responses likely to be available to the ISPs and the point is simply that
21 this goes to that question of magnitude of any possible impact. Mr Matthew, again
22 paragraph 74, you've just been pointed to as well.

23 One point CityFibre make here at least in their skeleton at paragraph 42 is that we
24 had failed to appreciate that it's the impact of the offer in what they call the period of
25 challenge, i.e. the initial 12 to 24 months period, that matters, to which our simple
26 response is: no, we haven't failed to appreciate that. We have looked at how the

1 ISPs could respond in the short-term, and one sees that in particular from the
2 paragraph we looked at at A3.35 at page 921 of tab 74, where at the bottom of that
3 page one sees the reference to:
4 "There is also a range of things ISPs can do to mitigate the risk of missing the
5 targets in the short-term."
6 So we emphasise that.
7 Now here again we have a new argument by CityFibre that condition 3.3 again
8 depends on the overlap conclusion and we make very much the same responses as
9 in relation to condition 3.1. First, it is a separate conclusion where the condition
10 needs to be independently satisfied, as Mr Matthew has explained.
11 Secondly, in any event and for the reasons already given, and in the light of the
12 evidence and the calculations you have seen, the magnitude of any impact on
13 incentives will not depend on the extent of overlap due in particular to the
14 countervailing effect of stop sell, a point I know you have well on board.
15 So as in relation to condition 3.1, we say this new argument simply doesn't help
16 CityFibre. If the overlap condition were to be wrong, which it isn't, it would not follow
17 that condition 3.3 would have to be seen to be satisfied.
18 So it remains the position that any error in relation to the overlap conclusion, if there
19 were any, would not be material for the two reasons we've given. One, because
20 Mr Dunn's evidence is consistent with the overlap conclusion so it isn't wrong, but
21 secondly, because there are other conditions that would need to be satisfied which
22 aren't. Again, I know you have all of that well on board.
23 Which then takes me, I believe, to ground 2 of the appeal finally. Ground 2 as
24 pleaded in the notice of appeal, as I think Mr Holmes very fairly acknowledged, was
25 really squarely a rationality challenge saying there just wasn't a rational basis for
26 Ofcom's decision. That has now very much transformed into a claim or allegation

1 that Ofcom misdirected itself in relation to its own analytical framework, particularly in
2 the way they have approached the notion of a potential barrier to competition.

3 We have of course made it clear that in assessing that question of a potential barrier,
4 i.e. question 1, we have looked at whether certain scenarios would be plausible --
5 that is the word we have used there -- meaning not a purely theoretical possibility but
6 something based on reasonable underlying assumptions and likely to apply. In other
7 words: is it reasonably likely that X or Y will be the effect?

8 This is explained particularly at Mr Matthew's witness statement, paragraphs 42 and
9 onwards, and it probably is worth turning that up. Core bundle tab 5, page 118. In
10 fact, sorry, it's 119 which starts with 42. One sees just above actually at
11 paragraph 40, the three questions are formulated and then paragraph 42 explains
12 how likelihood came into it. If I could invite you to read paragraph 42. **(Pause)**

13 I will also invite you in a moment to look at 43 to 46, but if we stop there just for now.

14 This is not of course the same as Ofcom looking for proof, which I think is one
15 complaint that has been levelled against us, because we are not looking at whether
16 on a balance of probabilities something has happened, we are looking at predictions
17 for the future. So that is one straightforward point on it.

18 But there are really three key reasons why we reject the complaints made against us
19 here. First, CityFibre don't dispute that we were entitled to look at whether scenarios
20 were plausible and based on reasonable assumptions. They actually say that at
21 paragraph 54(c) of their notice of appeal, no need to turn it up, but just to flag that
22 that is a concession, if you like, of some standing and they haven't in any way tried to
23 resile from it.

24 But what is important here is that if one looks at the ordinary dictionary meaning of
25 plausible, it is clear that it includes likelihood, something being likely. You have the
26 various dictionary meanings that we refer to in volume 5, tabs 7 to 10.

1 **THE CHAIRMAN:** I am not sure I have a volume 5. Mine seems to have
2 disappeared.

3 **MS CARSS-FRISK:** Oh. It has the skeleton arguments as well.

4 **THE CHAIRMAN:** Thank you. I have taken those out and have them separately so
5 that's probably why.

6 **DR BELL:** Can you give me the reference again?

7 **MS CARSS-FRISK:** Yes. It's tabs 7 to 10 of that volume 5. So we have the
8 Cambridge English Dictionary at tab 7, "plausible":
9 "Seeming likely to be true or able to be believed."
10 Now I can see of course that Mr Holmes may say: how about the definition that says
11 "able to be believed"? But our point is, and that's important, that provided we are
12 using the word in a reasonable way, recognised to be a way of perceiving that word,
13 its meaning, then that is something we are entitled to do. So the fact that there may
14 be other dictionary meanings which suggest something less certain, if you like, is
15 from that perspective neither here nor there.

16 We were entitled to say "plausible" in this context for the purposes of what makes
17 sense for our analysis does look at likelihood. So this is just to illustrate that
18 likelihood is recognised as a meaning of the word.

19 You get the same thing from the Collins English Dictionary at tab 8, "plausible", right
20 at the top there:
21 "An explanation or statement that is plausible seems likely to be true or valid."
22 Then again at tab 9, Macmillan Dictionary definitions:
23 "Likely to be true."
24 At the top of the page. Then finally at tab 10, Oxford Advanced Learner's Dictionary,
25 again at the top of the page:
26 "Reasonable or likely to be true."

1 **THE CHAIRMAN:** Sorry, it does seem -- it did seem to me that CityFibre had
2 accepted plausibility as being a proxy for potential and it may be -- I think the
3 argument probably sits below that, doesn't it?

4 **MS CARSS-FRISK:** Yes.

5 **THE CHAIRMAN:** I wonder, and perhaps you are coming on to this, I guess the
6 question that comes out of this is: what degree of likelihood, assuming there is
7 a likely aspect to plausibility which comes from I suppose the forward-looking
8 predictive nature particularly of this, and I think the agreed position that you are able
9 to exclude the theoretical.

10 **MS CARSS-FRISK:** Yes.

11 **THE CHAIRMAN:** I think Mr Holmes is saying that the -- I am not sure he accepts
12 likelihood as being part of it, but if he were to accept it or indeed just on the way he's
13 put it, but whatever it is, it's quite a low level.

14 **MS CARSS-FRISK:** Yes. Picking up first the fact we are looking at plausible and it's
15 accepted we were entitled to consider what scenarios would be plausible, that's
16 when you then, as I think you've suggested, we get into in a sense the second level
17 of then looking at what does plausible mean.

18 I understand CityFibre to be saying it just means possible and maybe add in based
19 on a reasonable assumption. Our response then is: no, it actually can mean
20 something further down the scale than that. The way we took it, it meant more than
21 possible. It meant likely.

22 I don't think we, if I can put it that way -- in order to answer the complaint, I don't
23 think we need to say likelihood is precisely there on the scale, but the point is it's
24 something more than possible.

25 **THE CHAIRMAN:** What does "likely" mean though? Because we have formulations
26 about "likely" to qualify as well which we are more familiar with, like "more likely than

1 not".

2 **MS CARSS-FRISK:** Yes.

3 **THE CHAIRMAN:** Presumably you are not putting it as high as that?

4 **MS CARSS-FRISK:** I don't think we have attempted to put it -- and this was the
5 point I clumsily tried to make just now -- I don't think we have tried to place it at
6 a precise scale of there is one end possible and there is one end beyond reasonable
7 doubt.

8 **THE CHAIRMAN:** Yes.

9 **MS CARSS-FRISK:** But it's clearly, as I say, something beyond possible and if we
10 are right about that, we were entitled to use likely as being something more than
11 possible, then we were entitled to do what we did in our approach of thinking around
12 question 1.

13 **THE CHAIRMAN:** How does Ofcom go about making that determination about
14 where it sits on the sliding scale, which I think you are saying, and I think I have
15 understood the submission, perhaps provoking you with my question --

16 **MS CARSS-FRISK:** Yes.

17 **THE CHAIRMAN:** -- but how does Ofcom go about making a decision about where
18 it sits in that spectrum on the basis that presumably it's fact-specific and different in
19 every case?

20 **MS CARSS-FRISK:** I think the point really, and I will be corrected by those sitting
21 behind me if I am wrong, is that it wasn't necessary to place it for these purposes at
22 a precise point in the scale, but it had to be more than just possible. It had to be, if
23 you like, capable of being described as "likely".

24 **THE CHAIRMAN:** Is that because you say with the evidence you have and the
25 measure of discretion you have about the way in which you've gathered that, you are
26 closer to theoretical than -- you are beyond, you know you are not beyond -- I have

1 not put that very well.

2 **MS CARSS-FRISK:** You are not beyond theoretical if you say possible.

3 **THE CHAIRMAN:** Yes, you are somewhere in that spectrum from theoretical to
4 possible to something elsewhere, where you are saying the degree of likelihood is
5 sufficiently low that you don't consider there's any further requirement to go on and
6 investigate the further questions. I suppose that's a self-evident statement but do
7 you see what I am saying? Part of the reason why you might not need to work out
8 what the absolute answer is --

9 **MS CARSS-FRISK:** Yes, but it has --

10 **THE CHAIRMAN:** -- that you are sufficiently comfortable that it's a relatively low
11 level of likelihood which meets your requirements.

12 **MS CARSS-FRISK:** Or put it the other way round: you had to believe that it was
13 sufficiently likely for it then to make sense to actually go on to consider questions 2
14 and 3 with the need to demonstrate a benefit and that kind of thing, which of course
15 comes into it too.

16 So it's a question of pitching it in such a way that you don't end up with having
17 passed question 1, if you like, on too little evidence. I am sorry, I am not trying to
18 avoid the question --

19 **THE CHAIRMAN:** No, it's helpful, and I can see the difficulty. I wonder if -- I don't
20 know if it is helpful, but certainly I had some questions about how this fits with the
21 position articulated in the market review and then how that fits in actually with the
22 formulation that appears in the statement, because I wasn't convinced that the two
23 were actually completely aligned and I wondered whether --

24 **MS CARSS-FRISK:** I was certainly going to come back to that as well.

25 **THE CHAIRMAN:** Because it does seem to me, it helps a little bit on the point you
26 are making, which is that there must be some -- underlying my question was really

1 whether there's any policy setting that would deliver to you a sense of where you
2 would put this. And clearly the way in which question 2 is put does seem to me to go
3 to the policy setting.

4 Mr Holmes actually takes that as a point in his favour, but --

5 **MS CARSS-FRISK:** Yes. I think so far as the policy aspects are concerned, this
6 may be the right time actually to invite you to look at paragraphs 43 to 46 of
7 Mr Matthew's statement.

8 At paragraph 43:

9 "Question 1 is distinguished from question 2 which asks whether such a barrier
10 would be sufficiently large that it is likely to have a material impact on nascent
11 competitors, in particular a materially detrimental impact on network build.
12 Therefore, while question 1 and question 2 both involve an assessment of material
13 impact, this assessment is in relation to different impacts."

14 Sorry, I am jumping ahead.

15 **THE CHAIRMAN:** To pause there for a minute, I think that is of course correct, but
16 actually in reality the primary driver of the answer to question 1 is really the primary
17 driver of the answer to question 2, isn't it? This really all about whether --

18 **MS CARSS-FRISK:** Well, they are, with respect. I am not sure if that is right
19 because they certainly look at different impacts under different subject matter in the
20 sense that one squarely looks at the impact on incentives to buy from Altnets, and
21 question 2 then looks at the impact on the Altnets, on network build, on the investors
22 into the Altnets.

23 **THE CHAIRMAN:** I guess the most important thing to an Altnet, not less an
24 investor, is the likelihood of subscriptions from ISPs and they really are --

25 **MS CARSS-FRISK:** Of course I am not suggesting they are completely uncoupled,
26 one from the other. But it is important though to have in mind that they do address

1 different subject matters, albeit there is a link.

2 **THE CHAIRMAN:** Yes, I accept that. Yes, I can see that.

3 **MS CARSS-FRISK:** But then if we go on to paragraphs 44 and 45, and I am going
4 to come back to this topic about the distinction between the two because I was
5 actually hoping to answer your question about policy, one sees at 45:

6 "The test set out in the statement was designed to place much tougher limits on
7 Openreach's ability to use volume and loyalty discounts than would arise under
8 competition law. If question 1 was satisfied, the starting point would be that the offer
9 would be prohibited unless Openreach can show that the terms are likely to create
10 clear and demonstrable benefits for the purposes of question 3, even if the degree of
11 impact on nascent network competitors in terms of their network build is unlikely to
12 be material for the purposes of question 2. Also if question 1 was satisfied, the offer
13 would be prohibited if it was likely to have a material impact on nascent network
14 competitors under question 2, even if there were benefits to consumers under
15 question 3."

16 So one has that concern about how likely should you be able to step over the first
17 barrier, if you like, or how likely should that be seen to be satisfied when you then
18 end up looking at things like is there a demonstrable benefit.

19 **THE CHAIRMAN:** Yes. I think I confused Mr Holmes yesterday when I was talking
20 about high barriers and low barriers. But actually the point I was trying to make is
21 exactly that point, which is when you look at the market review description of it, you
22 do get what's there at subparagraph (a), "the reference to the impact on nascent
23 competitors is unlikely to be material".

24 So you not only have the concept of likelihood, but you have put it in a negative, and
25 I was suggesting to Mr Holmes that if, for example, you were -- I am not saying this
26 is a concluded view -- but if you were to attribute in that context likely to being more

1 likely than not, then actually that becomes, as I think Mr Matthew is saying, quite
2 a high hurdle.

3 **MS CARSS-FRISK:** Yes.

4 **THE CHAIRMAN:** And I think that does link into the discussion we've just had,
5 which is if you are going through a process of identifying whether ISPs might be
6 incentivised not to use AInets and you have a positive answer on that, then it does
7 seem highly likely that when you get to -- I shouldn't use the word likely -- it seems
8 quite logical that when you get to this question, question 2, applying the test as
9 unlikely to be material, you are going to have some difficulty in showing that it's not
10 material.

11 Sorry, that is probably making it more complicated than it needs to be, but you see
12 what I mean. There does seem to be a slight, a peculiarity perhaps -- and I am sure
13 there are good reasons for the way it's put -- between the first question and the
14 second question and, if you like, the hurdle that Openreach has to meet to convince
15 you to get past each step.

16 If you do get past the first step, the second step looks very difficult as a practical
17 matter if nothing else.

18 **MS CARSS-FRISK:** One thing one mustn't lose sight of here, and it's very easy to
19 do that, is when we do look at question 1, of course we are concerned with whether
20 there's a potential barrier to competition and in deciding whether that is so, one looks
21 at various scenarios that lie behind it and see whether they are likely.

22 So that is a further nuance that should be factored into it: it's not a sort of overall
23 likelihood test, you are actually looking at different scenarios which then come in that
24 question of potential or plausible. But plausible is really the word attached to the
25 different scenarios that come into it when you assess it.

26 **THE CHAIRMAN:** Is that an evidential standard point that you could reach

1 a conclusion on question 1 with less evidence and with less investigation than you
2 might be required to do in order to reach your conclusions in relation to question 2?
3 Is that the point or have I misunderstood you? I don't want to put words in your
4 mouth. I thought --

5 **MS CARSS-FRISK:** It may be difficult and I am waiting for a rustle behind me, but
6 I slightly hesitate to agree with that although I think I see entirely your point. I think
7 I should stick to the idea that whereas the whole point of question 2 is that you look
8 at likelihood and materiality, in question 1 you do look at something different
9 because it is about potential barrier. That is the question.

10 But behind that, you then look at what are plausible scenarios, likely scenarios. So
11 they are somewhat different in that way.

12 **THE CHAIRMAN:** I don't want to push the point too far, I think there's obviously
13 a curiosity -- I think there is a curiosity about the way it evolves in the market review
14 into the questions and whether that actually maintains the integrity of the original
15 arrangement in the market review. But that's probably more curiosity than actually
16 strict relevance to the case.

17 Because I think the only point really which comes out of the discussion is whether it
18 helps you understand better what the threshold for potential is, how and where one
19 puts that threshold, which of course is a matter of contention, I think, between you
20 because I think --

21 **MS CARSS-FRISK:** Yes -- well, I am sorry if I am just repeating myself, but I think
22 the contention really is between possibility, possible scenarios or scenarios that
23 might happen, is that enough, that is CityFibre's contention. Or does it have to be
24 more than that such that it can be described as likely, which is our contention.

25 I think that's really where the debate is. I don't think you have to decide precisely --
26 I am sorry, I am coming back to that. I don't think you have to decide precisely

1 | where on a scale the standard that has to be met falls, as it were. It's more flexible
2 | than that but it is about: is possibility enough or does it have to be likelihood?

3 | **THE CHAIRMAN:** Yes, I understand that. Of course, I think Mr Holmes might well
4 | say, given half a chance, that's all very convenient for Ofcom because it effectively
5 | gets to determine where it puts the stick in the ground for the standards, because
6 | I think you are saying it's fluid and it's a matter of judgement for the regulator.

7 | **MS CARSS-FRISK:** It has to be likely and I am only recognising some fluidity in that
8 | because I think that is how one tends to understand likely as not necessarily falling
9 | at a precise point on a scale. But if it isn't likely, this is not saying that Ofcom can, as
10 | it were, do what they like. They can't make words mean something that they are not
11 | capable of meaning.

12 | **THE CHAIRMAN:** No, clearly.

13 | **MS CARSS-FRISK:** We completely accept that.

14 | **THE CHAIRMAN:** Yes.

15 | **MS CARSS-FRISK:** So it's really saying: could you fairly describe this as likely?
16 | That's really what it's about. On our case, that likelihood was an appropriate test to
17 | apply when looking at scenarios and whether they are plausible.

18 | **THE CHAIRMAN:** I think you were resisting my attempt to try to qualify "likely" so it
19 | has a reference point which we would recognise as an evidential burden of some
20 | sort, and I think you said that's --

21 | **MS CARSS-FRISK:** Yes, because we are looking at predictions for the future, we
22 | are in that sort of territory. Of course, if we were looking at did X happen on X date,
23 | then it would be very straightforward: on a balance of probabilities, did it happen or
24 | not? But we are just not in that sort of territory.

25 | **THE CHAIRMAN:** That does give a considerable margin of discretion to Ofcom in
26 | relation to whether question 1 is passed. So I think you are saying that's appropriate

1 because of the nature of the exercise and the regulator's position. Is that --

2 **MS CARSS-FRISK:** Yes, I think that's absolutely right. If you look at the policy
3 drivers as they are at least indicated, if not expressly described, in the passages
4 we've seen just now in Mr Matthew's evidence, then it makes sense for that to be so.
5 What does not make sense, with respect, is for the bar to be set as low as CityFibre
6 contend it should be because from their perspective, or on their case, possibility or
7 might is enough. You don't have to have likelihood of the various scenarios that
8 come into it. So you surmount that hurdle very easily and then you come into that
9 question of demonstrable benefit.

10 **THE CHAIRMAN:** Yes, and Mr Holmes says if you are thinking about it from
11 a policy point of view, then the biggest policy driver here, as articulated by the
12 market review, is the preservation of that competitive position and therefore the
13 protection of the interests of Altnets. That's, as I understand it, his argument.
14 So when you are talking about policy position, what's your position on that? Do you
15 take that into account? Are there other policy aspects that drive the decision
16 whether or not question 1 is met?

17 **MS CARSS-FRISK:** Of course competition is an important policy driver. One also
18 needs to bear in mind things like the legal requirements not to act in
19 a disproportionate and non-targeted way.

20 One out of a jumble of points we make here is that this is all to be seen in the context
21 of sections 3(3)(a) and 49 of the Communications Act, section 3(3)(a) obliging Ofcom
22 to have regard to the principles that regulatory action should be targeted at cases
23 that need it, and other regulatory principles such as proportionality, but also the even
24 more hard-edged requirement in section 49 that Ofcom may only give a direction
25 under the relevant SMP condition where it is justified and proportionate to do so.

26 So that has to come into it too, all of which supports the view, in our submission, that

1 Ofcom have struck the appropriate balance in their approach, or at least it's one they
2 were entitled within their considerable margin of regulatory discretion to strike.

3 If we go back just to pick up that point to the market review and what is said there,
4 I will try and come back to various other points in a moment.

5 **THE CHAIRMAN:** That's been helpful and I am sorry I have taken you out of
6 course.

7 **MS CARSS-FRISK:** No, not at all. That is bundle 2A, tab 13, page 329. I hope
8 I have the right reference. Yes, 329, I think these were the passages that you were
9 taken to by Mr Holmes yesterday.

10 At 7.159, "our objective is to promote investment in gigabit capable networks by
11 Openreach and other operators in order to promote network-based competition and
12 this will be our guiding principle in assessing commercial terms proposed by
13 Openreach. Our key concern is commercial terms that could undermine investor
14 confidence in new network build and impact rollout plans ..."

15 I think Mr Holmes homed in on the word "could" there as to which we make the
16 simple point that this paragraph is clearly not designed to set out a sort of legal test
17 to be applied and the word "could" there is, in any event, quite consistent with the
18 approach of reasonable likelihood which was then adopted in looking at the
19 plausibility of scenarios that would go into answering what became question 1.

20 I know there was also a reference to the opening sentence of paragraph 7.160:

21 "If Openreach proposes commercial terms which clearly have no impact on access
22 seekers' incentives to use alternative networks, then they are unlikely to be
23 a concern if Openreach proposes commercial terms that potentially create a barrier
24 ... we will apply the framework set out in 7.154."

25 We do say, to pick up a point I think you made yesterday, Sir, that there is scope for
26 middle ground here. So it simply doesn't follow that the question is: is this a case or

1 is this a situation where there is clearly no impact on access seekers' incentives and
2 that's it. That would not be a fair reading of this paragraph, in our submission. It
3 certainly does not preclude Ofcom from then developing and adopting the approach
4 which it in fact did.

5 Here, I should perhaps also pick up a point that was made, albeit lightly yesterday,
6 which was about the objectives. Reference was made by Mr Holmes to Matthew
7 paragraph 16, if you recall, and the reference to BT or Openreach being encouraged
8 to develop its Fibre to the Premises network. So Matthew, paragraph 16,
9 core bundle tab 5, page 110.

10 There was a suggestion that the objectives had somehow shifted. Well, can I just
11 put on record that that is not accepted on behalf of Ofcom and actually one gets of
12 course from paragraph 7.159, which we've just looked at on page 329, the reference
13 to "objective to promote investment in gigabit-capable networks by Openreach and
14 other operators".

15 Just for your reference, can I also give you these: bundle 2A, tab 5, page 38,
16 paragraphs 2.7 to 2.8. In this same tab we've just had open, tab 13 in bundle 2A,
17 page 307 as well, paragraph 7.33, making the same point.

18 I don't think this is the biggest point in the case, but I just wanted to make that clear.

19 May have one second to seek to digest a note.

20 **THE CHAIRMAN:** Yes, of course.

21 **MS CARSS-FRISK:** Yes. I think what those behind me would particularly want to
22 stress, and rightly so no doubt, is the difference in subject matter between questions
23 1 and 2. That is a very real point. It's not a question of -- well, it's important when
24 you look at what is meant by likelihood in relation to both of those questions, it's very
25 important that they don't apply to the same thing. That's just restating, I'm afraid,
26 what I have already said, but emphasising how very important it is from Ofcom's

1 perspective that that is so. They are simply not comparable because they ask
2 different things.

3 Here, I wanted also to draw your attention to footnote 44 in Mr Matthew's statement,
4 which I think got slightly lost. So it's page 120 of the core bundle in tab 5, which
5 I would respectfully suggest is a very helpful illustration of how one is looking at
6 different things in the two questions.

7 **THE CHAIRMAN:** Yes.

8 **MS CARSS-FRISK:** I was also going to take you to a couple of authorities which
9 make the significant point that when you are looking at a statement of policy or
10 statement by a public authority, you don't interpret it like a statute or a contract. You
11 should adopt a broad and untechnical approach, which again is absolutely not saying
12 that a regulator has carte blanche to just make words mean something that they
13 don't. That's not at all the submission.

14 But the submission is exactly what I just said and there is therefore a degree of
15 latitude in how words are used in a particular context, provided that the meaning
16 attributed to them fall within, if you like, a reasonable range. In our case, that is of
17 course supported by the dictionary meanings we've looked at.

18 So Tesco Stores v Dundee is the first one at bundle 4A, tab 20, and it's just a short
19 passage in the speech of Lord Reed at page 328.

20 **DR BELL:** Can you give me the page number again?

21 **MS CARSS-FRISK:** Yes, page 328, the beginning of paragraph 19:

22 "That is not to say that such statements [and this is the context of statements by
23 public authorities] should be construed as if they were statutory or contractual
24 provisions. Although a development plan has a legal status and legal effects, it is
25 not analogous in its nature or purpose to a statute or a contract."

26 Then I just invite you to read to the end of paragraph 19. **(Pause)**

1 **THE CHAIRMAN:** Yes, thank you.

2 **MS CARSS-FRISK:** Then the other case is called Re McFarland at tab 16 of the
3 same bundle. At paragraph 24, this is Lord Steyn in the House of Lords, and it's
4 page 250. It's quite a long paragraph, but the key is really about seven lines from
5 the bottom:

6 "Looking at the interpretation of words in statements by public authorities, the court is
7 bound to decide such question for itself, i.e. question of interpretation, paying of
8 course close attention to the reasons advanced for the competing interpretations.
9 This not to say that policy statements must be construed like primary or subordinate
10 legislation. It seems sensible that a broader and wholly untechnical approach should
11 prevail."

12 I was just checking to see if I had hopefully made the points I thought we should
13 make. There is in fact one other, which is about what was in the consultation
14 document concerning all of this. Perhaps it's a bit of a broad brush merits point, but
15 I will make it anyhow, which is CityFibre have said nothing in the consultation
16 document to flag up this approach to the analytical framework. We don't accept that
17 because if one looks at that document, and I'll show you in a moment, it is in fact
18 peppered with references to "likely". So it is just odd that that was then another point
19 not raised in the consultation, given the grave concern we now have by CityFibre.

20 I should say others did make points about how the analytical framework should be
21 applied, quite similar points in fact to what is now being said by CityFibre, but they
22 did it in the consultation.

23 Anyhow, to make this good, can I invite you then to the consultation document one
24 more time at tab 45 of 2B. It's really the conclusion. I am sorry, I now seem to
25 have -- yes, no, it's the provision of Ofcom at page 590, that's the reference, where
26 at 2.45 they say:

1 "Applying our analytical framework above, we first consider whether the order mix
2 targets create a potential barrier to using Altnets."

3 Then if you leap down to paragraph 2.48:

4 "There is thus a plausible scenario in which using an Altnet is unlikely to affect an
5 ISP's eligibility for discounts because that ISP is nonetheless likely to surpass the
6 order mix targets. In this scenario, these targets are unlikely to create a barrier to
7 using Altnets."

8 The next paragraph:

9 "However, given it is also plausible ISPs could be close to the target particularly in
10 the next few years, we have considered how ISPs might behave. In particular, we
11 have considered whether ISPs using an Altnet are likely to continue to sell legacy
12 products ..."

13 Then at paragraph 2.51:

14 "We consider that under the Equinox offer, ISPs are unlikely to continue to offer
15 legacy products for new sales ..."

16 Then finally at 2.53, right at the top of page 592, one sees again a reference to
17 "likelihood":

18 "However, our provisional view is the risk is likely to be small and time-limited. As
19 a result, it is unlikely to be significant for upstream resellers' choice."

20 Forensic points perhaps, but there you have a very similar approach set out to what
21 we are now arguing about. If one then looks at what was actually said in response,
22 one sees a reference to that in the statement at paragraph 3.54 and onwards where
23 consultees did take issue with some of this, at tab 74, page 874, under the heading
24 "Shareholder responses to the consultation":

25 "Openreach agreed with the approach in the consultation. The joint consultation
26 response submitted that Ofcom should have proceeded directly to an assessment of

1 | questions 2 and 3 ..."

2 | So taking issue with the analytical framework which CityFibre did not.

3 | I know one thing you also wanted me to do was to give an answer to
4 | Professor Waterson's question about new legacy connections and what we mean by
5 | that.

6 | **PROFESSOR WATERSON:** I thought you'd forgotten.

7 | **MS CARSS-FRISK:** No, no. I was just going to give a reference to core bundle,
8 | tab 5, page 114, footnote 23.

9 | Before I sit down, if I may just check whether there is anything that those behind me
10 | would wish me to say.

11 | **THE CHAIRMAN:** I have one further question for you, if I may. It's just in relation to
12 | the discussion we've had about question 1 and where you'd put what "likely" means
13 | and where you'd put the reference point, if you like.

14 | Does that all have a relevance to the matters we discussed in relation to ground 1 as
15 | well? Because presumably the standard you are setting yourself for the enquiry you
16 | are making has some bearing on the amount of evidence you need to accumulate
17 | and, if you like, the completeness of that. This all tied up together, isn't it?

18 | **MS CARSS-FRISK:** I think it's right it has a bearing in the sense that obviously
19 | whatever standard the analytical framework involves, that is then a standard that
20 | must be satisfied. It doesn't affect the question of the court's or tribunal's approach
21 | and when as a matter of law the Tribunal is entitled to intervene, but of course it
22 | does affect the task before the decision maker. So in that sense it's relevant.

23 | But it's not, as it were, relevant to the particular legal arguments which are in debate
24 | before you.

25 | **THE CHAIRMAN:** No. Yes, I understand the point. Putting it another way, if you
26 | were designing the exercise you were going to carry out to gather the evidence and

1 deciding when you had sufficient evidence, you would in doing that have regard to
2 the way in which you framed the question you set yourself.

3 **MS CARSS-FRISK:** Yes, absolutely.

4 **THE CHAIRMAN:** That just makes common sense, doesn't it?

5 **MS CARSS-FRISK:** Yes, quite, which we of course say is exactly what Ofcom did.
6 Then subject to any further questions, that completes our submissions.

7 **THE CHAIRMAN:** Yes. No, thank you, Ms Carss-Frisk. Mr Palmer.

8

9 **Opening submissions by MR PALMER**

10 **MR PALMER:** Sir, members of the Tribunal, I am limited to 30 minutes on the
11 timetable, so I am going to rattle through a bit of material and give you quite a few
12 references if I may, rather than turn everything up, although I will turn up some of the
13 key references.

14 What I want to do is say something about the market context which Mr Holmes
15 opened upon yesterday morning, which of course bleed into and through my
16 submissions on ground 1A and ground 2. I don't propose to say anything much
17 more on the consultation ground which, as we've indicated, is really a matter for
18 Ofcom, not us.

19 But let me start with the market context. You have heard and I know understand that
20 BT has a legacy network, the copper-based network, and you will have seen
21 reference in the documents to that being used at present, that copper network, to
22 provide what is referred to in the marketplace as "standard" broadband and
23 "superfast" broadband. I just want to put a little bit of definition on that.

24 You may well be familiar with these terms as customers of telecommunications
25 companies in the way you indicated at the outset. But just to remind you, standard
26 broadband has absolutely maximum of 24 megabits per second. The now outdated

1 term "superfast", which no doubt had currency when it first came in, is absolute
2 maximum of 80 megabits per second that's delivered by fibre to the cabinet
3 technology.

4 But in terms of consumers' experience, they don't necessarily experience those
5 maximum speeds, again as you may be familiar with. These things are marketed
6 therefore on average speeds which often are way below those theoretical
7 maximums. Because one of the features of copper, unlike fibre, is that the signal
8 degrades over distance. So the further the customer's premises from the local
9 exchange, the slower the speed, so often substantially below that. So a standard
10 broadband typically may only be 10 or 12 megabits per second, for example. It will
11 vary.

12 These maximum speeds that I have given you even are well below what's now called
13 in the marketplace "ultrafast", 900 megabits per second, or gigabit-capable networks,
14 which is what is provided on FTTP, otherwise known as full fibre networks, which
15 doesn't degrade over distance because it's light down a fibre, which is very reliable
16 and less prone to faults and so forth. So there is a huge disparity between the
17 quality of these next generation Fibre to the Premises network and what can be
18 provided over the legacy network.

19 You were taken to -- I might just ask you to turn it up -- figure 1 of Mr Matthew's
20 statement yesterday morning. That's core bundle 1, tab 5, page 160. You will
21 remember this diagram and Mr Holmes' explanation of it.

22 **THE CHAIRMAN:** Yes.

23 **MR PALMER:** I just want to draw your attention to another feature of it which is not
24 prominent in Mr Holmes' submissions because it doesn't affect CityFibre's business
25 model or its role in the marketplace. That is the bottom line marked "Consumers at
26 the retail level".

1 You can see working across it that "Downstream BT" on the left competes for
2 consumers with first of all Virgin Media, its biggest competitors are right on the
3 right-hand side. It is competing with Altnets as well, many of whom build and retail
4 fibre to the premises to end users -- CityFibre has chosen not to adopt that model
5 but of course other Altnets have done -- and BT also compete against the ISP
6 resellers as well as the ISPs directly, mainly the third party ISPs: Sky, TalkTalk,
7 Vodafone, who of course use Openreach's network as well as any Altnets they
8 choose to use to deliver those services.

9 So that's what is going on at the retail level. At the wholesale level, obviously BT
10 Openreach is competing with CityFibre, potentially other networks for third party
11 ISPs' business. But like BT, those ISPs want to offer FTTP to consumers. They
12 don't want to be left behind any more than does BT. When I say left behind, can
13 I remind you of the evidence in relation to what Virgin Media, BT's biggest retail
14 competitor, is. I give you the reference, it's Mr Matthew, paragraph 9.

15 But also Mr Allwood, paragraph 17D if we could just turn on to that in the same
16 bundle, tab 7, page 191. 17D, just to remind you, that Virgin Media has announced it
17 has already completed the upgrade of its entire national network to gigabit speeds,
18 so it's delivering gigabit speeds over its existing coaxial cable-based network, and it
19 intends to upgrade its fixed cable network to full FTTP having 14 million premises
20 with completion in 2028, as well as a joint venture to build FTTP to a further 7 million
21 premises.

22 The concern Mr Allwood voices in the final sentence there but which is prominent of
23 course in the statement itself as well as in the market review is that BT needs to
24 invest at a faster rate to stay competitive. The legacy copper-based network cannot
25 compete with that and that means that ISPs who are dependent on Openreach, and
26 in so far as they are dependent on Openreach, can't compete with that either.

1 So there is the driver both at retail and at wholesale level. Very great competitive
2 pressure on BT and Openreach within BT to keep pace with Virgin Media and to
3 keep pace with the Altnets, hence very large investment, as you've seen in the FTTP
4 network on which downstream BT as a retail supplier of course will be completely
5 dependent on that in order to continue to attract and serve customers across the
6 country.

7 That investment, Mr Allwood describes from page 189, just one page back -- I will
8 give you this reference -- from paragraph 12 through to 18 what that investment is
9 and how it is being developed and why there has been more recent increase of the
10 target up to 25 million premises by December 2026.

11 The upshot of that evidence is that bearing the costs of running the legacy network
12 at the same time as investing in an entirely new FTTP network depends obviously on
13 migrating customers from one to the other where FTTP is available and doing so
14 quickly.

15 The evidence on that is Mr Allwood, paragraphs 19 through to 25. Can I refer you
16 also to Mr Matthew, paragraph 20, tab 5, page 111 for your note.

17 One of the drivers to drive that migration to the new FTTP network as it's built is
18 a regulatory mechanism which you've heard about called stop sell. That is part of
19 the journey to what will ultimately become copper retirement. That is the dream. We
20 are still some way off that, but copper retirement is the dream. The journey is
21 facilitated from a regulatory perspective by stop sell.

22 Can I just remind you of the detail of that. You'll find that in tab 5, page 111,
23 Mr Matthew, paragraphs 20 to 24. There he explains in 20 moving towards copper
24 retirement. Over the page, 21:

25 "The first step where the copper retirement process is engaged is the regulatory stop
26 sell. Once Openreach's FTTP network covers 75 per cent of an exchange area,

1 Openreach can stop selling legacy products to new customers within that exchange
2 area."

3 That means, just to answer Professor Waterson's question which you just have the
4 reference to, but whilst I am also here, can I also show you Mr Allwood, footnote 15,
5 page 193. From the point of stop sell, if you look at the second line of footnote 15
6 where it puts it the other way round:

7 "Prior to stop sell ISPs may" - in other words after stop sell Openreach need no
8 longer accept - "orders with Openreach [from ISPs] to install new legacy lines, to
9 upgrade the capability of existing legacy lines to their end customers [so from copper
10 to FTTC or from 40 mega FTTC line to an 80 mega FTTC line] or to transfer an
11 existing Openreach legacy service from another ISP where they have acquired the
12 end customer."

13 So, for example, if a TalkTalk customer decides to move to Vodafone, they are an
14 existing FTTC customer, if they switch to Vodafone from regulatory stop sell,
15 Vodafone would have to supply FTTP. They couldn't simply do what they would do
16 at the moment, which is provide a new connection to FTTC. It is still a new
17 connection because there is a physical new connection that happens at the
18 exchange: the wires are plugged into different boxes essentially. So that counts as
19 a new connection, to answer your question.

20 None of that, though, would be available after the point of stop sell and all that BT
21 must do is provide notice 12 months ahead of when it expects to get to that
22 75 per cent point. It must give that notice and that gives some time to ISPs to
23 prepare in their marketing to consumers.

24 It's not 12 months after you have reached that threshold, you give 12 months' notice
25 that we expect to get there.

26 That has a real commercial implication --

1 **PROFESSOR WATERSON:** I was just going to ask -- just going to check: does that
2 mean that FTTP rollout goes hand in hand with stop sell, or rather vice versa, that
3 stop sell goes hand in hand with FTTP rollout or not necessarily?

4 **MR PALMER:** To a large extent, I will show you -- I think you've seen the table.

5 **PROFESSOR WATERSON:** In the same areas, I am talking about.

6 **MR PALMER:** Yes. It's not the case that in investing in FTTP in an exchange area,
7 Openreach will necessarily push straight up to the 75 per cent. But you can see the
8 logic as to the reason why they might soon after being there push up to 75 per cent
9 as they expand in that area. Because whether it's BT or any other ISP, what they
10 are concerned to do is to market their FTTP services as widely as possible and as
11 nationwide as possible. What they don't want be doing is getting sucked into
12 detailed sort of subdivisions of geographical areas.

13 You've been on a website trying to see what kind of internet connection you can be
14 offered. You have to put in your postcode and exact address so it can tell you
15 exactly what there is. Obviously the more broadly they can cover an area, the more
16 effective their marketing to that area. That's not a BT-specific point, that's any ISP.
17 So you can see the logic where once you're going to invest in an area, you get up to
18 at least 75 per cent as soon as you realistically can. But it wouldn't be immediate
19 and I'll show you some of --

20 **THE CHAIRMAN:** That's the question I was going to ask because we have the table
21 on 194, which is a condensed version --

22 **MR PALMER:** That's what I have in mind, yes.

23 **THE CHAIRMAN:** Yes. The question I think you've answered in the second box
24 where stop sell's been notified and will be activated in 12 months. The notice has
25 been given, it's not therefore certain that the consequences of stop sell will be that
26 BT or Openreach will cease to provide legacy services as described. But you are

1 saying actually in practice, it's quite likely at least 75 per cent of them will do that.

2 **MR PALMER:** Yes. Not only that, what's the purpose of the 12 months' notice?

3 The purpose of the 12 months' notice to allow ISPs to prepare to market their

4 services to people living in that area. They will not know 12 months in advance, or

5 even quite close up to the area, precisely which streets Openreach will have dug

6 down, which ones they won't. They will not know if they will actually come out at 70

7 per cent, or 75 or whether they'll come out at 80 per cent or more after that 12

8 months. They will be preparing to market their services to that area saying: good

9 news, we Sky, or we TalkTalk, whoever it is, are here with our fantastic new fibre to

10 the premises, full fibre service, however they describe, to market it.

11 That's important because of the commercial implications that it has more widely

12 across the country in all areas where Openreach has announced it's going to be

13 investing in FTTP and beyond because of the commercial reality that as soon as

14 regulatory stop sell does bite in an area, those ISPs will have no choice but only to

15 offer FTTP in that area.

16 So they must have the capacity to do that, they must have the things to do that, they

17 must have the marketing to sell that. I just want to show you how that feeds into

18 Ofcom's analysis in just a moment.

19 Yes, just to answer your question about the figures, if you look over the page at

20 page 194 of Mr Allwood's witness statement, you will see the figures are confidential

21 other than they add up to 100 per cent. This is a fixed snapshot on

22 21 February 2022 which is about six days before this witness statement, the areas

23 where stop sell had already been activated as a percentage of Openreach's total

24 FTTP build. That is using the measure of THP, which is total homes passed. So

25 that percentage on the right as of that date, total homes passed of Openreach's

26 FTTP network as it stood on that date, you see that figure.

1 Below it, you see the figure where in addition, stop sell has been notified and will be
2 activated in the next 12 months. So that gives you a broad idea of the proportion
3 which will have reached stop sell of the existing FTTP network. Obviously that's not
4 standing still, the FTTP network is growing every week. So that's what takes you to
5 the table that you have seen at the back of Mr Matthew's statement, which is
6 page 164 where you see, in relation to Q3 2021, on the right-hand side, the same
7 percentage as that which I've just shown you.

8 Beyond that prediction, which is a range in each case going forward of what's
9 anticipated, and of course that is partly a function of the increasing size of the
10 footprint in the first column as time progresses, and you see what sort of relationship
11 that has expected to develop.

12 **PROFESSOR WATERSON:** We also notice from that table that regulatory stop sell
13 lags significantly total FTTP in Mr Matthew's table. For example, if you look at the
14 figure for Q4 2021, if you compare the two columns of Q1 2022.

15 **MR PALMER:** Yes. I mean, you see it not rolling out as quickly as the FTTP, you
16 don't see it rolling out stop sell as quickly but you see that percentage gradually
17 going up over time --

18 **PROFESSOR WATERSON:** Yes.

19 **MR PALMER:** -- and never going down again or comfortably above the
20 assumptions which Ofcom used.

21 **THE CHAIRMAN:** There is a difference between the number as of -- I don't know --
22 we can't precisely tell because it comes in middle of Q1 2023, but there is
23 a difference between the number for Q1 2023 in Mr Matthew's table and the
24 composite of the top two figures in Mr Allwood's. Is that because of the difference of
25 the size of the network?

26 **MR PALMER:** Yes, because the network is growing. As I tried to make clear --

1 **THE CHAIRMAN:** No, I understand, I was just checking.

2 **MR PALMER:** It's always a percentage of the size of the network as it exists now.

3 **THE CHAIRMAN:** Yes, fine. So that's not suggesting that a new assessment is
4 going to be faster than --

5 **MR PALMER:** No. This is Openreach's own prediction. They are pretty consistent
6 with each other.

7 **THE CHAIRMAN:** Yes.

8 **MR PALMER:** So the commercial messages to take from this, first of all,
9 is Mr Allwood's 27 to 28, which is that regulatory stop sell on its own is not driving
10 orders fast enough from a commercial perspective to create the necessary
11 investment, so therefore Equinox.

12 The second commercial message is that ISPs already have to be prepared to market
13 and sell FTTP exclusively in certain areas because of regulatory stop sell. It is
14 inevitable that those areas will increase in number and proportion of total homes
15 passed as time goes on.

16 In principle, there is no reason from a commercial perspective where just as they
17 provide exclusively FTTP where they have to, they couldn't also do so in areas
18 where they don't have to.

19 In support of that statement B2, tab 74, page 920, paragraph A3.29, in particular the
20 confidential bit. **(Pause)**

21 Statement paragraphs 3.81 to 3.82, which you find on page 880, not a passage
22 Mr Holmes took you to.

23 **THE CHAIRMAN:** Sorry, just give me that reference again. 3.80, is it?

24 **MR PALMER:** 81 to 82.

25 **THE CHAIRMAN:** Yes.

26 **MR PALMER:** The ISPs will largely cease placing new orders for legacy products is

1 the upshot from that, driven by the fact that it's going to have to, sooner or later,
2 whether they like it or not, they might as well do it sooner because of that competitive
3 dynamic which I've outlined to you.

4 If you look at paragraph 3.80, five lines up from the bottom, just after Ofcom have
5 sketched out a scenario which you have seen before, it then says about five or six
6 lines up from the bottom:

7 "There are two broad possible reasons why an ISP wishes to do this. First as
8 a commercial choice. If the ISP perceives their gains from continuing to offer legacy
9 Openreach products to new customers."

10 It's paragraph 3.81 and 3.82 which dispose of that and explain why that's not a likely
11 scenario.

12 The second is that if there are short-term difficulties in moving away from selling
13 legacy Openreach products; for example, contractual details with ISP resellers or the
14 need for technical changes to ordering systems.

15 Before I go on to those short-term points, let's just deal with the significance of this
16 disposing of the commercial reasons, why they wouldn't want to do anything other
17 than move on to FTTP in preference to legacy orders. Allwood paragraph 52,
18 page 201 -- I won't turn it up now, it's core bundle tab 7, page 201. It shows that
19 very few legacy orders made by ISPs are truly necessary.

20 There is a percentage figure there which is confidential. You may recall it if you've
21 seen it.

22 **THE CHAIRMAN:** Yes.

23 **MR PALMER:** I would draw your attention to it. It's a figure of the overall volume of
24 orders received in a given area which are proven to be actually necessary to be
25 FTTC or non-FTTP. That is evidence provided by examples of existing regulatory
26 stop sell areas where ISPs have had to grapple with this already -- Salisbury is one

1 example, there are others -- which shows that other factors should be surmountable.
2 That's Allwood, paragraph 53.
3 That's evidence which was submitted to Ofcom during this consultation exercise, it
4 was accepted. Let me give you the reference for that where you find it in the
5 statement. It's paragraph A3.30 which you'll find at page 920. I am going to speed
6 up for time so I won't turn everything up.
7 Secondly, recent experience has demonstrated that ISPs have been able to pivot
8 sales activity from legacy sales to FTTP, see the experience of a predecessor offer,
9 the "FTTP only V2" offer. That is described by Mr Allwood at his paragraph 55.
10 Again, that was in evidence before Ofcom and set out in their statement at
11 paragraphs A3.11 to 3.15, page 914, which shows that they placed weight on that
12 experience of ISPs being able to pivot sales.
13 Then we come to the short-term problems. There are two categories given. One is
14 what I call the initial teething problems, the other is the resales. The teething
15 problems were addressed by Openreach in the design of the Equinox offer. You
16 have that explained by Mr Matthew in his witness statement, you will remember the
17 passages which deal with the consultation with ISPs and the changes made to the
18 offer to accommodate those early problems.
19 You remember there's particularly two ISPs which identified particular early problems
20 they expected to overcome but would take them time. That was allowed for by the
21 lower target of 75 per cent in the first year.
22 Now that was accepted by Ofcom to deal with the problem. Not the reseller's
23 problem on its own, but to deal with the teething problems; IT systems, necessary
24 infrastructure installed and the exchanges, and so forth.
25 You have that at paragraph A3.31, page 920, which is supported by evidence drawn
26 not only from experience of the FTTP-only offer, but also another source which

1 I think is marked as confidential. If you look at page 920, the second to third lines of
2 paragraph A3.30, that's confidential, I just ask you to look at that and to look at the
3 date at the end of that sentence.

4 **THE CHAIRMAN:** Yes.

5 **MR PALMER:** Note also what Vodafone says A3.17C on page 916. Again, I want
6 to show you the date -- confidential, page 916, it relates to Vodafone. Just look in
7 the second line, you'll see the date.

8 **THE CHAIRMAN:** Yes.

9 **MR PALMER:** There's an exception which is described in the next few words, but
10 that's it.

11 **THE CHAIRMAN:** Yes.

12 **MR PALMER:** So that deals with the teething problems. That leaves the reseller
13 issue, as I have called it.

14 Mr Holmes showed you A3.32 to 33, pages 920 to 921. You may remember that.
15 Most of it is marked as confidential but you've read that before. He didn't go on to
16 the following paragraphs and spend any time on that. But there are several points to
17 be made about these reseller problems. The first point is that this of course only
18 arises in overlap areas. As I am going to suggest to you, this is the residual
19 significance of the overlap point because the teething problems have been dealt with
20 and met by the lower target. So we're left with the significance of overlap areas for
21 resellers within the timescale of 12 to 24 months.

22 The first point is that the conclusion that Ofcom relied on was the modest one that
23 Ms Carss-Frisk set out to you, just that that overlap would be limited. Can I recall the
24 context of Mr Allwood at paragraph 30, page 195, to recall that the Equinox offer, the
25 calculation on which the order mix targets must be met, if you look at the last
26 sentence:

1 "Applies to new acquisitions and regrade activity by ISPs only in areas where
2 Openreach FTTP is available to order and only to apply in places with Openreach."
3 So it's not just where the FTTP has been dug, it's actually premises ready.
4 That's the sole calculation which needs to be made. So take a step back from this:
5 the suggestion that the conclusion that overlap will be limited within 12 to 24 months
6 has no evidential basis is frankly bizarre.

7 CityFibre knows that there was evidence before Ofcom that it and other Altnets
8 choose to build where Openreach is not present. Openreach has increased
9 transparency to industry as part of a commitment to DCMS to list the exchanges
10 where it has built, where it is building and where contracts have been signed with
11 contractors for fibre build to commence, going out to 2023 originally, there's
12 uncertainty, and now, although non-exhaustively, up to 2026. That's all on
13 Openreach's web page which is publicly accessible. The reference you have for that
14 in terms of explaining that to Ofcom is bundle 2A, tab 31, page 493.

15 That information shows four delivery phases between now and 2026. It lists the
16 towns and villages where FTTP rollout is going to be made and each local exchange
17 name. So that is part of a commitment made to DCMS to provide certainty to local
18 authorities, CPs and others.

19 So that extent of build and timing has always been known. Ofcom consulted on the
20 fact that overlap/extent of overlap would be uncertain. If CityFibre had certain plans,
21 which they now say they did by the end of August 2021, indicating the extent of
22 overlap, then they could easily say so if they thought Ofcom was wrong just to simply
23 treat overlap/extent of overlap as being uncertain. They could look at that, they
24 could look at that at their plans. As Ms Carss-Frisk submitted to you, that was more
25 than sufficient to prompt them to do so.

26 As to Openreach building on Altnets, Mr Matthew has explained that there would be

1 a competition problem for Openreach. It would certainly attract Ofcom's attention if
2 we were to seek to target areas built by CityFibre or Altnets to try to build round and
3 discourage expansion, that would invite regulatory attention. That appears in the
4 market review itself as well. That's paragraph 2.69, at bundle 2A, 11, 244.

5 The second point is that the extent of the problem within the overlap areas narrows
6 down only to those areas in which an ISP might, as a result of switches there, face
7 a cliff edge. I just want to put this in context before I sit down. I know I am at the
8 end of my time. This does not include cases where the effect of reseller orders is
9 that the ISP is going to fail to qualify for the Equinox discounts, regardless of whether
10 it moves FTTP orders to an Altnet or not.

11 Mr Holmes spent lots of time emphasising that certain ISPs would struggle on this
12 basis. That's not enough for him. He would need to have to show that there is
13 a likely enough risk deserving of Ofcom's intervention. So not that it would struggle,
14 but that this risk of being deterred from moving to FTTP at Altnets rather than
15 Openreach would arise because they were that close to meeting those targets,
16 notwithstanding all those reseller problems, that that was what was going to make all
17 the difference. They would have to be hitting that sweet spot before this made any
18 difference at all, and that is a missing link in CityFibre's argument.

19 We are dealing with that marginal case and in that marginal case, look at the terms
20 in which Ofcom deal with it in their decision at 3.87, which has not received enough
21 attention from Mr Holmes, page 882. This goes to the materiality of the overlap
22 conclusion at all, as well as the likelihood or otherwise of any competition risk
23 arising.

24 The context in which this analysis, this residual consideration of the reseller problem
25 arises in 3.87, is:

26 "Even in locations where there is an overlap, moving volumes to Altnets will not

1 necessarily result in worsening performance against OMTs if instances do arise
2 when meeting the order mix targets is in the balance."

3 Just pause there. If that requires what I described as the sweet spot to be hit.

4 **THE CHAIRMAN:** Sorry to interrupt you, but just to be clear: are you saying there
5 might be some ISPs who are going to miss the order mix targets by a greater
6 amount and so this would not make any difference? Is that the point you are
7 making?

8 **MR PALMER:** I don't have time to go through all the figures, but where the reseller
9 problem most acutely arises, the predictions are some way short of even the first
10 year target of 75 per cent.

11 **THE CHAIRMAN:** So the point is that it doesn't really help the ISP not to make
12 sales to the Altnets because they have other things they have to do which will not get
13 them there.

14 **MR PALMER:** They have other stuff to do, and that is crucially not just my
15 submission but it's what Ofcom found. I will give you that reference in just
16 a moment.

17 So we are dealing with the marginal cases and in that marginal case, if it were to
18 arise, if that sweet spot -- or not so sweet spot, if you like -- were to be hit, then what
19 would they do? What would ISPs then do? It's in that context that it would make
20 sense for them to take the range of things identified by Ofcom at A3.35 (a) and (b)
21 and footnote 270, see that on page 922. It's that which may attract a cost but of
22 course maybe not the cost of missing the targets altogether.

23 So bear in mind, see Mr Allwood paragraphs 44 to 49, that there remains deliberate
24 flexibility by design in the first 12 to 24 months, the special on boarding
25 arrangements put in place by Openreach specifically to deal with this problem,
26 including on boarding periods, ramp up mechanisms, extended sign-up period, all of

1 that -- what that means is explained by Mr Allwood -- again minimising the possibility
2 of actually ending up on that cusp allowing ISPs maximum flexibility to avoid ending
3 up in that position in the first place and then if they do, they have other ramps off to
4 deal with the problem. That is what Ofcom decided.

5 This of course in a context where they further decided that the specific circumstance
6 of the impact of moving FTTP to Altnets is likely to have "very little effect" on the
7 effective OMT for reasons set out by Ofcom at A3.47, even when subject to the
8 sensitivity testing done for different degrees of overlap based on what Mr Matthew
9 has told you. It's because of this very temporary nature of this problem as well that if
10 there are those additional costs, they will be proportionate to the overall benefit.

11 That is the point I want to stress to you. It's a dwindling pool of effect and the way
12 Ms Carss-Frisk's submissions on ground 2 are best to be understood, to say: look,
13 we started off by identifying a theoretical possibility and we've analysed it and
14 analysed it and analysed it, we've brought it down, we've shrunk the problem down
15 and down and down until you're left with a residual problem: what's the magnitude
16 and likelihood of that problem and then does that justify our intervention, bearing in
17 mind the requirements under the Act that any intervention, any direction, would have
18 to be proportionate and would have to be justified and would have to be -- given
19 there's an interference with a measure which otherwise is acceptable from BT
20 commercial freedom, but also, as we stress at paragraph 2 of our skeleton
21 argument, in all other respects has great benefits. It benefits BT and Openreach in
22 their ability to compete at all, it benefits ISPs, it benefits consumers.

23 **THE CHAIRMAN:** How are you doing for time?

24 **MR PALMER:** I'm trying to wrap up.

25 **THE CHAIRMAN:** I just want to have a sense of whether you are going to --

26 **MR PALMER:** I am right at the end.

1 **THE CHAIRMAN:** Fine.

2 **MR PALMER:** I am right at the end.

3 **THE CHAIRMAN:** Good, good.

4 **MR PALMER:** The last point in fact is that Mr Holmes placed some emphasis on the
5 fact that while despite all that, TalkTalk in their consultation response asked that
6 reseller contracts be excluded, and Ofcom could have done that and didn't do so.
7 I just want to show you that TalkTalk's position was nothing to do with this problem
8 identified, nothing to do with its likelihood or otherwise of using Altnets. The
9 message -- I will give you the reference in a moment -- it gave is they anticipated no
10 effect on Altnets and gave reasons why. That is at their consultation response 2B,
11 tab 64, pages 805 to 806. I invite you to read that.
12 But more importantly, when they asked for the exclusion of reseller contracts, it's
13 because they were worried they would not meet those targets under any
14 circumstances; therefore their costs would be higher, therefore their downstream
15 prices to consumers would be higher, therefore there would be disadvantaged as an
16 ISP in competing for customers.
17 That was their concern and Ofcom's answer to that was: we are not concerned with
18 that in this review, you have to raise that separately. Here we are looking specifically
19 at the disincentive effect on Altnet build, effectively.
20 What I've shown you is that there's an evidence base for Ofcom's conclusions. The
21 weight to be attached to these arguments and these facts is a matter for Ofcom, the
22 basis on which it can be attacked is on rationality basis only.
23 I have one other point which I need to draw to your attention, which is going to be
24 very quickly done, which is: what has experience showed us so far? Mr Allwood
25 gave you that evidence. It's confidential so I cannot read it out, but can I direct you
26 to paragraph 55 on page 202.

1 **THE CHAIRMAN:** Yes, and I think we have certainly all read that.

2 **MR PALMER:** You have seen that.

3 **THE CHAIRMAN:** Yes.

4 **MR PALMER:** This witness statement is dated 28 February, therefore I took
5 instructions. I did not want to mislead the Tribunal at all, I wanted to make sure that
6 was still current. The answer is it is and it's in respect of all ISPs, including those
7 mentioned at paragraph 49. One of the flexibilities that Openreach introduced was
8 extension of the sign-up periods. Those who had initial problems could sign up later
9 to --

10 **THE CHAIRMAN:** To the end of March, yes.

11 **MR PALMER:** You see the ones who most recently signed up on 1 March 2022,
12 there are three mentioned there.

13 **THE CHAIRMAN:** Yes.

14 **MR PALMER:** They have met the target since as well. So that's the updated
15 position on instructions, but we still stand behind what's said in paragraph 55 as
16 accurate.

17 I am very grateful for the indulgence. I have been a little too long. If there is
18 anything I can help you or any member of the Tribunal with, I am most happy to do
19 so.

20 **THE CHAIRMAN:** Thank you. It was always going to be tough in 30 minutes. Is
21 there anything else? No, that's very helpful. Thank you very much.

22 I do think we need to give the transcribers a break, Mr Holmes. We will make sure
23 you get the proper time.

24 **MR HOLMES:** I would be grateful as well. I think we'll be fine for time, Sir.

25 **THE CHAIRMAN:** If we need to find a bit more, we can sit a little bit later if need be.
26 But shall we just take 10 minutes for the transcribers.

1 **MR HOLMES:** I am grateful.

2 **(3.39 pm)**

3 **(A short break)**

4 **(3.49 pm)**

5

6 **Reply submissions by MR HOLMES**

7 **THE CHAIRMAN:** Yes, Mr Holmes.

8 **MR HOLMES:** Sir, it's the end of two long days. I propose to focus my reply
9 submissions by addressing my learned friend's points in the order of my opening
10 submissions, if I may, beginning with the economic context.

11 This was not seriously contested by Ofcom and in my submission, it shows why this
12 case matters. As regards the economics, as emerged from a document which
13 Ms Carss-Frisk showed you during the course of yesterday afternoon, there is
14 currently a race to build fibre networks. That's not controversial.

15 Openreach is in the process of a huge rollout to run fibre to 25 million premises
16 within four years. CityFibre is rolling out to 8 million and there are other Altnets
17 seeking to build as well. Anyone who has taken a taxi in Central London in recent
18 months will have seen the roadworks which this race to build is generating.

19 Against that backdrop, Ofcom's conclusion of limited overlap within 12 to 24 months
20 estimated in the 2 to 5 per cent range cannot be accepted as an obvious conclusion
21 or as a modest conclusion, as Ms Carss-Frisk sought to suggest yesterday. Nor is it
22 one that can be derived simply from the fact that Altnets prefer not to overbuild. That
23 evidence ignores the largest and most ambitious build plan of all, that of Openreach,
24 which plans to cover the great majority of premises within only four years.

25 Whether the Altnets welcome overbuild or not, it is clear that they will be overbuilt on
26 a significant scale. Given that the race to build is unrolling in real-time, Ofcom could

1 not simply infer that overlap would be limited or assume that it was 2 to 5 per cent.
2 In fairness, Ofcom needed to ask Openreach and the Altnets whether they agreed
3 with its limited overlap assumption.

4
5 You put it to Ms Carss-Frisk that an important aspect of fairness may be to ensure
6 that the decision maker is properly informed on the matters which it proposes to
7 determine. We respectfully endorse that suggestion as a correct statement of the
8 law. You saw the point put in that way by Mrs Justice Andrews in the British Gas
9 case.

10 As a point, it shows the potential for overlap between consultation and reasonable
11 enquiry arguments. This case illustrates that very clearly, as I will come on to
12 submit.

13 It was said by Mr Palmer today that the Altnets will know where BT is going to build.
14 He said that everything was clear. But if we could just take up Mr Allwood's
15 statement, it's in core bundle 1, tab 7, and turn to page 202 and review
16 paragraph 58.

17 The available information doesn't cover the entirety of their build plans over the
18 coming four years, nor does it show which particular premises within an exchange
19 will be supplied with FTTP at any given time.

20 This unclear position shows why the Tribunal should be very cautious of attempting
21 to assess matters on the merits for itself. The question is whether there was any
22 public law problem with the decision. Mr Palmer's rapid fire submissions this
23 afternoon do not provide a confident basis on which the Tribunal can reach its own
24 conclusions as though it were some roving public enquiry.

25 On the regulatory context, I showed you Ofcom's overriding strategic priority, namely
26 to promote network-based competition, taking competition as far up the supply chain

1 as possible. That was not seriously contested. My learned friend Ms Carss-Frisk did
2 emphasise the words in the market review about "promoting investment in networks
3 by Openreach and other operators". We don't shy away from that. Of course they
4 are intent upon promoting investment. But that was crucially qualified with the words
5 "in order to promote network-based competition".

6 In my submission, the network competition was the key underlying objective and not
7 just the rollout of fibre. The Altnets are not just a means to an end, based on the
8 strategic intent set out in the market review, and that informs the policy underlying
9 the questions. So it really goes to ground 2, the interpretation of those questions
10 and how they fit together, which I will come to in a moment when I turn to ground 2.

11 In opening submissions on the regulatory framework, Ofcom did appear to suggest
12 that rollout by other Altnets could be safely disregarded when considering overlap
13 because of uncertainty as to their likely success in wholesaling. There are two
14 points about that. First, it is not what the market review suggests. Ms Carss-Frisk
15 referred you to paragraphs 8.60 to 8.71 in volume 2 of the market review statement,
16 which are cited in the Equinox decision at paragraph A4.6(b) and footnote 286.
17 I took you in my opening submissions to those paragraphs. They show that Ofcom
18 was concerned to keep open the scope for Altnets to win business, whether they are
19 yet wholesale or not, by protecting them via the notification requirement. You saw
20 that in paragraph 8.68 of volume 2 of the market review in particular.

21 It is also not how Ofcom approached matters in the Equinox decision itself. Its
22 finding on the overlap conclusion was said to relate to overlap by Altnets generally
23 and not just CityFibre. Paragraph 3.78(e) of the contested decision, the Equinox
24 statement, relies on "the limited overlap of the Openreach FTTP footprint by Altnets
25 [I emphasise Altnets in the plural] in the next 12 to 24-months".

26 That brings me to the Equinox offer. There's no dispute as to the terms of the offer,

1 but there were two questions by Professor Waterson which I didn't address in
2 opening, Mr Palmer has addressed one of them now, but may I just give you my
3 answers. The first concerned the meaning of legacy products. This is explained in
4 footnote 7 of the contested decision.

5 Now I know that I am in closing, but just very briefly to show you that, so it's in
6 bundle 2B, tab 74, at page 864. You see there that legacy -- tab 74, 864, footnote 7.
7 You see there that legacy broadband refers to both fibre to the cabinet and products
8 that solely use a copper connection (in other words, the old ADSL product with now
9 comparatively very slow speeds to which Mr Palmer referred).

10 In other words, these are the slower products which still contain a copper element.
11 That is relevant when assessing the incentive effects of the Equinix offer. To get
12 the substantial discounts across all their Openreach FTTP purchases, ISPs need to
13 ensure that their legacy purchases from Openreach do not exceed a proportion of
14 their total Openreach purchases. If they are struggling to meet the target, that will
15 make them very cautious of buying any FTTP products from rival networks in areas
16 where those are available.

17 Now Ofcom now says that for this incentive to bite one needs to assume that ISPs
18 will buy their legacy products disproportionately from Openreach, the so-called skew,
19 and it says that that remains an open question, although it wasn't identified as an
20 aspect of the reasoning in the decision.

21 But that condition is obviously and straightforwardly met. Only Openreach supplies
22 copper-based products to ISPs in the market. None of the Altnets are building shiny
23 new copper networks. In the decision, Ofcom did not found itself on any conclusion
24 that the skew condition would not be met. On the contrary, it found that ISPs would
25 struggle to meet the targets and that is because of this inevitable skew which cannot
26 be avoided voluntarily because of the reseller issue.

1 The second question raised by Professor Waterson was whether switching from one
2 ISP's FTTC product to another ISP's FTTC product counts as a new connection for
3 the purpose of the targets. The answer is yes, and I think Mr Palmer accepted that.
4 So if one ISP wins an FTTC customer from another ISP, that will be a legacy
5 connection which could jeopardise meeting the target.

6 Footnote 23 of Mr Matthew's witness statement at paragraph 29(c) on page 114 of
7 the core bundle makes good that point. I don't think we need to go there now but
8 you have the note.

9 On the consultation, it has not been suggested by Ofcom that this contains the
10 conclusion that overlap would be so limited as to avoid potential barriers in the first
11 12 to 24 months of Equinox, nor that the consultation contained the indicative 2 to
12 5 per cent estimate of overlap in the first 12 to 24 months on which Ofcom relied in
13 assessing matters in the statement.

14 Those were new elements, not canvassed in consultation.

15 **THE CHAIRMAN:** And they say they had not formulated them at the time of the
16 consultation.

17 **MR HOLMES:** That's correct, and my answer to that, Sir, is that as and when they
18 did formulate them, they should have raised them with industry parties.

19 Now Ms Carss-Frisk says there's no magic about the word "reconsultation". We
20 agree with that. The threshold for further consultation will also depend on the
21 context and the factual setting. It was a point that Ms Carss-Frisk emphasised. And
22 we agree, fairness is context dependent; that's very clear from the case law.

23 But the context of this case is that Ofcom was in continuing dialogue with industry
24 parties in relation to overlap in the period after it had released its consultation
25 document. This was the significance of the point to which Ms Carss-Frisk took you
26 in our notice of appeal where we referred to the fact of the information request in

1 I think August of 2021.

2 The point is Ofcom was talking to us, it was talking to BT, as it formulated these new
3 thoughts in relation to the extent of overlap. In those circumstances, it should have
4 engaged. Even if it had engaged briefly, it would at least have had the opportunity to
5 inform itself, and we say that fairness required that in the circumstances of this case.
6 Now on the reasoning in the decision, Ofcom spent very little time in oral
7 submissions on the decision itself. It tended, as its first port of call, to cite the
8 evidence of Mr Matthew. For example, Ms Carss-Frisk sought to fortify the
9 conclusion of limited overlap by saying that Openreach might risk regulatory
10 attention if it targeted its overbuild at Altnets. Mr Palmer sought to ride on the
11 coattails of that submission this afternoon, but it's nowhere in the decision and it's
12 also not a credible foundation for the overlap conclusion.

13 Openreach does not need to target Altnets with overbuild for substantial overbuild
14 rapidly to emerge; that results simply from the massive scale of Openreach's rollout
15 programme which will achieve almost market wide coverage within four years. That
16 won't materialise on 31 December 2026, it will require a huge ramp up over the
17 coming two years.

18 That brings me to the law. We rely on the proposition that a consultation must at
19 least provide sufficient information to allow intelligent response, and that includes
20 information as to the factors likely to be of substantial importance and as to the basis
21 of the decision.

22 My learned friend Ms Carss-Frisk pointed to the discretion which public authorities
23 enjoy when deciding on the scope of consultation. They certainly do enjoy some
24 discretion. But as Mr Justice Ouseley explained in *Devon County Council*, there is
25 a limit to that discretion and it certainly should not be confused with *Wednesbury*
26 unreasonableness. I think, in fairness to my learned friend Ms Carss-Frisk, she

1 | accepted that point.

2 | There are matters that must be canvassed in the interests of fairness. Those
3 | matters include the significant factors that carry weight in the authority's reasoning in
4 | support of its proposed decision and the basis of the decision. That is what
5 | Mr Justice Ouseley said, and it was endorsed by the Divisional Court in the
6 | Law Society case, as I showed you, and we say that that is good authority.

7 | Ofcom suggested that there is a high threshold for reconsultation. You have my
8 | point about that. The circumstances of this case differentiate it. Ofcom was in an
9 | ongoing process of consultation and enquiry, and in the period after its formal
10 | consultation exercise, and that afforded it with the opportunity to put these points. It
11 | failed to do so.

12 | We do also say that consultees must be prejudiced by non-disclosure. We accept
13 | that as a proposition. But the prejudice may be as a result of other consultees not
14 | having been given the opportunity to respond. Nothing in the Wilson case suggested
15 | otherwise. In this case, the present case, one can clearly infer that Altnets would
16 | have had something to say about the likely overbuild in the coming 12 to 24 months,
17 | and that would only have shown more overlap than Mr Dunn's statement suggests.

18 | It was prejudicial to CityFibre that Ofcom did not give the other Altnets, as well as it,
19 | an opportunity to bring that forward and inform Ofcom properly as to the state of the
20 | market.

21 | As a final proposition on the law, Ms Carss-Frisk asked whether CityFibre's appeal
22 | was really a public law challenge. Now, laying aside Mr Palmer's attempts to take us
23 | into roving public enquiry territory, the grounds are, we say, classic judicial review
24 | grounds.

25 | My task today is not to meet any burden of proof in relation to the underlying
26 | questions that were before Ofcom, it is to persuade you that there were public law

1 errors in Ofcom's decision. We say that the decision should be set aside because of
2 the failure of consultation and the failure to conduct proper enquiries and because of
3 the failure to apply the policy which Ofcom had identified as its guiding light in these
4 proceedings. We do not say that the decision should be set aside because of
5 a dispute about the correctness of the evidence that was before Ofcom.

6 Contrary to BT's submissions in its skeleton, our complaints about Mr Matthew's
7 nine-point analysis aren't disagreements with Ofcom's conclusions on these points,
8 or rather the four points excluding overlap which Mr Matthew says Ofcom relied on.
9 Rather, we have pointed out that those points were not in fact relied on in the
10 decision and in some cases were contrary to what was said in the decision and/or
11 they are not independent of the overlap conclusion.

12 That brings me to the grounds. Ms Carss-Frisk had five headline points which I will
13 address in turn. First, she said that there was a clear and rational basis for the
14 overlap conclusion. Well, on this, whether the conclusion was rational or not, it
15 should have been consulted upon. The conclusion was, in any event, not
16 reasonably sustainable based only on the evidence cited in the decision. The
17 conclusion was that the overlap was so limited to as to avoid potential barriers, and
18 specific reliance was placed on an indicative maximum estimate of 5 per cent within
19 12 to 24 months.

20 Ms Carss-Frisk pointed to the propositions that current overlap is 2 per cent, that
21 Altnets generally avoid overbuilding and that Altnets' success in wholesaling is
22 uncertain. The 2 per cent overlap is confined to CityFibre. It ignores the other
23 Altnets, although Ofcom's policy is to protect them as well. The Altnets' preference
24 not to overbuild ignores the impact of rollout by Openreach, the race to build and the
25 risk of overbuild.

26 As regards uncertainty as to whether Altnets will wholesale, that does not affect the

1 overlap conclusion which was expressly stated to include the Altnets. That was the
2 right approach for Ofcom to take, in view of the very clear indication in the market
3 review that it wished to protect the option of wholesaling against conditional pricing
4 by Openreach.

5 Secondly, she said that there was no failure to consult or to make reasonable
6 enquiries. Ofcom does not dispute that material factors in a decision need to be
7 consulted upon. We say the overlap conclusion is one such factor. It played no role
8 and was not relied upon at all in the Con Doc, and the fact that Ofcom say that we
9 appreciated the significance of overlap in the abstract goes nowhere. Of course
10 overlap is significant. Without it, there would be no possibility of switching.

11 But in the decision Ofcom advanced a specific view as to the extent of overlap as
12 a novel reason for concluding no competition concerns in the first two years. It
13 should have consulted on that proposition so that consultees could properly inform it.
14 Ofcom suggests that CityFibre had the opportunity to put the Dunn evidence forward
15 during the consultation. We didn't do so because nothing in Ofcom's consultation
16 document contained reasoning that needed to be addressed or corrected by
17 reference to the Dunn figures. Ofcom has suggested it was proceeding just on the
18 basis that short-term overlap was uncertain. That was its suggestion in the
19 consultation document.

20 Well, we agreed that there was uncertainty. It did not suggest that overlap would be
21 limited and that this showed that there was no problem for the first two years, and so
22 we didn't need to put forward our evidence from our estimates of our own position to
23 correct Ofcom's thinking.

24 Ofcom asked Openreach for overlap estimates. That was on 16 August after the
25 consultation document had been sent out. This suggests that it didn't think the
26 consultation document would necessarily elicit the relevant responses.

1 We agree with the point that was canvassed in questioning by the Tribunal that this
2 does reveal an oddity. Ofcom didn't ask CityFibre, although CityFibre would have
3 been likely to have this information given the acknowledged fact that Altnets prefer
4 not to overbuild and will therefore be considering these matters. We say this shows
5 unfairness and we challenge it under the failure to adequately consult head. We
6 don't make a Tameside irrationality challenge about that.

7 Ofcom's response was, with respect, formal. It said that it wasn't appropriate to ask
8 a section 135 request, but that begs the question why not raise the question
9 informally? Why not at least ask if there was pre-existing information? Why just
10 guess that there was not?

11 We say it's not ultimately a satisfactory explanation of what looks like and is not just
12 curious but a glaring lack of fair and even-handed consultation.

13 Ofcom said that the sophistication of the audience is sometimes a factor be taken
14 into account, depending on the facts. We agree, but we say that in relation to
15 fairness it cuts both ways. As the court held in the Law Society case, the
16 sophistication of the consultees may be a reason to provide more information, not
17 less. Informed consultees may be especially well placed to provide useful evidence
18 in response, and we say that's the case with the Altnets here.

19 At the risk of labouring the point, my learned friend Ms Carss-Frisk says that Ofcom
20 decided not to take a punt on asking CityFibre about its overlap expectations, on the
21 basis that it had no reason to think it would hold relevant information. But it's really
22 not in dispute that the likely extent of overbuild is a key metric to anyone that an
23 Altnet is asking to invest, given the first mover advantage, any equity or debt
24 investor.

25 CityFibre is the largest challenger to BT and FTTP. It is the winner or loser of
26 Ofcom's professed network build strategy. It's, with respect, obvious that CityFibre

1 would have had things to say about this, and Mr Dunn's evidence puts that beyond
2 doubt.

3 Thirdly, Ms Carss-Frisk says that Mr Dunn's evidence does not show that Ofcom was
4 wrong and as a result CityFibre was not prejudiced. Its evidence as to overlap, it is
5 said, would have made no difference.

6 There are two strings to this argument. First, there is the suggestion that the Dunn
7 figures are consistent with the maximum overbuild percentage considered by Ofcom
8 in the statement. But this is only by taking the maximum overbuild percentage --
9 sorry, I am not sure if the maximum --

10 **THE CHAIRMAN:** We know what you mean.

11 **MR HOLMES:** Yes, you know the figure I mean.

12 **THE CHAIRMAN:** I think of it as the one in the middle.

13 **MR HOLMES:** Yes, as the 12-month estimate.

14 **THE CHAIRMAN:** Yes.

15 **MR HOLMES:** You asked Ms Carss-Frisk about that and she did not answer the
16 point. It's simply not what the decision, including annex 3, says about this. The
17 focus was always on the period of 12 to 24 months or, alternatively, the next few
18 years in which it was anticipated that some ISPs may struggle.

19 The immaterial impact conclusion founded on the two illustrative figures that you
20 have seen in the annex was drawn in relation to that period, and we say it's post hoc
21 rationalisation to suggest the upper bound figure related only to the first year. In any
22 event, Mr Dunn only gives evidence based on CityFibre's rollout plans, but the
23 overlap conclusion is stated to cover the degree of overlap of the Openreach
24 network by Altnets generally. That is the right approach, based on Ofcom's policy,
25 and the Altnets will add materially to Mr Dunn's estimate. One sees that simply from
26 looking at the current overbuild which the FTTP only Altnets were estimated to

1 represent by BT, which was several multiples of the CityFibre only overlap.

2 The other strand in relation to prejudice, the main strand, is to rely on Mr Matthew's

3 calculations in his evidence as to the impact on effective order mix targets based on

4 the Dunn overlap figures. I think it's in those --

5 **THE TRANSCRIBER:** Sorry, it's the transcriber. My computer has crashed. Is it

6 possible to have a small break please?

7 **MR HOLMES:** Of course. I'm very -- I'm on the home straight now, but --

8 **THE CHAIRMAN:** Yes. How long do you need, do you think?

9 **MR HOLMES:** I think at most another ten --

10 **THE CHAIRMAN:** I mean the transcriber.

11 **THE TRANSCRIBER:** I have the spinning wheel of death on my laptop. It's going to

12 restart, so I would say about five or ten minutes. Apologies for this.

13 **THE CHAIRMAN:** No, these things happen. Why don't we break and we'll resume

14 as soon as we're advised that the transcriber is ready to go again and we'll make

15 sure we find some extra time to get you finished.

16 **MR HOLMES:** I'm very grateful.

17 **THE CHAIRMAN:** Yes.

18 **THE TRANSCRIBER:** Thank you. --

19 **(4.21 pm)**

20 **(A short break)**

21 **(4.27 pm)**

22 **THE CHAIRMAN:** Yes, Mr Holmes.

23 **MR HOLMES:** I was coming to the other main strand on materiality, which is to rely

24 on Mr Matthew's new calculations which are said to factor in the Dunn overlap

25 figures. The impacts are said to be modest and to show that even higher overlap

26 would not have made a significant difference to the targets.

1 Now the first point, this is all new analysis. The second point, it cannot give
2 confidence. Mr Matthew's table still shows that there are changes to the effective
3 order mix targets. They lift the order mix targets. There is a countervailing effect
4 from stop sell, which we accept, but there is still an effect from the targets on the
5 overall effective target. Small percentage changes in that target can affect
6 compliance with the targets where ISPs may struggle to meet them.

7 We know that two significant ISPs were saying they might struggle to meet the
8 targets. We have seen TalkTalk's best case figures which show it close to the
9 relevant thresholds. That's in the decision for your note at annex A3, paragraph 18
10 in figure A3.3.

11 We don't know the central case figures and we don't know the worst case scenarios.
12 We say the Tribunal simply does not have before it the material to come to
13 a confident conclusion that a correct calculation would have shown no risk of ISPs'
14 incentives being turned against purchasing from Altnets had Ofcom properly
15 consulted on the short-term extent of the overlap.

16 You have my point that even the input, you don't know whether the Dunn figure
17 represents the appropriate figure, it could be higher. That would increase the
18 materiality of the effect. This just can't be done in this appeal process. It's a matter
19 that requires consultation, enquiry and consideration, and it involves matters of
20 judgement by Ofcom.

21 Nor can the Tribunal have confidence that if the calculations were run now based on
22 current market conditions, there would be no difficulty. Mr Palmer gives evidence
23 about the position in relation to ISPs' performance against the targets, you recall it
24 was a point he made.

25 **MR PALMER:** It's in the witness statement.

26 **MR HOLMES:** Yes. But it's confidential, I think.

1 **MR PALMER:** Yes.

2 **MR HOLMES:** But of course we do not know whether the position in relation to
3 those targets is because the ISPs in question have reduced their purchasing from
4 Altnets in consequence of Equinox.

5 We are now in the factual world with Equinox in place and it may be having an
6 impact on incentives and it may be affecting purchasing in order to ensure that the
7 targets are achieved, given the very substantial discounts at stake.

8 In connection with this, can I in turn update you on instruction about CityFibre's
9 experience of its dealings with the ISPs to show you the difficulty of dealing with
10 these matters on the hoof in these proceedings.

11 I can do that by reference to our evidence at the administrative stage and tell you
12 what the position currently is. It's confidential, obviously, but that will show you and
13 give you an indication. If we could go within bundle 2B to tab 60. This is a witness
14 statement from Mr George Wareing, who is CityFibre's sales director.

15 On page 767, you see at the top of the page, he turns to consider the position with
16 one particular ISP. It's a complicated passage, I won't take you through it all, but if
17 you look at paragraphs 25 and 26, you see what the position then was in relation to
18 this ISP's performance against its contractual obligations with CityFibre.

19 **(Pause)**

20 **THE CHAIRMAN:** Yes, thank you.

21 **MR HOLMES:** That remains -- I can confirm the position outlined in paragraphs 25
22 and 26 remains the case. That evidence would be consistent with the possibility that
23 the evidence that Mr Palmer now relies upon about ISPs' performance against the
24 targets was achieved at the expense of Altnets.

25 **PROFESSOR WATERSON:** Can I just check the date of this document, I have not
26 immediately found it.

1 **MR HOLMES:** Of course, Sir. The date is probably at the conclusion. Let me just
2 check ... it's not given there.

3 **THE CHAIRMAN:** 772.

4 **MR HOLMES:** Yes, I am grateful. At 772, you see his signature and the date given
5 there.

6 **PROFESSOR WATERSON:** Right, yes. Thank you.

7 **MR HOLMES:** But on instruction, in the same way Mr Palmer was able to confirm
8 the current position, I can confirm that that position remains correct.

9 Now I am not inviting this Tribunal go down this road of a merits-based assessment
10 of these matters now. It can't possibly do that, it should focus on whether there are
11 public law errors. I am simply trying to avoid any false impression that may have
12 been given to you about what such a merits-based enquiry would conclude.

13 In the same vein, Mr Palmer showed you figures about stop sell and Openreach's
14 performance there. I would simply ask you to compare the figure given as at
15 February 2022 for activated stop sell with the figure given for Q1 2022 as the
16 expected stop sell level in annex 2 of Mr Matthew's witness statement to see how
17 those two compare.

18 **THE CHAIRMAN:** So we are looking at it -- if we are looking forward at 27 on
19 page 194, do you want us to look at the number in the top right-hand box?

20 **MR HOLMES:** Yes, so -- sorry, let me just go to it.

21 **THE CHAIRMAN:** Just to make sure we get the right thing.

22 **MR HOLMES:** Yes, I need to go to the core bundle.

23 **THE CHAIRMAN:** 194.

24 **MR HOLMES:** So it's -- yes --

25 **THE CHAIRMAN:** The percentage in the top right-hand corner, is that the one you
26 want us to --

1 **MR HOLMES:** It's the number -- I am so sorry. If you look at the total -- it's the
2 middle column, the total -- it's only the numbers which are confidential in the table.
3 So total FTTP build as at 21 February 2022 in areas where stop sell has already
4 been activated, and there are number of premises confirmed in the top middle
5 column.

6 **THE CHAIRMAN:** Yes, I see.

7 **MR HOLMES:** Then if you look, there's then a figure given for the expected extent
8 of regulatory stop sell.

9 **THE CHAIRMAN:** For Q1 2022?

10 **MR HOLMES:** 2022 for premises.

11 **THE CHAIRMAN:** In the second column, yes.

12 **MR HOLMES:** Yes, exactly. Now I can't make firm submissions about what this
13 shows. I think it simply shows the difficulties of attempting on a second day of a trial
14 on the basis of brief and limited evidence forming any view about what the position
15 now would be if this exercise were properly conducted and run. So I would urge the
16 Tribunal not to embark on such an exercise and to simply consider the focused
17 public law challenges that we have advanced in the course of these proceedings.

18 In the same vein, Mr Palmer relied on various other evidence which he says shows
19 that there were ways of dealing in the short-term with the problems the ISPs faced.

20 But with respect, Ofcom took account of that. You saw -- so he directed you to
21 A3.30. You will see if you look at that, it refers to the position in the medium-term.
22 He also relied on the catch-up provisions. But as we saw, Ofcom factored that into
23 its analysis and found there was a risk of ISPs struggling, even taking account of the
24 catch-up provisions.

25 So Mr Palmer was making a valiant effort to reargue a point which Ofcom decided
26 against him, the 12 to 24-month problem and the finding that ISPs might struggle to

1 meet targets during that period. He rummaged in the annexes of the decision, but
2 the findings about this are clear in the body of the decision. He says that teething
3 problems only arise in the overlap areas, but of course that takes you straight back
4 into the overlap conclusion.

5 The fourth point is the nine different factors. I am going to be very brief about this.
6 Despite the Tribunal's attempt to seek clarity, what my learned friend Ms Carss-Frisk
7 says about it is still unclear. Sometimes she seemed to be saying: although this was
8 not reasoning in the statement, Ofcom would have reached the same decision on
9 this basis. That we understand to be the Tribunal's understanding of the submission.
10 But sometimes she seemed instead to be saying this was Ofcom's reasoning at the
11 time and it just didn't set it out in the statement. We say the latter point is bad
12 because the reasoning in Mr Matthew's statement is in fact on certain points
13 inconsistent with that in the statement.

14 As a matter of principle, yes, a public authority can elucidate; yes, it can put in post
15 hoc evidence and reasoning to argue immateriality, although the court must treat
16 with caution such evidence, given the interests the authority has by that stage in
17 sustaining its answer.

18 But what cannot be done as a public authority is to fill gaps in the reasoning after the
19 event with new reasoning to make it a better decision. If we are approaching this as
20 a public law challenge, that is the public law approach: you look at what is in the
21 decision. And, no, you certainly can't argue immateriality as a public authority on the
22 basis of assumptions that are inconsistent with those on the basis of which the
23 decision proceeded.

24 I think I have been through the conditions and they have probably been flogged to
25 death, and at this time of the afternoon I am not going to revisit them.

26 **THE CHAIRMAN:** And we are not going to invite you to revisit them.

1 **MR HOLMES:** Yes.

2 The fifth and the final point is whether it was rational and lawful for Ofcom to interpret
3 "potential" as "likely". I am going to make just a handful of short points about that.

4 The first point is we say potential should be given its natural and ordinary meaning,
5 and we say that one doesn't need to go to a dictionary definition to see this. It
6 means that -- it does not mean the same as likely, it means possible. We accept that
7 a barrier must be a possibility or a potential outcome based on plausible
8 assumptions about the relevant market context, but the final conclusion as to
9 whether there is a barrier is pitched, on Ofcom's own policy, at the level of potential.

10 Just to illustrate -- analogies or examples are always hazardous, but to illustrate the
11 difference between saying that a conclusion must itself be plausible and whether the
12 assumptions on which it is based must be plausible, one can take the example of
13 a student who has the potential to pass an exam on the plausible assumption that
14 they revise hard but that does not mean that they are likely to pass the exam.

15 We say that the assumptions about market context do have to be plausible, we
16 accept that, but the question about the barrier that results from them is pitched at the
17 level of potential or possibility.

18 Secondly, we say that a contextual interpretation of the questions supports
19 a distinction between question one and the remaining two questions. Potentiality is
20 the test for the first question and likelihood is expressly identified in the subsequent
21 two questions; see the decision at paragraphs 352 and 360.

22 Thirdly, we say there is a coherent policy justification for this phasing. The concern
23 is to promote network competition; that requires regulatory scrutiny wherever there is
24 a potential barrier. Offers which meet the potential barrier screening test will then be
25 tested on two distinction bases. First, is it likely that competitors will be adversely
26 impacted? And, secondly, as a cumulative and additional test, is it likely that there

1 will be clear and demonstrable benefits?

2 The fourth point, we certainly did object that Ofcom's analysis did not show a lack of
3 potential barriers. That is set out at paragraph 1.16 of our consultation response.
4 We drew attention to that standard and submitted that it was met so we don't accept
5 that this was not raised as a concern in consultation.

6 Fifth point, this is a stated policy of the test that Ofcom will apply, and it's very
7 important for regulatory certainty and transparency that Ofcom sticks to its word
8 about the tests that it will apply.

9 CityFibre and other Altnets are staking very large amounts of money by way of
10 investment in this market on their understanding of the regulatory framework as set
11 out in the market review. In my submission, it's not acceptable that Ofcom should
12 reveal its approach in a footnote to a witness statement submitted in the course of
13 litigation.

14 Let me just check if there are any further or final points. But subject to that, I think
15 those are my closing submissions.

16 I am very grateful for your attention and patience, Sir. Subject to any questions,
17 those are the submissions.

18 **THE CHAIRMAN:** Thank you very much, Mr Holmes.

19 Can we thank all of you. It has been a busy couple of days and we know there's
20 been a huge amount of work that's gone into that, and we are particularly grateful
21 that you managed to fit it all into the limited window we had. We certainly found it
22 a very helpful discussion indeed.

23 We will reserve our judgment, as you would expect, and we will try and produce that
24 of course as soon as we sensibly can.

25 Thank you very much.

26 **(4.44 pm)**

(The hearing concluded)

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