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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1111/3/3/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 September 2009

Before:

VIVIEN ROSE
(Chairman)
THE HONOURABLE ANTONY LEWIS
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC

Appellant

Supported by

BRITISH SKY BROADCASTING LIMITED

Intervener

– v –

OFFICE OF COMMUNICATION

Respondent

Supported by

BRITISH TELECOMMUNICATIONS PLC

Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Jon Turner Q.C. and Mr. Meredith Pickford (instructed by Osborne Clarke) appeared for the Appellant.

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward and Mr. Rob Williams (instructed by BT Legal) appeared on behalf of British Telecommunications PLC.

Mr. Stephen Wisking and Mr. John McInnes (of Herbert Smith LLP) appeared on behalf of British Sky Broadcasting Limited.

1 THE CHAIRMAN: Good morning ladies and gentlemen. I have some introductory comments to
2 make on a number of issues that have arisen in the correspondence. The first point is the
3 point that was made in the Tribunal's letter to the parties of 21st September concerning my
4 social acquaintance with Professor Franks of the London Business School, who is the
5 external consultant for Ofcom. Carphone Warehouse have indicated that they only foresee
6 this being a problem in the event that Professor Franks' evidence is key in the final stage of
7 these proceedings if there should be any judicial review type challenge to the Competition
8 Commission's determination. Of course, we have no knowledge at the moment as to how
9 likely that is but if the parties are content to leave it at that then we are content to do so as
10 well.

11 The second point concerns the Interveners. British Telecom and British Sky Broadcasting
12 were granted permission to intervene by order of 18th August, and that order also directed
13 that non-confidential versions of the notice of appeal with supporting documents be served
14 on them by 4th September and I understand that all went smoothly.

15 There has already been some debate between Ofcom and BSKyB as to the permitted scope
16 of the interventions and how this might affect the drafting of the reference questions. Our
17 experience indicates that it is not helpful to try and indicate in advance what is or is not
18 within our outside the scope of the appeal, but all I would say is the interveners would do
19 well to familiarise themselves with the Tribunal's previous practice in s.192 appeals and
20 also, for example, in the *National Grid* appeal before they draft their statements of
21 intervention.

22 As far as the pleadings are concerned, the initial point that Ofcom had raised in their letter
23 of 17th September about the use of certain phrasing in their notice of appeal referring to
24 "examples" or "in particular", and such like, which left it unclear whether other allegations
25 were being made and, if so, what they were. We understand from Carphone Warehouse's
26 response that they have indicated that those types of wording are not intended to extend the
27 scope of the pleading beyond the instances which are expressly set out and that accords with
28 the Tribunal's view of the matter and the rulings in similar instances in the past.

29 The most recent exchange of letters has focused on the fact that Carphone Warehouse have
30 signalled that they may want to change or supplement their arguments once they have seen
31 the confidential information from Ofcom in particular, the costs' model. This was a point
32 made by Carphone Warehouse in footnote 43 of the notice of appeal.

33 Our current view is that it is not satisfactory for this to be done by way of reply and
34 certainly not in some informal way in submissions before the Competition Commission.

1 BT has suggested that time should be allowed for any application for amendment of the
2 notice of appeal to be made before the rest of the pleadings are served. At present we are
3 very reluctant to hold up the service of the defence to allow for these changes. The best
4 way forward is usually the simplest which is for the pleadings to progress as soon as
5 possible, and if any amendment to the notice of appeal is need once confidential
6 information has been disclosed that can be dealt with by way of amendment. Rule 11.3(b)
7 of the Tribunal's Rules specifically refers to amendments arising on the basis of issues that
8 could not reasonably be known about at the time the pleading was lodged, although of
9 course the sooner any new points are raised the better, but we will certainly hear the parties
10 on that point if they wish to make submissions.

11 As far as the sequence of pleadings is concerned, the parties' positions have moved back
12 and forth on this point. Until recently it appeared that it was agreed that the statements of
13 intervention should be lodged after the defence has been served, that is the normal way that
14 the Tribunal procedure has progressed, but in the latest exchange the parties seem to have
15 gone back to the idea that Sky's statement of intervention in support of Carphone
16 Warehouse should come before the defence and BT's statement in support of Ofcom should
17 come after. We are not particularly attracted to that course, again experience shows that
18 there may be debate about the scope of the statement of intervention and whether some
19 issues raised are properly raised, and it would be unfortunate for the service of the defence
20 to be put off even further whilst such issues are resolved. At the moment our view is that
21 we should have the defence served and then the statements of intervention served after that
22 – both statements at the same time but after the defence – and then take stock of where we
23 are with the pleadings to see if any further pleadings by way of reply or rejoinder or
24 whatever are needed.

25 In terms of a timetable as we said in our letter of 24th July we will set a short time limit
26 given the amount of time that has elapsed since the appeal was lodged. We recognise the
27 points that Ofcom has made, that they are currently the respondent in a number of appeals
28 recently lodged with the Tribunal. Our current view is that given that the defence will not
29 now have to deal with a statement of intervention if we go with the sequence that we have
30 indicated we would prefer, we would ask the defence to be served by 16th October and then
31 leave two weeks for the statement of intervention to be served which brings us then to 30th
32 October and then, as I said, take stock to see if anything else is needed. It is understood I
33 think on all sides now that this is to be a full defence both to the price control and to the

1 non-price control issues and similarly the statements of intervention will make all the points
2 that the parties wish to make.

3 On the establishment of the confidentiality ring, we are very grateful to the parties for
4 producing a draft order which seems fine for the most part. As I understand it we are
5 gathering together the undertakings from the people listed in the schedule to the draft order
6 and if we have by the end of today a large number of those undertakings in place then we
7 will make the order covering those and anyone who wants to be added in later can be added
8 in; in the past that has not proved difficult.

9 Perhaps if I just go to that draft it might be helpful if we make the points. In the definition
10 of confidential information after the word “documents” when it appears in two instances,
11 there are words in parenthesis “(including in electronic format)” as far as we are concerned
12 the word “documents” includes items in electronic format and it might lead to confusion if
13 it is mentioned sometimes but not others, so we would prefer it for those words in
14 parenthesis to come out.

15 The other point is of course the date on which disclosure will take place and, as I understand
16 it, 29th September has been agreed as the date on which that will happen. So whoever is in
17 the ring by 29th September will get access to those documents and then people who are
18 added in later will be able to see them.

19 Overlap with other appeals under s.192 which have recently been lodged with the Tribunal
20 – it seems unlikely to us that there is any overlap with the case about the carrier pre-
21 selection dispute (case 1113). There may be a question mark as to whether there is a link
22 with the case 1112/3/3/09 brought by Cable & Wireless, which we refer to as the “leased
23 lines charge control case”. We note there is some material in the notice of appeal in this
24 case to do with BT’s costs allocated to the Openreach business. It seems to us unlikely that
25 it would be a good plan to try and redo the whole Openreach exercise of examining whether
26 Openreach is functionally separate, so we are not at the moment clear how far we are going
27 to want to get into questions of cost allocation as between Openreach business and the rest
28 of BT’s business, but it is early days to think about that, but just to flag up there may be a
29 link with the leased lines charge control case.

30 There has also been some discussion in the correspondence about whether the expected
31 decision setting a price control for wholesale line rental will be subject to a challenge and, if
32 so, whether that is likely to affect anything that happens in this appeal. Again, all we can
33 say at present is that we will have to wait and see what happens, but we do not envisage

1 delaying any aspect of moving forward on this appeal in anticipation of what may or may
2 not happen once that decision is published.

3 The role of the Competition Commission – is there anyone present from the Competition
4 Commission today, or acting for them? Yes. They have been provided now with copies of
5 correspondence and as the Tribunal indicated on 14th September that should continue to be
6 the case.

7 As regards the draft questions to be referred to the Commission, and the timing of that
8 reference Ofcom have helpfully provided some draft terms of reference and, as I understand
9 it, it is still agreed that the reference should not be made at least until the defence and the
10 statements of intervention have been served and we certainly agree with that. However,
11 given that these things always take longer to sort out than one thinks I am sure that there is
12 benefit in making progress with the wording of the questions, even if the draft is not
13 finalised and the reference not made until some later stage. We have some comments on
14 the draft but let us see how we get on today before deciding whether it is helpful to raise
15 those now or whether they are best dealt with in correspondence. We will ultimately, of
16 course, have to consider the time limit to set for the Commission to come up with its
17 determination.

18 Other points that we might want to consider today is whether we need to pencil in some
19 dates for the hearing of the non-price control matters, and what is happening with those;
20 there has been some too-ing and fro-ing in the correspondence as well. Finally we would
21 welcome the parties' ideas for ways of limiting the amount of photocopying that takes place
22 in the course of these proceedings. We have had substantial folders delivered
23 accompanying the notice of appeal, they include many earlier Ofcom decisions and very
24 extensive appendices to the expert reports, that is all fine, but experience again shows that
25 the number of pages of those sorts of bundles to which we are actually taken in the course
26 of the whole appeal is usually very small, so as I say we would welcome any ideas which
27 would reduce the number of times that all those bundles are photocopied either for our
28 benefit, or for the benefit of the other parties.

29 That is all I had to say – rather lengthily – by way of introduction. Mr. Turner, are you
30 going to go first?

31 MR. TURNER: Madam, I am grateful. Perhaps for the transcript I could formally introduce the
32 legal representatives of the parties. I appear with Mr. Pickford for Carphone Warehouse.
33 My friend Mr. Holmes appears for Ofcom, Mr. Wisking and Mr. McInnes appear for Sky

1 and Mr. Ward and Mr. Williams appear for BT, and Mr. Jones for the Competition
2 Commission is sitting behind me.

3 Madam, as a matter of housekeeping first, there was a single file of correspondence that was
4 intended to get to the Tribunal which begins with the Tribunal's letter of 24th July. I do not
5 know if you have that?

6 THE CHAIRMAN: I think we do.

7 MR. TURNER: All it does is to collect in one place documents which you may already have and
8 they are ordered in chronological sequence beginning with the Tribunal's letter. At the end
9 you will find the outline submissions from the parties.

10 Madam, your opening remarks were extremely helpful, there is little within them with
11 which we, for our part, disagree. So far as the confidentiality ring order is concerned, we
12 are content with the proposed changes which you have outlined, and subject to any
13 observations from the other part we believe that that order can be made today.

14 THE CHAIRMAN: Do we have all the undertakings then from your people?

15 MR. TURNER: We have all the undertakings from our side; I do not know whether they have
16 been collectively gathered in yet, but perhaps ----

17 THE CHAIRMAN: Well maybe you will find out during the course of the day.

18 MR. TURNER: The next issue, the timing of the reference of the price control matters to the
19 Commission. There is agreement between the principal parties that the grounds of appeal in
20 paras.76 to 129 of our notice are price control matters, and for the interveners, both BT and
21 Sky do not appear to dissent from that. So the starting point is that the notice of appeal has
22 crystallised the price control matters, and then in deciding precisely when to make the
23 reference there are two principles at play. The first is the fundamental point which we do
24 urge that there should be no unnecessary delays in making the reference to the Commission
25 and progressing this matter expeditiously. Madam, I recognise that you have that point well
26 on board, but if I mention the following two points. As Ofcom itself has emphasised in its
27 correspondence, this case concerns a price control governing a period of under two years,
28 from May 2009. Time is running and there is a real danger of the period being eaten into by
29 the time that will be needed for these appeal proceedings, and it would be against the
30 interests of justice were that to happen. It may suit the interests of those who wished the
31 price control to remain in place for as long as possible, because as you are aware there is no
32 statutory mechanism explicitly for granting compensation if parties such as Carphone
33 Warehouse had been overcharged in the meantime, and that is why it is in the interests of
34 justice to get on with things.

1 The second principle which the parties have in different ways all drawn to your attention is
2 that a reference should not be made so early that it would be counter productive because it
3 would end up lengthening things rather than shortening them. Now, on that issue
4 everybody agrees with the principle that Ofcom should serve its defence, the interveners
5 should serve their statements in intervention before a reference is actually made and the
6 Competition Commission inquiry starts. That will help the Commission to set its work
7 programme, because the essential nub of the points in dispute will become clear and,
8 Madam, your opening remarks indicate that the Tribunal is provisionally in agreement with
9 that. It is unnecessary to await a reply to the defence from Carphone Warehouse, again we
10 agree with your opening remarks in relation to this point. It will not alter, and cannot alter
11 the grounds of appeal or the framework of the price control matters.

12 Thirdly, it is unnecessary and, we say, entirely wrong to suggest that the making of the
13 reference should await Carphone Warehouse considering unseen confidential material
14 which may be disclosed and then having a fixed deadline to elect whether to amend the
15 notice of appeal; it is not workable. It is also based, if I may say so, on a false premise
16 which is, that we would need, having seen that to amend the notice of appeal as opposed to
17 developing the arguments and being able better to make the submissions in evidence in
18 response to the Competition Commission inquiry.

19 The fourth and final point, again in accordance with your remarks is that we see it
20 unnecessary to await any appeal that may be brought in relation to this supposedly
21 imminent wholesale line rental price control decision, if that is made in the way that Ofcom
22 indicates.

23 In summary, the right course, with which we agree, is that the principal parties must serve
24 their responsive pleadings in the case to the notice of appeal according to a timetable which
25 we hope will be laid down today, and then the provisional date fixed thereafter for making
26 the reference to the Competition Commission.

27 The timetable, madam, that you provisionally proposed, whereby Ofcom serves its defence
28 by 16th October, and the interveners follow afterwards on 30th October seems to us to be
29 absolutely right and we would agree with that. It would mean that Ofcom will have had
30 some 12 weeks from the service of the notice of appeal before putting in its defence and,
31 given the context of this case, that is a very long period, and I would emphasise, of course,
32 that Carphone Warehouse has pulled together its notice of appeal in the time frame laid
33 down under the rules of eight weeks. Ofcom, like all defendant public authorities, was the
34 author of the decision and should be able to pull its defence together in a suitably

1 correspondent period, and that is why we say 16th October is a good date and it should not
2 be allowed to push out beyond that.

3 So far as the statements of intervention are concerned, in fact, although you said that the
4 parties had moved to a position that Sky should serve its statement of intervention first, it is
5 true that Carphone Warehouse originally ventilated that proposal, but in our recent
6 correspondence we have firmly stuck to the idea that the interventions should follow after
7 the defence in the interests of minimising complexity and delay. Indeed, that accords with
8 what Ofcom itself set out as its position in a letter some days ago. So we agree with the
9 timetable for the pleadings.

10 In terms of disclosure, the application that we have made seeks disclosure from Ofcom of
11 what we describe as “the model used” in generating the price controls which are the subject
12 matter of the appeal. I can say to the Tribunal on looking at this a little bit further that is
13 what we would like. It turns out, we believe, that there are four models. There are three
14 models which were used to arrive at relevant costs and those are referred to, if I may show
15 the Tribunal in bundle SD4, which contains the decision itself. The main decision is the
16 relatively short document at tab 3 and then there are extensive annexes to it at tab 4. If you
17 go to tab 4 and turn three quarters of the way through that to para. A6.273, which is p.143
18 of the internal numbering, you will see there that Ofcom refers to having used, when we
19 talked about the model to it, to there being three cost models – three separate models – and
20 those are set out in those three bullet points.

21 Beyond those three models we understand that there is a further model, which we call the
22 “price model”, which Ofcom then used, taking this costs information to arrive at the final
23 prices. When we refer to asking for disclosure of the Ofcom model or models, that is what
24 we have in mind.

25 THE CHAIRMAN: What, the price model?

26 MR. TURNER: And these as well.

27 THE CHAIRMAN: All four.

28 MR. TURNER: These models, we understand this to be the relevant subject matter of the request.

29 We have also asked if Ofcom’s staff would help us, or the Competition Commission or
30 whoever else is within the ring and sees this material, if there are any questions that need to
31 be asked to explain how the models work. Ofcom have graciously agreed to serve us with
32 the copies of the model or models and to give co-operation in understanding them. So there
33 will not be any issue as to that.

1 The other area of disclosure which we have mentioned came at the end of our skeleton
2 submissions which we served yesterday and that is simply to flag up that we also expect
3 Ofcom to disclose, along with its defence when it comes on 16th October, copies of internal
4 documents in which they speak to the reasoning for arriving at certain key assumptions or
5 decisions insofar as those are not apparent from the final LLU statement itself. The reason is
6 because those documents cast light on the decisions that were made and the reasons for
7 them. At the time of serving its defence in the usual way Ofcom will be expected to serve
8 all relevant documents in support. Plus, it is a public authority and it is expected in the
9 normal course to disclose any documents that are adverse to its case, bearing in mind the
10 notice of appeal as well as in support of it.

11 THE CHAIRMAN: Why are those documents relevant to anything that the Competition
12 Commission has to decide? The reasoning is the reasoning set out in the decision, if they
13 want to raise new arguments in support of it, if BT wants to raise different arguments in
14 support of the same result then they either can or cannot, but if they are different from the
15 original reasons does that matter? This is a merits appeal.

16 MR. TURNER: Yes, it is not merely a question of whether the reasons may be different from the
17 ones set out in the decision, subject to appeal. The concern is as indicated in our notice of
18 appeal in some areas Ofcom's LLU statement is opaque. One does not know the reasons
19 why particular assumptions were made, or particular numbers were chosen, and to the
20 extent that light is cast on that by internal documents we would expect that to be made clear.
21 So that, for example, we have said that certain areas, such as the allocation of costs as
22 between Openreach on the one hand and other business activities of BT, is an issue that we
23 believe was wrongly decided. In certain places it is not clear why Ofcom arrived at the
24 decision that it did. If the reasons are not to be found in the decision itself, but are in
25 underlying documents, then we would expect those also to be disclosed at the time of the
26 defence.

27 THE CHAIRMAN: Well I will wait to hear what Mr. Holmes has to say about that.

28 MR. TURNER: I am obliged. Madam, insofar as the non-price control matters are concerned, we
29 agree with the proposal that these should be decided by the Tribunal while the Competition
30 Commission reference is underway at a date convenient to the Tribunal and the parties in
31 November or December. We have made a specific point – what we have called the
32 “decoupling” point – one of the two non-price control matters. As to that its future, its fate
33 depends to some extent upon whether Ofcom now provide the wholesale line rental price
34 control decision which has been promised in short order, and we have said that when we see

1 this document, if it arrives in short order, we will consider our position and promptly notify
2 the Tribunal and the parties what further relief we will seek in relation to that ground.

3 THE CHAIRMAN: Well there are two points there, are there not? There is whether you are
4 seeking any relief from that ground, and there is another point which is whether, assuming
5 that at least by November/December we have had the WLR decision, whether there is still a
6 point of principle that you wish to pursue, that they ought to have decided the two at the
7 same time, which seems to be potentially a point for us to consider regardless of when the
8 WLR decision does come out, given that it did not come out at the same time as the
9 decision under appeal, but are you saying – putting aside the question of relief – that you
10 might not wish to pursue the decoupling point even as a matter of principle once the WLR
11 decision is published?

12 MR. TURNER: Madam, you are absolutely right to have made that distinction. There is a
13 distinction between the point of principle and the specific claim for relief. All I am saying is
14 that out of an abundance of caution we are reserving our position in relation to both those
15 matters until we have been able to see this document if and when it arrives.

16 Madam, subject to any questions from the Tribunal ----

17 THE CHAIRMAN: Well there is the consultation point as well.

18 MR. TURNER: The consultation point is clear. The basis for it and its importance are set out in
19 para.75 of the notice of appeal. We have clarified in correspondence the full ambit of the
20 consultation point as, madam you remarked in your opening statement, and we do see that
21 as a live issue that will require to be decided by the Tribunal.

22 THE CHAIRMAN: I see. Thank you. Just to be clear, as far as the pleadings are concerned, you
23 are in favour of the defence being lodged and then the ----

24 MR. TURNER: Statements of intervention following in the normal way.

25 THE CHAIRMAN: And then we will see where we are in terms of any further pleading and
26 hopefully send off the reference at that point, that is your position?

27 MR. TURNER: That is our position, madam, it is in accordance with your opening remarks.
28 Perhaps only two further matters. First, so far as the content of the questions is concerned,
29 the Tribunal will have seen that we made certain comments and marked up Ofcom's draft.
30 There are two points of principle that arose there, the first point of principle being whether
31 an intervener's intervention can lead to the price moving the other way against the interests
32 of the appellant and we have set out our position. The only question for the Competition
33 Commission should be whether the price control is too high because that reflects the appeal.

1 The second point refers to what has been called in a previous decision of the Tribunal “the
2 s.88 criteria adjustment.” I do not think it fruitful to go into the intricacies, the Talmudic
3 intricacies of the s.88 criteria adjustment today, but the Tribunal will note that it is there and
4 that is a subject which needs to be decided before the reference is finally made.

5 Madam, the final point is simply to pick up on you reference to whether the parties have any
6 ideas for limiting the photocopying, and you would welcome ideas for reducing this. I
7 speak, I believe, for all of the parties when I say that we will now make every effort to co-
8 operate in reducing photocopying and will put our heads together on that.

9 THE CHAIRMAN: Thank you very much, Mr. Turner. Mr. Holmes?

10 MR. HOLMES: Madam, first of all on a point of housekeeping, we also agree with the
11 amendments that you have proposed to the order establishing the confidentiality ring and
12 for our part we hope that we have supplied undertakings on behalf of all those that we
13 would wish to include in the confidentiality ring. So that should be now ready to be made.

14 THE CHAIRMAN: I did not think Ofcom usually included people in their confidentiality right.

15 MR. HOLMES: Madam, out of an abundance of caution we have included our external
16 consultant and also counsel, although whether it is strictly necessary for external counsel to
17 be included I am not entirely sure, but there we are.

18 Your introductory comments we likewise found extremely helpful and they will hopefully
19 enable me to abbreviate my submissions quite substantially. We agree with much of what
20 you say; there are a few points on which we hope that we will be able to persuade you.

21 Many of us here are veterans of the first price control appeal not long concluded, and our
22 position on case management is informed by this experience. We say that effective and
23 efficient case management is extremely important and we think that your proposals for the
24 most part are likely to conduce to that. We agree with Carphone Warehouse’s counsel
25 when they say that there is a clear need to make the reference to the Competition
26 Commission as early as possible, consistently with the orderly conduct of the appeal
27 proceedings as a whole.

28 Now, when we first wrote back in the heady days of the summer we thought that this
29 objective could best be served by reference before close of pleadings with our responsive
30 submissions in relation to Sky’s statement of intervention following at a later stage from our
31 defence. Our main objective at the time of writing was to resist the delays that we saw as
32 inherent in two case management proposals by Carphone Warehouse which have since been
33 abandoned. Now, we have a slightly different perspective on matters. We are concerned
34 that the Tribunal will need to play a role in disciplining the process, and that this means that

1 pleadings should close before reference questions are sent off and we should have an
2 opportunity in fairness to respond to the points made by Sky at the time when we deal with
3 the points made by Carphone Warehouse against us.

4 There are two particular developments which have given rise to this change of position.
5 The first is that Sky has sought to amend the reference questions to allow it to come forward
6 with new arguments and evidence limited only by the very broad categories of Carphone
7 Warehouse's appeal. According to Sky it makes no difference that those broad grounds of
8 appeal would allow more or less any arguments at all to be advanced by interveners. Sky is
9 not yet in a position to tell us what new arguments it would be making, or what evidence it
10 envisages. We are slightly surprised by this because the correspondence between the
11 principal parties suggested dates in early October for the lodging of Sky's statement of
12 intervention in the course of August.

13 Whatever Sky's new material will encompass, it will apparently take until 23rd October to
14 be ready.

15 The second cause for concern is the very recent suggestion by Carphone Warehouse made
16 for the first time in its letter of Wednesday, that its ability to amount an effective appeal in
17 this case has been generally limited by the lack of access to Ofcom's model. Disclosure of
18 the model was previously sought as you pointed out in your introductory comments on only
19 two specific points – cost allocation between BT Group and Openreach and calculation of
20 the differential between MPF and WLR, and the references for that, madam, are footnote 43
21 to which you have already referred and para. 100 of the notice of appeal. Carphone
22 Warehouse now says that it cannot know what points will emerge from the model until it
23 has seen it. We do not, of course, dispute Carphone Warehouse's entitlement to advance
24 fresh arguments or evidence which it was genuinely unable to offer without having seen the
25 model. What we do say is that this will need to be dealt with in an orderly manner.

26 Carphone Warehouse's proposal that new arguments and evidence should be brought
27 forward before the Competition Commission in a reply is, in our submission, unacceptable,
28 and we understand you to accept that. Carphone Warehouse recognises in its submissions
29 of yesterday evening that if it wishes to raise new grounds of appeal it will apply to amend
30 its notices of appeal. We say that is not good enough, Rule 11 of the Tribunal's Rules
31 requires permission to raise new arguments as well as new grounds of appeal.

32 Also, madam, you will recall that in the calls to mobile litigation the Tribunal required
33 parties to apply to it before putting in unsolicited new evidence, or material of any kind in

1 the Competition Commission's proceedings, and we say that that is the right approach to
2 take.

3 So Carphone Warehouse should come forward with any new points as soon as possible. If it
4 can be done before the defence is filed then it should be done by then. Any later material
5 should be brought before the Tribunal to decide whether to allow it and the Tribunal's role
6 as gatekeeper is crucial to keep the appeal within manageable grounds. If the reply is to be
7 the vehicle for this new material we say that the reference should be delayed until after the
8 reply is served.

9 We understand from your introductory comments that you agree with us that Carphone
10 Warehouse should come forward with its new arguments and evidence before a reference is
11 made and during the course of the procedure before the Tribunal. If I have misunderstood, I
12 would be grateful for clarification.

13 THE CHAIRMAN: The problem we see is this, that if we are to delay the service of the defence
14 until Carphone Warehouse have had a chance to read and inwardly digest, etc. the models
15 then that might be quite substantially delayed. I know someone suggested that they should
16 come forward with their application to amend by 9th October, but we do not see that that is
17 likely to be feasible; it takes as long as it takes to work your way through these models. So
18 what we envisaged was that the defence would be served to the notice of appeal as it
19 currently stands, and we would proceed on that basis. If, at some point, there arose an
20 application to amend the notice of appeal then we would deal with that and, depending on
21 when it arose and what it comprised, that may or may not call for some amended defence
22 from Ofcom, or may or may not affect the questions or the timing of the reference, it is just
23 very difficult to see what is likely to happen. As I understood from Mr. Turner he was
24 saying one could not be 100 per cent sure that actually anything would need to be amended
25 as a result of seeing the models and that may well be the case.

26 MR. HOLMES: Madam, we accept entirely that no amendments may be forthcoming. We
27 equally see the difficulty which you identify that it may not be possible for Carphone
28 Warehouse to come forward with new arguments or evidence by the time of the service of
29 the defence. We say simply that insofar as they are able to do so they should be encouraged
30 to do so and we say that insofar as amendments come forward afterwards it would certainly
31 be preferable if they came forward before questions were referred off.

32 Carphone Warehouse may find it all terribly difficult, and they may say despite the very
33 formidable assembly of experts that they have within the confidentiality ring that they need
34 months and months in order to mount additional elements to their case. If they do so we say

1 it will be a relevant consideration to bear in mind when considering the admissibility of new
2 material which comes forward late as to whether it could reasonably have been brought
3 forward at an earlier stage. We are not asking you today to put a break on this or to say that
4 the defence should await some fixed deadline by which any amendment must be brought
5 forward, we simply wish to emphasise that new points should be brought forward promptly.
6 The model, madam, was said to be relevant in the notice of appeal on only two relatively
7 discrete points and we would have thought that given Carphone Warehouse's considerable
8 work on the case to date it should not be difficult for their experts instructed in this case to
9 come forward with material on those points relatively fast. But, madam, I agree, do not
10 think we can take the point further now.

11 As regards the sequence of pleadings ----

12 THE CHAIRMAN: Can I just be clear where we are as a result of that, that you are not asking us
13 to delay the service of the defence until some time after they have had a chance to look at
14 the models?

15 MR. HOLMES: No, madam, we hope that Carphone Warehouse, and trust that Carphone
16 Warehouse will come forward with new material as soon as possible, and will not wait until
17 the Competition Commission procedure, because it would obviously be disorderly and
18 disruptive of proceedings before the Competition Commission if we all had to troop back to
19 the Tribunal, as was the case in the calls to mobile appeal, in order for you to adjudicate on
20 questions of admissibility – the sooner the better is the message that we wish to convey.

21 THE CHAIRMAN: Sequence?

22 MR. HOLMES: As regards sequence, Ofcom's position on the sequence of pleadings is that
23 Carphone Warehouse's initial proposal in its letter of 31st July was correct. You will have
24 seen that Carphone Warehouse suggested there that interveners in their support should go
25 first, that is to say Sky, then Ofcom, and then interveners in Ofcom's support, in other
26 words, BT followed by a reply.

27 On reflection, we now accept that this is the fairest and most efficient way of proceedings.
28 It is fairest for Sky to go before us because before we settle our defence we must be entitled
29 to know the full extent of the case that we are expected to meet. Sky has candidly
30 acknowledged in correspondence that it does intend to come forward with new arguments
31 and evidence in its statement of intervention. It says that the new evidence will not be
32 substantial but it can give no assurance as to the nature or scope of the evidence or
33 arguments that it will seek to run, and it would be wrong to require us to meet Carphone

1 Warehouse's points without seeing how those points may be adapted or embroidered by
2 Sky.

3 It is also more efficient for Sky's intervention to come before the defence. I think no one
4 would dispute that we must at some stage be given an opportunity to respond to the points
5 that Sky raises against us. The most straight forward and accessible way for Ofcom to
6 develop its case is by preparing a single and integrated document which responds
7 simultaneously to Carphone Warehouse's and Sky's points. Such a document is likely to be
8 of greater assistance to the Competition Commission and, indeed, to the parties in
9 crystallising the issues requiring to be determined. It is likely to assist clarity and it will
10 also save time by avoiding the need for the Competition Commission to timetable
11 responsive submissions at a later date.

12 THE CHAIRMAN: What happens though if there is some dispute about whether the scope of the
13 statement of intervention goes too broad considering the grounds of appeal?

14 MR. HOLMES: Madam, we will have to see whether or not happens. My suggestion would be
15 that Ofcom could plead to those points which are clearly within the scope of the appeal, and
16 no doubt sky will bear in mind your introductory comments, and will tailor their
17 intervention accordingly.

18 Insofar as there are points in dispute as to their admissibility, they could be set aside for
19 determination later. There will certainly be some points within Sky's intervention which
20 are properly within the scope of the appeal. We do not say, and it is a caricature of our
21 position to suggest that we say that an intervener cannot come forward with new arguments,
22 they have to be able to play some role if they are not permitted to simply duplicate the
23 arguments that are being advanced by the appellant, but we do say it is a matter of degree
24 whether those new arguments distort the appeal, raise matters that should properly have
25 been brought in by way of an independent appeal and that will need (or may need) at some
26 stage to be determined in the case of Sky's intervention. But it would still be more
27 convenient in relation to those points which will be within the scope for them to be
28 addressed as part of a single and integrated document, where we also meet the arguments in
29 relation to the same grounds of appeal that are being advanced by Carphone Warehouse.
30 The alternative is that we will be left with a rather scrappy procedure in which we make our
31 case not knowing fully how points may be developed, expanded upon, articulated
32 differently and without the ability to guard ourselves in our language in full awareness of
33 how points will be put; that is our concern.

1 Carphone Warehouse resists its own original proposal on several grounds. First, it says that
2 a sequence of pleadings is not normal in which interveners in support of the appellant go
3 first. It is hard to respond to this generalisation. No examples are offered but in the cases
4 that we have been able to identify where interveners supporting an appellant have arrived on
5 the scene in advance of the defence the Tribunal's practice does appear to us, at least in
6 some cases, to mean to order that the interveners should go before the respondent and for
7 your note, madam, you will see that this is the case in the *Barclays* PPI appeal which was
8 recently heard, and the same approach was taken in the *Mastercard* litigation. There are not
9 that many cases from a rapid review in which we could find a situation where the
10 intervener supported the appellant as opposed to the respondent, and that needs to be borne
11 in mind when considering the order of submissions.

12 Secondly, Carphone Warehouse in common with Sky appears to admonish us for revisiting
13 the position we set out in our letter of 12th August. That letter was, of course, written before
14 we knew that there would be an intervener supportive of the appellant's position. Now we
15 know that we must beat Sky's as well as Carphone Warehouse's arguments. We also know
16 that Sky will be supplementing Carphone Warehouse's case in various unspecified ways,
17 and this has brought into sharp focus for us the difficulties that are likely to be involved in
18 seeking to meet Carphone Warehouse's points without knowing how Sky may wish to
19 develop them.

20 Finally, Carphone Warehouse says that its concern is to avoid undue delay and that three
21 rounds of pleadings is over elaborate. Madam, we have difficulty understanding this point.
22 The approach that we are proposing would avoid an additional 'round of pleadings in which
23 Ofcom later responds to Sky's case. Ofcom's approach is a more streamlined one and it
24 would, we say, in the long run avoid delay. In any event, this appeal should progress
25 rapidly but it must also proceed fairly, and it would not be fair to require Ofcom to plead its
26 case before Sky has advanced theirs.

27 Unless I can assist you further on that point ----

28 THE CHAIRMAN: What do you say about the dates then for which ----

29 MR. HOLMES: Well, madam, we were surprised to see in the recent correspondence a
30 suggestion by Sky that they have some expectation, as a result of correspondence during the
31 course of the summer, that they would be allowed until late October or the principal parties
32 would not be pushing them to put in their statement of intervention until late October. We
33 say nothing could be further from the case. Carphone Warehouse's original proposal in its
34 letter of 31st July was that 2nd October was an appropriate date for Sky to put in its

1 intervention. In our letter of 12th August it is true that we suggested a date at the end of
2 October. Carphone Warehouse replied on 14th August suggesting 9th October for all
3 interveners, and we replied on the following Monday recognising that there were two
4 possible approaches to interventions, they could either all go together or supporters for
5 Carphone Warehouse could go first; at that time we did not mind which approach was
6 adopted, we have explained why we have changed our position on that. But this should
7 have made clear to Sky that 2nd October was still on the table and that the alternative date
8 proposed by Carphone Warehouse was 9th October. So it was clear from this exchange
9 there were various possible dates on the table, that the principal parties were proposing
10 dates a good deal before the end of October and Sky is well advised by cautious solicitors if
11 there had been any doubt about this they could and should have written. We are also
12 surprised by the late date proposed by Sky given that they apparently will not be dealing
13 with all grounds of appeal, or relying on substantial evidence, they have made that clear in a
14 letter of clarification to us when we requested them to explain what new arguments they
15 might be advancing.

16 So we say that Sky should come forward in short order with their statement of intervention
17 and that that need not delay service of the defence.

18 If I could turn then to timing of the defence? You will have seen what we say about that in
19 our skeleton. As instructed by the Tribunal we have been working hard on the defence
20 throughout the period since we received the notice of appeal, and we have carefully
21 surveyed the progress that we have made and tried to assess the magnitude of the remaining
22 work, and the conclusion we have reached is that we cannot realistically commit to
23 providing our defence before 23rd October. We have set out the factors which have made
24 matters difficult for us, the scale of the appeal; you, yourselves, have seen the amount of
25 material that has been put in, the number of expert reports, a substantial statement of fact,
26 an extremely detailed and comprehensive challenge mounted by Carphone Warehouse to all
27 aspects of Ofcom's price controls. We have also had to deal with our ongoing regulatory
28 responsibilities of getting the WLR decision out. The same team must necessarily work on
29 these matters. We recognise that they are intimately connected, that has never been in
30 dispute.

31 Thirdly, as you have said, there is another substantial price control appeal on the table,
32 namely the leased lines appeal. The areas of overlap seem somewhat broader than those
33 identified in your introductory comments although I think we accept, subject to further
34 consideration of these appeals, that they should continue to run their separate courses. We

1 are slightly cautious of adumbrating in too much detail those matters because I understand
2 that we are still awaiting redactions for confidentiality in the notice of appeal in the leased
3 lines appeal, but I think I can say that cost of capital arises in both, the use of LRIC arises in
4 both, the allocation of corporate overheads arises in both, the allocation of corporate
5 overheads arises in both. The correct approach to financial modelling arises in both. The
6 interpretation of the consultation provisions of the EC Common Regulatory Framework is a
7 feature of each.

8 THE CHAIRMAN: Well we are not thinking so much about whether there are issues in common
9 in terms of that but a more substantive effect, namely, that if it is decided in this case that
10 certain costs ought not to have been allocated to Openreach, those costs have to be allocated
11 somewhere in the business and if another charge is – I mean in the absence of the leased
12 lines appeal those costs would then be floating about unallocated, but if you have the leased
13 lines appeal, which is opening up the question then it may be that some costs are included in
14 there in a way as a result of this appeal. I do not know if that is something that might
15 happen?

16 MR. HOLMES: We certainly agree absolutely that in conducting its work the Competition
17 Commission will need to be mindful of the bigger picture and of the broader regulation of
18 all parts of Openreach's business in order to ensure that the result of these various
19 piecemeal appeals is not to leave costs unallocated and is not to create a risk of under
20 recovery in the long run.

21 My point here is a narrower one, which is simply that the two pending appeals inevitably
22 require the attention of the same senior economists regulatory accountants and lawyers
23 within Ofcom and moreover that work can partly be done sequentially, we do not say that
24 we have to wait until we have our notice of appeal in, in leased lines, and we know that the
25 timetable is still to be conclusively determined in relation to the leased lines appeal. But
26 because of the overlaps we must at least ensure that our position is consistent in relation to
27 points which arise in both of these substantial appeals. Taking all this together, the date of
28 23rd October appears to us to be the earliest date by which an adequate defence to this
29 appeal could be prepared. To be clear madam, I know that it is sometimes the practice of
30 parties appearing before you to offer a long bid in the expectation that the party will be met
31 somewhere in the middle. That is really not the spirit in which we are offering the date of
32 23rd October. With the best will in the world we do not think that we could properly defend
33 this appeal in any shorter time frame.

1 THE CHAIRMAN: The 23rd October, is that the date that you opt for whether or not the Sky
2 statement of intervention is served before your defence is required?

3 MR. HOLMES: Whether or not Sky goes first, it is clear that there are substantial work streams
4 outstanding and the 23rd October date was calculated not really considering that the scope of
5 Sky's intervention – we cannot know what additional work that may entail until we have
6 seen it. We wrote to ask Sky to clarify what new arguments they would be advancing in the
7 hope that it might enable us to factor that into our calculations and to offer you a date which
8 was more informed as to the tasks that are likely to confront us in relation to Sky's
9 intervention. Understand that we do not criticise Sky for not being able to offer us a
10 statement of their case now, but it does make it difficult for us to give any firm guarantees
11 that we will be able to respond to Sky's material by the date required.

12 The more important point as regards the linkage between the Sky statement of intervention
13 and the preparation of our defence to Carphone Warehouse's points is that we should have
14 sight of what Sky says so we can put our case in full awareness of the points being made
15 against us. We hope we will make a heroic effort by 23rd October, and subject to what Sky
16 puts in, if you decide that they should go first, we will endeavour to meet their additional
17 points. But really our point about Sky going first is as much about fairness and allowing us
18 to understand what Sky is saying as well as what Carphone Warehouse is saying. Any
19 respondent should understand what case is being put against it because it will affect how
20 arguments are developed, what points are made. It is very difficult for us to plead
21 cautiously and carefully if we think points could be taken off in all sorts of new directions
22 within the scope of Carphone Warehouse's appeal once Sky put forward their case.

23 THE CHAIRMAN: Yes.

24 MR. HOLMES: I realise that was a long answer to a short question. In relation to your specific
25 inquiry as to whether this date is fixed to allow also for a response to Sky's intervention, we
26 had not given a block of time aside after we finished all of the other stuff, that is just not
27 how we had gone about calculating the date. We cannot give you, you will understand, any
28 firm assurance that if Sky did go first we would be able to meet all of their points
29 satisfactorily by 23rd October.

30 I hear Mr. Turner asking where that leaves us? That leaves us, madam, in my view with the
31 requirements of fairness, necessitating that Sky's statement of intervention should go in. It
32 leaves us with 23rd October being the earliest date we say by which we can realistically
33 respond to the points made by Carphone Warehouse, and it leaves us saying with Sky's
34 material before us we will make all of our best efforts to meet the points that they make by

1 23rd October also, but it may be the case that that is not possible. There is likely, of course,
2 to be a linkage between the material that we cannot easily or adequately respond to and any
3 dispute about the scope of Sky's appeal, so it may very well be that exactly the material that
4 would pose the biggest difficulties for us, and that we would not be able to respond to in
5 time would also be the material that in any event would have to be left over in order that
6 questions of admissibility could be determined.

7 THE CHAIRMAN: Yes, thank you.

8 MR. HOLMES: Madam, my next submission is in relation to the disclosure application. We
9 have indicated that we are happy with the disclosure sought in Carphone Warehouse's letter
10 of Wednesday, that is that Ofcom be directed to disclose the model in electronic form
11 within two days to the members of the ring as well as to the Competition Commission staff,
12 and thereafter to co-operate with any reasonable requests made by Carphone Warehouse's
13 external economic advisers, or other relevant individuals to explain how it works. We have
14 checked, we are quite willing and able to disclose by 5 pm next Tuesday. I should enter
15 here a caveat, madam, in relation to the requests that may be made by Carphone
16 Warehouse's economic advisers and other relevant individuals. Of course, we will co-
17 operate with any reasonable requests received, but if those requests are extensive and there
18 is a volume of correspondence, madam, that you will not yet have seen, which passed
19 between the parties following our decision and prior to our appeal in which we strived to
20 answer very, very wide ranging requests for further information from Carphone Warehouse.
21 If substantial requests are made, and those requests appear oppressive and they risk
22 diverting resources from the process of preparing the defence, we will necessarily need to
23 reserve our position and it may be necessary for the Tribunal to adjudicate on those requests
24 on the papers.

25 In terms of the order set out here we are very happy with those terms, and we enter that note
26 of caution merely as an observation so that everyone hears it today.

27 On Thursday afternoon we received Carphone Warehouse's ----

28 THE CHAIRMAN: Is that all four models?

29 MR. HOLMES: Sorry, I think Carphone Warehouse has always been working using "the model"
30 as a shorthand for the various models. It was a complex price control and of course there
31 are different bits and pieces of modelling that go together to make up the price control. We
32 are very happy that all of those should be disclosed and we do not think there is any
33 ambiguity in the light of the helpful clarification from my friend Mr. Turner as to what the
34 model will connote.

1 On Thursday afternoon we received Carphone Warehouse’s skeleton argument for today’s
2 hearing which contains at para.17 an entirely novel request for disclosure. If I could ask the
3 Tribunal quickly to turn that up, it is at tab 44 of the correspondence bundle, you may have
4 it somewhere more convenient already, but it is certainly to be found there if not. You will
5 see at the end of the paragraph that Carphone Warehouse now accepts that the category of
6 documents it previously asked for: “all supporting information relied upon by Ofcom in
7 determining the price controls” is over broad, and it substitutes an new request that Ofcom
8 should disclose:

9 “documents in which Ofcom’s representatives set out the considerations that were
10 relevant to making its final decisions on each of the price control matters raised in
11 notice of appeal paras 76 to 129.”

12 Madam, we think this is still an extremely broad request and it is one that we emphasise in
13 the strongest terms we would resist. Carphone Warehouse appears to be seeking all
14 Ofcom’s internal documents containing considerations relevant to those aspects of the price
15 controls which are in issue which is, in reality, all aspects of the price controls. Ofcom has
16 been preparing the controls over a period of many months, and of course there are many
17 internal thinking documents, discussion documents, emails – this category is a potentially
18 very large one although we have not yet assessed – given the time we have not even begun
19 to assess – what it might involve. At first blush the proposal appears to us entirely
20 inappropriate. Ofcom’s reasoning in support of its decision, as you rightly point out, is set
21 out in the decision itself. This is a merits appeal. The Competition Commission’s role is to
22 decide whether Ofcom got anything materially wrong in the decision. Carphone Warehouse
23 does not explain what possible basis there is for requiring Ofcom to disclose a hugely broad
24 category of internal documents. Carphone Warehouse’s various interventions over the
25 course of the administrative procedure in this appeal are sometimes colourful but there is no
26 allegation of bad faith, and Carphone Warehouse is not making a judicial review challenge
27 to Ofcom’s reasons for reaching its decision. There are likely to be important policy
28 implications arising from the disclosure of internal documents of this nature, which Ofcom
29 has not even begun to explore, and equally the request looks as though it would be
30 immensely burdensome on Ofcom in the run up to service of the defence. Without any
31 good justification having been offered for it we say that it is clearly disproportionate. In our
32 submission what is clear beyond doubt is that Carphone Warehouse has not given adequate
33 notice of this application and that the Tribunal cannot fairly make an order for this
34 additional disclosure today. If Carphone Warehouse wishes to pursue the application it will

1 need to be made on proper notice and with all parties having the opportunity to make proper
2 submissions which are informed by the case law and the Tribunal may be aware that it has
3 previously considered the circumstances in which internal documents should be disclosed.
4 Taking account of the practical considerations on which Ofcom simply cannot advise you to
5 day, and based on a proper understanding of Carphone Warehouse's reasons for seeking
6 these documents, which we say are at present opaque.

7 THE CHAIRMAN: Well Mr. Turner says it is not clear from the decision why you chose to do
8 certain things that you seem to have done in the decision and it may become clear from the
9 internal correspondence as to why particular numbers were chosen.

10 MR. HOLMES: As to that, madam, we do not accept first of all the various allegations of opacity
11 which we find surprising given the very expensive correspondence which preceded the
12 lodging of the notice of appeal. But, in any event, insofar as there are any points on which
13 clarification is needed, that can be given in the defence in the normal way, it does not
14 require the disclosure of any internal documents. Mr. Turner's justification does not offer
15 any explanation as to why we should engage in a retrospective forensic inquiry into how
16 Ofcom's internal thinking progressed.

17 THE CHAIRMAN: I suppose if the Competition Commission also think it is unclear they can ask
18 you for the reasons.

19 MR. HOLMES: They can ask us for clarification in the many hearings that will follow after the
20 reference questions are referred.

21 Madam, the non-price control matters. There is clearly a difference between Carphone
22 Warehouse and Ofcom as to whether the Tribunal should entertain what we have called the
23 "WLR challenge" and what they call the "decoupling point" once Carphone Warehouse
24 abandons its claim for relief in respect of it following our imminent decision.
25 We flagged our concern at this stage so that everyone was aware of this, but we do not seek
26 to have that question decided today, it is common ground that the non-price control matters
27 do not need to be heard until after the price control matters are referred and, insofar as there
28 is an issue when we have seen what amendments Mr. Turner proposes we can come forward
29 with it later.

30 The reference questions, we are grateful for the Tribunal's indication that they found our
31 questions helpful. You have seen the various comments that have come forward. It is clear
32 that there are now quite a number of issues between the parties, and we think it is optimistic
33 to suppose that agreement will be reached on all of them. Mr. Turner flagged the scope for
34 interveners via their arguments to justify a revision of a price control in the opposite

1 direction from that sought. There is also a question in relation to the scope of Sky's
2 intervention, which we agreed cannot be determined in the abstract.

3 THE CHAIRMAN: That point was one that we parked in relation to the questions that were sent
4 to the Competition Commission in the "calls to mobile" case.

5 MR. HOLMES: It was, madam, and as it happened it did not arise in the proceedings before the
6 Competition Commission, but now it appears perhaps more likely to arise given a situation
7 in which you have commercial parties battling in each direction. We will not know, of
8 course, until we have seen everything that has been said, but there must be a risk that it
9 arises, and when we see the statements of intervention we will see whether it is a live issue.
10 Other points include the correct division of competence on remedial matters between the
11 Tribunal and the Competition Commission, which I think Mr. Ward has flagged in his
12 written submissions for today, and we will hear him on that later. Whether the Competition
13 Commission should revise a price control in the public interest and other than on the basis
14 of grounds pleaded in the notice of appeal in order to meet the criteria in s.88 is another
15 hoary chestnut which comes back in these proceedings. We agree with Carphone
16 Warehouse's suggestion that a CMC is likely to be helpful in resolving these, and it may be
17 sensible to timetable it now if the Tribunal is in a position to do so.

18 That, madam, concludes my submissions.

19 THE CHAIRMAN: Mr. Wisking?

20 MR. WISKING: Some preliminary points. First, we agree with the Tribunal's opening remarks,
21 and the remarks of Mr. Turner. On the question of confidentiality we are content with the
22 amendment to the undertaking and we have with us the undertakings from the people named
23 in the draft order.

24 On the question of Sky's intervention and the sequencing and timing of these proceedings
25 we would support the Tribunal's initial position as set out in its opening remarks. There are
26 three points that I wanted to make about this.

27 First, it is not Sky's intention at all to stray beyond the bounds of a proper intervention in
28 these proceedings. We do not intend to file a wide statement of intervention. The issue
29 arose because Ofcom provided a draft reference document, and it was apparent from the
30 correspondence that Ofcom's intention was to seek to have the terms of that reference dealt
31 with today, that would have been before Sky's statement of intervention had been filed.

32 Our concern was that the drafting of that document tied the reference so closely to the
33 appeal that it would have prevented us, or potentially left arguments open as to whether our
34 intervention was permissible within the scope of the references made at the time, and we

1 would be denied the ability to intervene within proper bounds; that was simply our concern,
2 That issue has now gone away, so there is nothing sinister about the position we took, and
3 as we have tried to explain in the correspondence it is not Sky's intention to advance
4 arguments or evidence on every point that Carphone Warehouse has made.

5 The second point is obviously that it is not normal, and I think it is accepted by Ofcom it is
6 not normal to foreshadow one's pleadings in advance and it is not useful to do so. As I have
7 said, we intend to have a focused statement of intervention. There is no basis therefore for
8 any expectation which seems to have assumed prominence in Ofcom's submissions that we
9 will necessarily stray beyond the bounds of what is permissible, and I noted the Tribunal's
10 comments about the proper scope of an intervention and we are confident that our
11 intervention will not leave any basis for a challenge along the lines that Ofcom has
12 suggested.

13 On the question of timing, obviously Ofcom and Carphone Warehouse have taken different
14 positions in the correspondence. However, it should be noted that Carphone Warehouse's
15 proposals about timing were always premised on the statements of interventions being on an
16 outline basis. Ofcom resisted that and asked for full statements of intervention and that was
17 the basis of the date of 30th October which appears in the correspondence. Indeed, even
18 after Sky's application to intervene was made Ofcom was making that position. So it is not
19 the case that anything new has emerged, there is no reason to think that Sky is doing
20 something different from what any intervener would have done, or what could have been
21 expected at the time it made its application to intervene. Indeed, at that time Ofcom
22 obviously envisaged the need potentially to respond to points made in Sky's statement of
23 intervention and its suggestion at that time was that it could do so by responsive
24 submissions as part of the reference process on a timetable set by the Competition
25 Commission. So in our submission nothing has changed, there is no need for Ofcom's
26 defence to follow Sky's statement of intervention and we would support the Tribunal's
27 initial remarks as to the sequencing and timing of the proceedings.

28 Ofcom has also made some remarks about the time that Sky was seeking to prepare its
29 statement of intervention. There are three reasons for this. First, we are taking care
30 obviously to focus very much the nature of the statement of intervention. That takes time,
31 but ultimately that is for the benefit of the proceedings, it will just be more efficient.
32 Sometimes it is easier just to throw everything in and we do not intend to do that.

1 Secondly, as the Competition Commission and I think all parties agree, the statements of
2 intervention are to be full and evidenced and that takes time. Thirdly, like all the parties we
3 have had the usual difficulty of getting on with this over the summer.

4 Those are the points that we wanted to make in relation to the statement of intervention. If
5 the Tribunal is minded to change the sequencing and have Sky's statement of intervention
6 precedes the defence, our alternative submission is then that we should still have until 23rd
7 October to do that. We consider that is what we need in order to prepare a properly focused
8 statement of intervention.

9 There is one other matter in relation to the characterisation of price and non-price matters,
10 we agree with the position taken by Carphone Warehouse and indeed Ofcom as to the
11 proper characterisation of the questions.

12 THE CHAIRMAN: So what you are saying is that your preferred option would be for your
13 statement of intervention to come after the defence, in which case in any event it is not
14 going to be before 23rd October, but if we decide to accede to Ofcom's sequence suggestion
15 that you would need until 23rd October to file your statement of intervention.

16 MR. WISKING: Indeed.

17 THE CHAIRMAN: Yes, thank you. Yes, Mr. Ward.

18 MR. WARD: Madam, BT is, of course, an intervener in these proceedings, but it probably goes
19 without saying that this appeal is of great importance to it, because the subject matter of it
20 of course is BT's own prices. Even though BT is an intervener it is seeking the opportunity
21 to fully respond to the case made against the price controls mindful of course of the need
22 not to replicate whatever it is that Ofcom do. But there can be no doubt that BT will be in a
23 position to bring particular expertise to the issues and of course to offer submissions on
24 matters that relate ultimately to BT's commercial position and to its costs modelling.
25 The parties before you appear to agree that it would be beneficial if the issues are fully
26 crystallised in the pleadings before a reference goes off to the Competition Commission
27 because in reality in the long run that will save time and make the whole process more
28 efficient.

29 I do want to make clear also that, contrary to the hint from Mr. Turner, there is no interest at
30 all on BT's side in simply delaying the outcome of these proceedings for the sake of it. But
31 the desire to crystallise the issues in the pleadings, and to do so efficiently does bear upon
32 the question of the order of submissions. Here we strongly echo the concerns that have
33 been expressed by Mr. Holmes for Ofcom. In the case of Sky we hear what Mr. Wisking
34 has said. We understand of course that he cannot commit Sky to some particularly limited

1 parameters of its appeal right now, but the reality is, of course if Sky is to make an
2 intervention that is permissible, it must not replicate Carphone Warehouse, it must find
3 something new to say, albeit then it faces the difficulty of not going so broad in its
4 submissions as to accede the limits of admissibility. But if it is going to say something new
5 and admissible, then our submission is the most efficient thing is for both Ofcom and BT to
6 have the opportunity to properly address that in a single round of pleadings, otherwise in
7 reality one way or another some way will have to be found for BT and Ofcom to answer
8 whatever it is that Sky is saying so that the Competition Commission at least knows the
9 parameters of the dispute.

10 The position of Carphone Warehouse is more difficult and we fully recognise the instinctive
11 lack of attraction in the suggestion that Carphone Warehouse should go first because
12 Carphone Warehouse in fairness has not seen the model that it now seeks the disclosure of.
13 It does not know what it will find and I am bound to say we are a little bit concerned about
14 what the scope will be of the submissions eventually made.

15 THE CHAIRMAN: Sorry, the point you are talking about now is whether Carphone Warehouse
16 should be required to bring forward any amendments they want to make as a result of the
17 confidential information?

18 MR. WARD: Yes, sorry, forgive me for not being clear, exactly so. The essential submission I
19 want to make though is that Carphone Warehouse's position does create a difficulty for the
20 Tribunal because on the one hand it is saying: "We are very anxious to get all of this off as
21 quickly as possible, we agree there should be a close of pleadings before the reference goes
22 off, but on the other hand we want to keep in our back pocket this potential expansion of the
23 grounds of challenged. They cannot be criticised for not knowing today what the breadth of
24 that expansion will be; I entirely accept that. But what we are concerned about is that thus
25 far in these proceedings the Carphone Warehouse approach has not exactly been one of
26 restraint.

27 You will have seen, of course, the very broad and detailed nature of the claim it has
28 advanced, it has even raised criticism of the fact that BT logos are to be seen on the side of
29 Openreach vans. The economic evidence is massively detailed, we have three experts on
30 the question of cost of capital alone. So despite the vague disavowals by Mr. Turner in the
31 skeleton that came yesterday afternoon, there is a very real concern that whatever comes
32 forward from Carphone Warehouse in the end will be highly detailed. There may be points
33 of great granularity on the mode, there may be issues of principle; we just do not know,
34 none of us know. The reason why BT made the proposal it did that Carphone Warehouse

1 should go first is that then there could be an orderly progression of pleadings. The points,
2 whatever the were, could be addressed by the parties that need to address them, then we
3 would at least be at the end of the process having had fully pleaded and distilled issues from
4 which the questions could be refined for the benefit of the Competition Commission.

5 It is also fair to say that whatever happens and whatever the Tribunal decides today about the
6 order of pleadings and the timetable of those pleadings, this reference is not going to go off
7 quickly in a matter of a few weeks. There are too many pleadings, there are too many
8 issues, and now some very substantial issues have arisen in respect of the content of the
9 reference to the Competition Commission itself. So yesterday afternoon for the first time
10 Carphone Warehouse raised the possibility of a s.88 adjustment, and one need only revisit
11 the judgment of the Tribunal in the mobile call termination cases to see how many and how
12 difficult the issues are that surround that; issues which in the end in fact divided the
13 Tribunal of course. So that is going to be very, very difficult to litigate. Then there are the
14 other issues that Mr. Turner mentioned when he was on his feet and, indeed, the question
15 that Mr. Holmes adverted to very briefly that we have called the “appropriateness” question.
16 In other words, the question of allocation of jurisdiction between the Competition
17 Commission and the Competition Tribunal; something else, in our submission, that must not
18 be lost sight of. None of this is trivial. If we have a further hearing, which appears in my
19 submission to be inevitable, then there will be complex issues for the Tribunal to resolve.
20 So it would be quite wrong to see this as a case that can be rapidly processed through into
21 the Competition Commission, even if all parties agree, as I think they do, that that would be
22 desirable, that it would be beneficial to get the matter dealt with as quickly as possible. All
23 parties also recognise that it must be done on an efficient basis and a basis that gives the
24 Competition Commission a clear task to address because to do it any other way will only
25 build in difficulty later.

26 Obviously the approach the Tribunal takes to these issues will itself impact on the question
27 of timetable.

28 THE CHAIRMAN: So what is the sequence that you are advocating then? Carphone Warehouse
29 first, bring forward whatever amendments they want to make following the disclosure of the
30 confidential information. Then BSKyB’s statement of intervention, then the defence, and
31 then your statement of intervention at some point after the defence?

32 MR. WARD: Well we put forward in our skeleton argument for today a sort of ladder of steps in
33 that order which allowed each step two weeks. Madam, you said in observation I think to
34 Mr. Holmes, that two weeks sounded pretty tight for Carphone Warehouse, and of course

1 we just do not know, that is a matter for Mr. Turner to address you on if he wishes. But of
2 course they do have an army of experts and it may be that a short initial period should be
3 allowed, it focuses minds, of course, and then maybe they can come back to the Tribunal
4 and say if it is really not enough. But our concern is that any other approach leaves this
5 uncrystallised issue sort of swilling around in the ether until at some point Carphone
6 Warehouse bring it down upon us and moreover removes the discipline of having to do it in
7 a specified time.

8 So recognising the reasons why the Tribunal is resistant to it initially we do submit that it
9 may, in the long term, in fact save time in these proceedings.

10 If I may make a secondary submission on the basis that all of that falls on deaf ears and the
11 timetable that you proposed at the beginning of the hearing this morning were to stay it
12 would have allowed BT two weeks to file its statement of intervention after Ofcom's
13 defence on 30th October, and rather like Mr. Holmes I do urge you for just a little more time
14 than that.

15 It must be recalled that BT has had the notice of appeal for about a month and supporting
16 evidence, because it was served very helpfully following the order of the Tribunal – I make
17 no criticism of that – that was, I think 19th August. So we have not had it for terribly long.
18 Like Ofcom, of course, BT is now concerned in a number of very major price control
19 matters, very much as Ofcom is and, like Ofcom, it faces the prospect of another one in
20 respect of wholesale line rental, and Carphone Warehouse raised the prospects on that one
21 up to “very likely” in their letter of the day before yesterday. Of course, although BT is a
22 large organisation, as one might expect a lot of the same people are working on more than
23 one of these appeals and, as you have observed, madam, the issues themselves are
24 interlinked. So BT is facing a very large load of litigation in this case, so if the timetable
25 initially proposed this morning were to stay in place we would ask for at least one further
26 week in which to prepare our statement of intervention – I think you suggested the date of
27 30th October, so that must take us to something like 6th November. Given the complexities
28 involved in getting this case off to the Competition Commission that additional week is not
29 realistically going to make a material difference to anything but may greatly assist BT in
30 properly formulating its submissions.

31 Finally, just to tie up some of the other points that arose this morning. On the other
32 questions, as is implicit in what I have already said, we strongly agree that that should be
33 left over for another day and that a further hearing will be needed. In respect of
34 confidentiality we are, of course, content with the form of order that you have proposed and

1 there are signed undertakings available for BT. There may be a slight delay in respect of
2 BT's external experts but they will follow next week.

3 Is there anything else I can assist with?

4 THE CHAIRMAN: No, I do not think so, thank you very much. Mr. Turner, do you want to say
5 anything in reply?

6 MR. TURNER: I will be very brief, I am conscious that the Tribunal today has a very limited
7 practical job to do of progressing the timetable for the case and so I am not going to
8 comment on general rhetorical flourishes that my friends may have made, I will just deal
9 with brass tacks.

10 Amendment of pleadings first. Mr. Holmes made some general point about amendment of
11 the Carphone Warehouse case, but ultimately he was not asking for any order or direction
12 other than we should be encouraged informally to make any amendments as soon as we can,
13 and that is not contested, we will make amendments as soon as we can.

14 Briefly, in relation to his taxonomy of the pleadings and what their function is I do need to
15 say something quickly. The reply will not be the occasion, and we have never said it will be
16 the occasion for adding any new grounds of appeal. It is only the notice of appeal that will
17 contain any new grounds by way of amendment. So far as the reply is concerned, I do not
18 believe that the argument so far has discussed what time if any should be allowed for
19 service of reply. If I may say so now therefore we would say that following the last
20 responsive pleading by my friends, whichever that is, we should be given a period of three
21 weeks, if so advised to file a reply. That is our submission on that.

22 Secondly, in relation to arguments, as opposed to grounds of appeal, one has to keep a sense
23 of proportion. It is obviously not right that every development of an argument which takes
24 place in the Competition Commission inquiry then requires some parallel amendment to the
25 notice of appeal to be made because people jump up and say "There is a new argument, it
26 has to be in the formal pleading". That was not what happened in the previous mobile call
27 termination case, no party went that far, and we say that where you are developing an
28 argument in the ordinary way, which is succinctly stated in the notice of appeal it is fair
29 enough, you do not have to amend your notice of appeal again.

30 Thirdly, and this is relevant to Mr. Ward's point about whether Carphone Warehouse
31 should be required to comply with a first stage from now in which we have to receive some
32 material, examine it, and then within a period of two weeks or so, "put up or shut up", I
33 maintain our submission very firmly that that is unworkable. The only point I would add to
34 what I said before is to remind the Tribunal that this is a process that it is inherent in what is

1 going on that there is confidential information that is going to be disclosed as time goes
2 forward. The model is a central item that we have identified and which we would have
3 asked for disclosure of, but of course when Ofcom serves its defence there may be further
4 confidential material there. When BT serves its statement of intervention there may be
5 some further information there. We certainly cannot say, no one can say now what, if any,
6 further amendments were going to be needed. The practical way to proceed, and the only
7 way in which any court proceeds is to move forward and deal with any issues as and when
8 they arise. So those are our submissions about amendment.

9 So far as the sequence of responsive submissions is concerned. We continue to have a
10 preference for there being one round of interveners' statements. The reason for that is that
11 we are worried about an unnecessary elongation of the case – you add two more weeks in
12 there, two more weeks in there – soon the process snowballs and the entire appeal
13 proceedings take months longer than they should do. It is overstating the importance of a
14 statement of intervention if I may say so, to attribute that degree of importance to it. There
15 will be no new grounds of appeal and, as Mr. Wisking has confirmed, they will be
16 providing arguments in support of the existing grounds. It is exaggerated to say this is
17 going to require an additional step in the process.

18 Ofcom's request for extra time for its defence beyond the time, madam, you indicated
19 provisionally of 16th October. They have said they will want one more week, taking them
20 to 23rd October. As to that we do not have a strongly held view provided that Sky follow,
21 because of course if Sky have to go first and they want a period of time for that, and then
22 Ofcom need to follow several weeks after that, the entire process gets pushed out to an
23 unacceptable degree causing delay.

24 I say again that there has to be proportionality. We, the appellant, worked under
25 Stakhanovite conditions to produce our notice of appeal within eight weeks. Obviously
26 Ofcom would like to do a full job, we would have liked to have had as much time as we
27 could get but the process is that people have standard deadlines in which they are meant to
28 do their bit. Ofcom will have had over twice the standard amount by the time it files its
29 defence on any view and that is long enough.

30 Finally, so far as disclosure is concerned, I listened carefully to what Mr. Holmes said. I
31 will not say very much more about the additional request for disclosure other than we are
32 content in view of what he said to wait until the service of the defence, we will look at what
33 is disclosed in the documents accompanying the defence, and if we feel there is need to

1 make application for specific disclosure we will make that application at that time and on
2 proper notice.

3 THE CHAIRMAN: So you are not pursuing the request for the internal documents today then?

4 MR. TURNER: For those internal documents, no. We are content in view of what Mr. Holmes
5 has said to wait. We have flagged up why we think those documents could be important,
6 without going into detail there are clear parts of our notice of appeal where we say – for
7 example, para.91.10: that this part of the decision was opaque and our expert evidence
8 reinforces that. We will expect Ofcom’s defence to give the full reasons as to why a
9 particular decision was taken and if there is not the relevant supporting information that we
10 would expect we will make an application.

11 Madam, the only other matter that has been left in the air to some extent is that people have
12 questioned whether we are in a position today to agree on a time for a hearing by this
13 Tribunal in relation to the non-price control matters, the two points of inadequate
14 consultation and what we have called the coupling point. As to that it is my apprehension
15 that, given the swathe of people facing you today, it may be best to co-ordinate diaries and
16 to try to deal with that after the hearing.

17 THE CHAIRMAN: How long roughly a hearing – assuming the points still remain that one or
18 other of them does not disappear for whatever reason, assuming both the decoupling point
19 and the consultation point remain, what kind of length of hearing? Would it be one long
20 day, or more than that?

21 MR. TURNER: Four sets of counsel, two points, I would say that it may be one long day, on a
22 precautionary basis it would be prudent for the Tribunal to think about there being two days
23 being needed, to programme that in.

24 THE CHAIRMAN: Yes, thank you very much.

25 (The Tribunal conferred)

26 THE CHAIRMAN: Thank you very much everybody. We will adjourn now and come back at 2
27 o’clock in the hope of being able to give you an answer to the questions that remain. If
28 there is a reduction in the number of people in the room at 2 o’clock substantial or
29 otherwise, including on the front bench, that would be fine by us, not everybody needs to
30 come back unless they are interested to hear the outcome. Thank you very much.

31 (For Ruling see separate transcript)

32 THE CHAIRMAN: I do not think there is anything else that we need to cover at the moment, but
33 the parties can indicate if there is something further we need to discuss. Mr. Turner?

1 MR. TURNER: Madam, in relation to the date for the proposed two day hearing, 1st and 2nd
2 December should be convenient for the Carphone Warehouse counsel team.

3 THE CHAIRMAN: Well we put the date out there and if people can let us know in due course
4 whether or not that is suitable.

5 MR. TURNER: Both Ofcom's counsel and Carphone Warehouse counsel do have another court
6 obligation on 20th November which I believe was the date you mentioned for the case
7 management conference, and I mention that now just in case it is possible to find another
8 date for that.

9 THE CHAIRMAN: Is Monday 23rd any better for you?

10 MR. TURNER: All of us have a hearing which says it is guaranteed to end by Friday but will
11 also be taking place on Monday 23rd. There appears to be a mistake in all our diaries
12 therefore, if we can sort that out and revert to the Tribunal.

13 THE CHAIRMAN: That is the sort of time frame we had in mind. The 24th is not possible, but
14 apart from that some time around there.

15 MR. TURNER: If it is in that week of 23rd November, though perhaps not on that day, that is
16 likely to be convenient for both the principal parties.

17 THE CHAIRMAN: Thank you. Yes, Mr. Ward.

18 MR. WARD: Predictably I am afraid I have a countervailing consideration on the date for that
19 hearing. In that week I have a two day case in a three day window in the Court of Appeal
20 from Tuesday 24th to Thursday 26th, but the date of 20th November that you first mentioned
21 would be okay for me! (Laughter)

22 THE CHAIRMAN: Well, one tries to be helpful and sometimes it works, more often it does not.
23 Why do counsel not consult their dairies and their instructing solicitors and see if there is a
24 date somewhere around that time which the majority of you can make? We may not need it,
25 let us be optimistic, but if we are realistic we might think that we are likely to. Thank you
26 very much.

27
