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IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 July 2013

Before:

THE HON. MR. JUSTICE ROTH

(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant (Case 1205/3/3/13)

- and -

(1) CABLE & WIRELESS WORLDWIDE PLC

(2) VIRGIN MEDIA LIMITED

(3) VERIZON UK LIMITED

Appellants (Case 1206/3/3/13)

- and -

(1) BRITISH SKY BROADCASTING LIMITED

(2) TALKTALK TELECOM GROUP PLC

Appellants (Case 1207/3/3/13)

- and -

OFFICE OF COMMUNICATIONS

Respondent (Cases 1205-1207/3/3/13)

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CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Mr. Rhodri Thompson QC, Mr. Benjamin Lynch and Miss Georgina Hirsch (instructed by BT Legal) appeared on behalf of the Appellant in Case No. 1205/3/3/13.

Mr. Tristan Jones (instructed by Olswang LLP) appeared on behalf of the Appellants in Case No. 1206/3/3/13.

Mr. Meredith Pickford and Mr. Julian Gregory (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Appellants in Case No. 1207/3/3/13.

Miss Kate Gallafent, Mr. Hanif Mussa and Miss Emily Neill (instructed by the Legal Department, Office of Communications) appeared on behalf of the Respondent.

1 THE CHAIRMAN: Mr. Thompson, I think we will take matters in the order of the agenda that
2 you have had, and thank you for your various notes and in particular the agreed note, which
3 has been most helpful. If we turn to the question of timetable on which we have been given
4 two alternatives raising a number of issues. First of all, I am sure that one or indeed two
5 reading days is not adequate for this case, but I am not sure what the source of the
6 information that the Tribunal is given time for reading that is assigned to it. We are not.
7 We will arrange to do pre-reading partly in our own time, but I think it would be helpful, as
8 indicated, to reserve the Monday, which will spill over from the weekend, for pre-reading
9 and take one day, not two, as a reading day for the Tribunal, and start the hearing on the
10 Tuesday.

11 When we get on to skeletons, on the basis that you will all be doing very full skeletons, we
12 really, in my view, do not need such extensive openings. We will have read those
13 skeletons. I note what BT has proposed, but I think half a day for BT and half a day for the
14 CPs to be divided between them should be adequate on the basis that we will have read and
15 studied your skeletons. Ofcom, I think it is common ground, will come third, and I would
16 have thought that is a responsive opening. In many appeals the respondent does not open at
17 all, and I think two hours should be adequate for Ofcom on what will then be the
18 Wednesday morning.

19 What I am hoping is that if, not on the first day, but on Wednesday, Thursday and Friday,
20 the Tribunal were to sit from 10 o'clock to 5 on those three days and Ofcom opens from 10
21 to 12 on the Wednesday, by the end of that week, that is to say by 5 pm on Friday, we could
22 get through the factual witnesses. I do think that it is appropriate to adhere to the normal
23 practice of factual witnesses first. I do not pretend to be on top of all the evidence in this
24 case, but just from a brief scanning it is clear that some of the factual witnesses, by no
25 means all, deal with matters that relate to the expert evidence, or parts of the expert
26 evidence. To have the experts first and then factual witnesses afterwards saying things that
27 differ from an assumption that an expert has made and then potentially the expert having to
28 come back is most unsatisfactory. I cannot see any reason not to have the factual witnesses
29 first.

30 I will be open to submissions as to whether you think that it is not workable if the factual
31 witnesses start at 12 on day two of the hearing, to complete them by the end of day five on
32 the basis of, as I say, 10 in the morning and 5 pm. I would hope that it would be. It is clear
33 that this is a case where the bulk of the evidence is expert evidence, and there is some
34 overlap between some of the factual witnesses.

1 Are people concerned that there is a real problem in completing the factual witnesses by the
2 end of the first week on that basis? Does anyone wish to express concern about that? No.
3 Fine, that is the way we will proceed.

4 As regards time required for each witness, on that basis can you now start thinking about
5 who wants to cross-examine which witness and how much time is needed and do a detailed
6 timetable for the factual witnesses.

7 We then come, on that basis, to week two starting on 4th November with the experts, and
8 that will give us seven days then for the experts. You are not very far apart on that. I think
9 BT says seven days, and the rest of you say seven and a half. I am sure we can manage
10 with seven. I would not propose to do a 10 to 5 day with experts, I think that is quite heavy,
11 so we will do 10.30 to 4.30, normal hours. Then we have the option, if we are getting into
12 difficulties, of sitting earlier. On that basis we should then complete the evidence by the
13 end of those two days in week three, 15th November.

14 We then have some days when we are not sitting, then we come to the question of closing.
15 I imagine that some, if not all of you, may wish to do some written closings. Is it envisaged
16 that that may be desired? Mr. Thompson, are you intending to put in something in writing
17 or just a normal closing?

18 MR. THOMPSON: I would imagine we will put something in in writing, whether it is in the form
19 of a number of specific notes or whether it is in the form of a comprehensive speaking note,
20 I think depends on how things are going. Obviously timing questions can slip and there
21 could be a question of whether there are specific questions from the Tribunal that might be
22 best dealt with in writing after the hearing. I would imagine that we would wish to consider
23 the possibility of a written closing.

24 THE CHAIRMAN: Mr. Pickford, do you think that you may be putting something in writing?

25 MR. PICKFORD: Yes, Sir, our position will be the same. I imagine we would also be putting
26 something in in writing.

27 THE CHAIRMAN: If a speaking note is just handing up the text that you are speaking to as you
28 do it, I am thinking not of that but of something that the Tribunal was given in advance of
29 oral closing.

30 MR. THOMPSON: I think the only two questions that arise, and it is partly on this and partly on
31 the question of the experts, I think we actually said that five days would be sufficient for the
32 experts which would raise the possibility of finishing the evidence in the second week,
33 which may be optimistic. If we do not do that then, as I understand it, we will not finish the

1 expert evidence until the Friday of the third week, and closings are, I think, envisaged on
2 the Monday ----

3 THE CHAIRMAN: No, we are not sitting until the Wednesday. What I was going to say is this:
4 three days for closings is long, and if you are going to put in something in writing you need
5 time to write it, but also we need time to read it. There is no point in giving it to us at 4
6 o'clock with closing starting the next morning. In fact, if you can submit anything by the
7 end of the Tuesday, we would read on the Wednesday and I think three hours each for
8 closing, with a potential hour for questions or slippage should be fine. We can review that
9 as the case goes along but we have those three days. I know one of the members of the
10 Tribunal, and possibly the other, is elsewhere engaged on the Monday and Tuesday and so
11 will not be able to read them then and, in any event, you probably will not be submitting
12 them until some time on the Tuesday. What I am suggesting is that we have Wednesday as
13 a reading day for closings and three hours each for closing on Thursday/Friday, 21st/22nd.
14 But, as I say, we can revisit that if you tell us first of all, if the experts finish earlier as Mr.
15 Thompson thinks possible but others do not, or if you tell us, on reconsideration, you are
16 not going to submit written closings we have that Wednesday, 20th available.

17 MR. THOMPSON: I am grateful. I think you have cut through a number of Gordian Knots very
18 effectively, if I may say so. I think that leaves the question of the order of the experts
19 insofar as Mr. Myers is treated as an expert, whether he goes first or last, and the order of
20 the closings where I think various suggestions have been made and there are obviously
21 advantages and disadvantages in going first or last in closing. I do not know whether, Sir,
22 you have any views on either of those questions.

23 THE CHAIRMAN: First, as regards Mr. Myers, Ofcom is the respondent so normally he would
24 come after the appellant's experts. Is there any strong reason, Mr. Thompson, why you
25 think it is advantageous for him to come first?

26 MR. THOMPSON: I think it is only because he inevitably is in a different position from the other
27 experts in that technically he is not an expert and he also knows quite a lot about the facts.
28 He has obviously been an employee of Ofcom I think throughout the relevant period and so
29 there may be factual issues that would be best dealt with by him which the other experts are
30 not really in a position to deal with. I think there is also an issue about Mr. Saini's
31 convenience, but I do not know how much that weighs with the Tribunal. I simply raise it
32 so that when the timetable is put down we can put it in the right place.

33 THE CHAIRMAN: I have to say that counsel's convenience on a case that has been fixed since, I
34 think, February, I think – I know it started timetabling a long time ago – really does not

1 weigh heavily in a case with a lot of parties. Witness convenience counts to a certain
2 extent, if they are not available on a particular day. So you think it is basically for that
3 reason. Does anyone feel strongly that Mr. Myers should come after the other experts?

4 MISS GALLAFENT: Sir, can I just speak on behalf of, as it were, the absent Mr. Saini? In
5 terms of availability, the Court of Appeal commitment that he has in that third week was in
6 fact a pre-existing commitment at the time this matter was listed, so it is not something that
7 he subsequently put in his diary.

8 THE CHAIRMAN: But he accepted this case knowing about that.

9 MISS GALLAFENT: Sir, I accept that. Both the disputing CPs are content to try and arrange
10 the timetable in a way that minimises the difficulty that that places Ofcom in. Mr. Myers,
11 we say should come after the experts on economic issues. Mr. Myers, of course, does not
12 purport to give evidence in relation to, if I can put it, the financial matters, so Sky's Ground
13 1, for example. So one way perhaps of arranging matters such that Ofcom does not find
14 itself in the potentially invidious position of calling its own witness at a point where its
15 leading counsel is not available, assuming we go into that third week on the Thursday and
16 Friday ----

17 THE CHAIRMAN: Mr. Saini is not available on 6th and 7th is it, or he is not available on the 4th
18 and 5th?

19 MISS GALLAFENT: It is the third week, he is floating in the third week, which is the 10th, and it
20 is listed for four days either to start at 10.30 or 11.

21 THE CHAIRMAN: On BT's proposal that Mr. Myers goes first, he would be on the 4th and 5th?

22 MISS GALLAFENT: We say he should not go first, but as a compromise we are suggesting
23 perhaps what should happen is that the experts who deal with the economic issues – as
24 distinct from what I call the financial/accounting issues – those experts should go first and
25 then Mr. Myers. I think all parties agree that can be accommodated in the five days, and
26 then thereafter the accounting experts could go – assuming we run into that third week – on
27 the third week, because Mr. Myers does not give evidence on those matters, so that perhaps
28 might be a way of managing matters, with the minimum inconvenience to any party. Mr.
29 Coulson and Mr. Robinson ----

30 THE CHAIRMAN: Yes, does not Mr. Coulson also deal with some economic matters, or is he
31 only on accounting matters?

32 MISS GALLAFENT: He does deal with both, Sir, he does.

33 THE CHAIRMAN: So you are suggesting the experts, other than Mr. Coulson and Mr. Robinson
34 go first, then Mr. Myers, then Mr. Coulson and Mr. Robinson – is that right?

1 MISS GALLAFENT: It might be preferable to hear Mr. Coulson on financial matters, if that is
2 more convenient, because what one would not want to happen is to have Mr. Coulson come
3 back twice, unless Mr. Coulson would like to do that, or have, as it were, the economic
4 issues to which he speaks after Mr. Myers, because we are equally of the view that Mr.
5 Myers should come at the end, in response to those matters upon which he is able to give
6 evidence. It may ultimately be that simply Mr. Robinson, as it were, is put at the very end.

7 THE CHAIRMAN: Yes. I cannot think there is any problem putting Mr. Robinson after Mr.
8 Myers if that really solves much of the difficulty. I am not sure it really does – you say, I
9 think, seven days for experts?

10 MISS GALLAFENT: We do.

11 THE CHAIRMAN: In which case Mr. Myers will be in the third week, so that is going to be the
12 effect of that. If you are really concerned that your Leading Counsel should be there when
13 Mr. Myers is there then Mr. Myers should come first as BT has proposed, and that solves
14 your problem.

15 MISS GALLAFENT: Well, Sir, we are in the Tribunal's hands in this matter. It puts us in a
16 difficult position for obvious reasons, but Mr. Myers of course does not speak to all of the
17 grounds on the economic issues as is seen from the agreed note. His participation in the
18 experts' meeting is proposed to be limited to certain of BT's grounds and the 1207
19 appellants' ground, the first ground. It may be that it is possible to juggle around to see if
20 he can come after those experts who speak to the points to which he responds. That might
21 be a matter that the parties can look at subsequently.

22 THE CHAIRMAN: From the point of view of the Tribunal it really does not make a great deal of
23 difference where Mr. Myers comes. I do not think this is a case where it is important that
24 he comes first or important that he comes last. If, because of either the expert's
25 convenience or counsel's convenience, there is a sensible way of putting him before some
26 of the experts but after some of the others, we would be happy with that.

27 MISS GALLAFENT: I am very grateful, Sir.

28 THE CHAIRMAN: I hope you can sensibly agree that between you. I think, rather than trying to
29 sort that out now, the sensible thing is to leave you with that indication, and see, when you
30 think about particular experts, whether there is a sensible way that can be done. You have
31 got these seven days to play with. If you really cannot, then put in, any time after mid-
32 September, some brief submissions in writing as to where you have got to and then I will
33 rule on it. I would hope, with good will, when it is a question of accommodating people's
34 convenience, you can work out a time and place in the order that is not going to cause

1 difficulties. It really does not affect the resolution of this case whether one expert comes
2 before the other.

3 I think we will leave it at that for the moment.

4 MISS GALLAFENT: I am grateful. Thank you, Sir.

5 THE CHAIRMAN: So that was one of the two points that you mentioned, Mr. Thompson, I have
6 now forgotten the other one.

7 MR. THOMPSON: The order of closings. I think there is something to be said for anyone of us
8 going first or last, but I think that we have proposed that we should go last and Sky and
9 TalkTalk have proposed that the disputing CPs should go last on the basis that they are not
10 opening. I do not know whether the Tribunal has any view on that.

11 THE CHAIRMAN: Ofcom will go first, that is clear. It does not make, frankly, any difference.
12 Years of experience tell one that having the last word does not have the sort of effect that
13 sometimes lay clients think it does.

14 MR. PICKFORD: Sir, if I might just add a few sentences. I had actually understood this had
15 been agreed between BT and the disputing CPs, because BT said that it should open the
16 case, and we said that is fine, if you want to open you should not have the privilege of
17 closing. BT's junior counsel agreed to that. It now seems that that agreement is one that
18 Mr. Thompson no longer wishes to adhere to.

19 In any event, our only point, and it is a very minor one, is that it is a small privilege perhaps
20 to close, and certainly BT should not be allowed both to open and to close.

21 THE CHAIRMAN: I do not know if it is really a privilege, particularly speaking when everyone
22 will be exhausted with everything. I think it really does not make any difference. I am
23 happy to say that BT can follow Ofcom and the CPs can go last.

24 MR. THOMPSON: I am grateful. I should perhaps apologise if that was agreed, because there
25 has been a good deal of baton passing with Miss Lee who is now on holiday and me who
26 was on holiday last week.

27 THE CHAIRMAN: These things happen. Do not worry about that, but let us say Ofcom, BT and
28 then appellants.

29 So that is our timetable.

30 MR. JONES: Sir, just on timetable, before we go on, can I raise one very small matter which
31 Miss Gallafent and I have had words on this morning, which is, as I understand it, all of the
32 parties agree that the appellants' openings will address both their own appeals and, to a
33 lesser extent, their interventions.

1 It occurred to me that Ofcom may not be saying anything, or certainly not anything much,
2 in relation to my client's appeals, which go to the interest issue. On the other hand, it may
3 make sense for Miss Rose to speak after Mr. Saini because he will have addressed more
4 exhaustively Ofcom's position on BT's appeal in relation to which we will be intervening.
5 So it may be sensible, to avoid duplication, for my client's opening to come after Ofcom's
6 opening.

7 What I have agreed with Miss Gallafent, subject of course to your approval, is that we can
8 leave that to Mr. Saini and Miss Rose to discuss between themselves as to the allocation of
9 the time that they speak in, if that is convenient.

10 THE CHAIRMAN: Yes, I do not have a problem with that, as long as openings conclude by
11 noon on the 30th.

12 MR. JONES: Yes, I am grateful, Sir.

13 THE CHAIRMAN: Anything else on timetabling? No. The next point is issues. I have looked
14 at your provisional list of issues. I am not going to rule or hear submissions on the disputed
15 issues, as it were. I think this will stand as the draft list. If you could, where there is a
16 dispute as to scope of the issue, address in your skeleton briefly – because in some cases the
17 difference does not seem as significant as it may be thought to be – why you say your
18 version is right and it should be approached that way.

19 MISS GALLAFENT: Sir, just for propriety's sake, we have inched slightly closer following
20 discussions between myself and Mr. Lynch yesterday and this morning, I have handed up
21 this morning a revised draft to that which was circulated on Friday. Perhaps that could be
22 substituted.

23 THE CHAIRMAN: We will substitute that on the same basis, and you may find, when you draft
24 your skeletons, you will be even closer, but that remains to be seen.

25 That is the list of issues. Anything else to be said about that?

26 Point three, witnesses and experts: you have now indicated all the witnesses and experts. I
27 think you are all agreed that it is sensible for experts of like discipline to meet and prepare a
28 joint statement. In terms of the financial experts, that is Mr. Coulson and Mr. Robinson.
29 There is no one from Ofcom, who deals with that. It is just those two, so that is relatively
30 straightforward.

31 The economic issues: we are only talking about the economic issues. They have been
32 listed on your agreed note as being the 1206 appellants Grounds 1 to 7, which I found a bit
33 puzzling because they did not all seem to me to be economic grounds, some of them seemed

1 to be grounds of law, unless I have misunderstood something. Are they all said to be
2 economic?

3 MR. JONES: No, Sir, if I may say so, it is a very good point and it will need to be amended to
4 address that. Many of those are legal grounds and actually, in the light of Ofcom's stance, it
5 will not be necessary for the Tribunal to go into all of those in any event, but we will amend
6 that so that it is ----

7 THE CHAIRMAN: It is certainly not for the experts. So it is only the economic issues on which
8 they should meet and discuss. There are a lot of them for that exercise, but there does not
9 seem to be any way of simplifying that, that is immediately apparent from what I have seen,
10 unless someone can suggest it. It also says the 1207 appellants, Grounds 1 to 4, and I am
11 not sure all those are economic.

12 MR. PICKFORD: It is not 1 to 4, but 1 and 4.

13 THE CHAIRMAN: That is right, yes, it is the other one that is 1 to 7. We will seek to have,
14 therefore, those meetings, and it is suggested joint statements before 6th September. That
15 date has been canvassed with the experts, I hope.

16 MISS GALLAFENT: Yes, as I understand it, arrangements are in hand, and some dates have
17 been proposed, although not everyone's availability has been ascertained, for the third week
18 of August. It is hoped that it will be possible to achieve a meeting before that date.

19 THE CHAIRMAN: So a meeting before that date. Have we fixed a date by which they should
20 produce their statement, or is that said to be the date for the statement as well as the
21 meeting? After the meeting they will need to draft a statement.

22 MR. THOMPSON: I certainly do not want to be difficult, but apparently we have not yet been
23 able to get contact from our experts to confirm their availability for those dates. We will
24 obviously do our best, because it is in everyone's interests ----

25 THE CHAIRMAN: What, none of them?

26 MR. THOMPSON: I am hearing whispers that Dr. Maldoom has been proving difficult to
27 contact. If I can just take instructions ---

28 THE CHAIRMAN: The other two - you have got three - are they all right?

29 MR. THOMPSON: Yes, I think it is just Dr. Maldoom that we need to confirm.

30 THE CHAIRMAN: It is important to have a date for the statement because that has a knock-on
31 effect for skeletons.

32 MR. THOMPSON: Yes, indeed. I am not sure what the best way forward is, whether I can come
33 back to the Tribunal as soon as possible, or ----

1 THE CHAIRMAN: I do not think that is really feasible at this stage. You said 6th September. If
2 we say that joint statements are by Friday, 13th, not an auspicious date, that will then fit with
3 the skeleton timetable.

4 MR. THOMPSON: Yes, I hope so. I understand there is some interaction between the experts.

5 THE CHAIRMAN: Frankly, it has to be, otherwise we will get into difficulties.

6 MR. THOMPSON: I do not want to cause any problems, I am simply raising a flag.

7 THE CHAIRMAN: I realise the meeting of that many is difficult, but if there is a bit of slippage,
8 but we must get the statements by 13th.

9 MR. THOMPSON: I suspect it is in everyone's interests to put as much pressure on for it to be
10 done as quickly as possible.

11 THE CHAIRMAN: Anything else on witnesses and experts?

12 MR. THOMPSON: I think the only point I was going to raise is whether there would be any
13 purpose in us trying to agree the issues slightly more fully, but I suspect that it is not
14 sensible to direct. If we can do that then we will.

15 THE CHAIRMAN: If you can do that, as you have already made some progress, then you will,
16 but I am not going to direct you to spend lots of time negotiating the issues.

17 Confidential information: no one has raised any concerns about that. We will follow the
18 normal practice of highlighting in the bundles what is confidential. You probably need a
19 non-confidential witness bundle just in case problems will arise. We will try and deal with
20 this, as always in this Tribunal, by not referring to confidential matters orally, and if it
21 proves necessary to have to go into camera at any point we will, but we will do that as a last
22 resort.

23 Next transcripts: you are arranging transcription, I understand, between you. Is that going
24 to be Livenote, do you know yet?

25 MR. THOMPSON: I believe that is what is currently being discussed, and there is obviously a
26 trade off between the luxury of having it and the cost of having it. I suspect that these
27 clients, between them, probably could bear those costs, but whether they want to and
28 whether the Tribunal has got any view, I do not know.

29 THE CHAIRMAN: I am not going to require you to, if you do not want to.

30 MR. PICKFORD: I understand that those instructing me have taken the lead on trying to
31 ascertain some costs in relation to this and they are going to put proposals to the other
32 parties in the next few days.

1 THE CHAIRMAN: If you could just let us know well in advance of the hearing if it is going to
2 Livenote, because we might then arrange some training for the other two members if we are
3 going to be using that.

4 Next is documents and core bundles. You have suggested that BT will prepare core
5 bundles. You will do that by 6th, I think, is that right? No, core bundles by the 6th. I am not
6 quite clear, I am looking at your note. There are two aspects to it, one is core bundle and
7 the other is any full bundles if anything further is needed, and it no doubt is because of all
8 the exhibits. What, from the agreed note, is the date by which – apart from authorities – the
9 bundles it is proposed would be prepared? Is it 6th September, provided that you can all
10 agree what is to be included?

11 MR. THOMPSON: I understand that is right, Sir. I think there are one or two minor issues, one
12 of which I think has been resolved, as to whether or not the skeletons go into a separate
13 bundle, but not a very exciting topic, and the other is whether or not the expert and witness
14 evidence for the parties should be put together or put separately.

15 THE CHAIRMAN: Well, I am about to rule on that. But if that is all it is, it is just mechanical
16 bundling, but getting it done is important, otherwise you cannot cross-reference your
17 skeletons.

18 MR. THOMPSON: Yes, I think 6th September is the agreed date.

19 THE CHAIRMAN: As far as the bundles are concerned, looking at your draft index, I think that
20 we should have – and the core bundle will be in a couple of volumes – Core A should be
21 pleadings, that is 1 to 10 on that list. Core B should be the Determinations. Core C should
22 be witnesses of fact, and Core D should be experts. It may have to be in two volumes, in
23 which case could you put the two financial – Mr. Robinson and Mr. Coulson – together. At
24 the beginning of Core D, that is to say the experts, could we have the two joint statements.
25 As far as skeletons are concerned, I do not think of that really as a core bundle, either you
26 give us a file with the skeletons, or we will create our own, but that is a separate bundle, it is
27 not a core bundle in the sense that I regard talking about ‘core’ bundles. That is what is in
28 your list, Mr. Myers going with the experts and within the experts you can do it by party
29 except that I think Robinson and Coulson should come together. Is there anything else on
30 that?

31 MR. JONES: I understand the parties have agreed more generally that on the other documents
32 which are currently they will simply remain where they are and there is not going to be a
33 different consolidated set of bundles. Unless, Sir, you would prefer it to be done
34 differently.

1 THE CHAIRMAN: Give me a moment. (After a pause) I am told by the Réfréndaire that it
2 should work, and if one can avoid you having to recopy that is obviously desirable. If, at
3 some point, you or anyone thinks that it is going to get very cumbersome, because it means
4 the bundles we have, which are behind me - of course different parties have arranged them
5 differently these are each parties' lodged bundles, some have their pleadings followed by
6 evidence, followed by exhibits, some have pleadings in a different file and so on. As long
7 as you all know where these things are then it will probably work.

8 MR. JONES: It may be sensible, but this may be something which we can all liaise on to produce
9 a fifth core bundle simply with any key factual documents, as it were, so that you would
10 have that to hand rather than having to go to the various other bundles which have been
11 prepared.

12 THE CHAIRMAN: Yes, if you can agree ----

13 MR. JONES: If we can agree on it.

14 THE CHAIRMAN: -- or if it does not become unmanageable. It only works if it is fairly small,
15 otherwise you end up with one called "key documents" and the other documents in the other
16 ones and you are jumping back and forth. So I leave that to you to see.

17 MR. THOMPSON: Just on that point, there are some documents – regulatory documents in
18 particular – which are extraordinarily long but which the passages that people rely on are
19 probably only about 40 pages, and it may be useful for the Tribunal to have some of those –
20 I am thinking of the relevant extracts of the LLMR 2004 in relation to the AISBO market,
21 for example, which is not very many pages, but sits in a massive document, and it may be
22 that we could assist the Tribunal with some intelligent agreement.

23 THE CHAIRMAN: Yes, I think what might be sensible is to have a fifth core bundle, E, which
24 could also have some of the key authorities that you rely on, and I am thinking of the TRD
25 case, perhaps in this Tribunal and the Court of Appeal, the partial private circuits Tribunal
26 and Court of Appeal Judgments, because those are pretty fundamental to a lot of the
27 argument, and otherwise they would be in a bundle with lots of authorities on various
28 things, so we could have those in a core bundle, and maybe Ofcom's Dispute Resolution
29 Guidelines and such extracts so that we have one bundle of authorities one can carry around
30 with one.

31 MR. THOMPSON: Would it be helpful to have also the CRF Directives, for example, in that?

32 THE CHAIRMAN: Then it starts getting ----

33 MR. THOMPSON: They are quite short and they are obviously pretty central to the whole
34 debate.

1 THE CHAIRMAN: Yes, maybe it is.

2 MR. THOMPSON: Perhaps that can be left to the parties.

3 THE CHAIRMAN: It might be worth having them.

4 MR. THOMPSON: The other reason I hopped up was whether there would be any use to this
5 present Tribunal in having a soft version of some of the more voluminous material on a
6 memory stick or possibly on an iPad, whether that sort of thing is useful? If not, we will
7 forget a bout it, but if it is useful it could probably be done relatively easily and would
8 obviously save on carriage.

9 THE CHAIRMAN: I think the sensible thing is to let me ask the other members – they are
10 obviously not immediately available – whether they would find that helpful. Certainly we
11 want soft copies of skeletons in the usual way, but whether people are going to want a
12 memory stick, for example, or a CD-rom with all the witnesses’ evidence and experts’
13 reports let me find out.

14 MR. THOMPSON: Yes, I am just aware that some of the volume here reflects the size of the
15 documents rather than necessarily the b it that you actually look at, and sometimes a soft
16 copy of that can be useful.

17 THE CHAIRMAN: Yes, I understand that. If that can easily be done and does not cause
18 problems let us do it.

19 MR. THOMPSON: I think it can be relatively easily done.

20 THE CHAIRMAN: Well, I will not direct it.

21 MR. THOMPSON: Would a memory stick be the most useful, it can be plugged into whatever?

22 THE CHAIRMAN: Yes. As I say, I am not going to require it if it turns out to cause difficulties
23 but I think that is a helpful suggestion that can be taken forward.

24 MR. THOMPSON: I am grateful.

25 MR. PICKFORD: Whilst we are discussing these practical matters, it might be helpful if all
26 parties got together and simply produced a new simplified indexing for all of the bundles
27 that are not going to be in the core bundle, that is certainly what was done in the Pay TV
28 case.

29 THE CHAIRMAN: That is a very good point, yes.

30 MR. PICKFORD: And then we can provide the same index to the Tribunal and everyone can
31 locate documents much more easily.

32 THE CHAIRMAN: Yes, that is a very important point, thank you, and I will require that. That
33 should be provided, hard and soft copy, emailed through. Can I ask – it is a small matter –
34 that each of these bundles we have just discussed, the index to each bundle is just the index

1 to that bundle. That sounds a strange thing to say but in other words it is not one index to
2 all five bundles, which is copied five times so that the actual index to the bundle you are
3 reading is on p.4 of the index, it is a source of some irritation that this happens so often, and
4 it is an easy word processing task separated out. Clearly a pre-reading list is important. and
5 you have said 4 pm on 18th October, that is fine. The cost of preparation of bundles costs in
6 the case. These core bundles that we have discussed, you are seeking to do that by 6th
7 September. Clearly the experts' joint statements will then slot in afterwards. Then skeleton
8 arguments – I will allow you the longer page limit for skeletons. We are having shorter
9 openings than some have asked for, so that is 50 for appellants, 70 for Ofcom, 20 for
10 intervention skeletons.

11 The question then is dates. We do not have a difficulty with the later dates. Is anyone
12 unhappy with the two alternatives in your note, the later dates, that is to say 27th September,
13 11th October, 18th October?

14 MISS GALLAFENT: Sir, the earlier date is agreed between Ofcom and the disputing CPs. It is
15 BT who proposes the later date. We propose the earlier date for two reasons: the first is
16 that it allows a little longer for Ofcom to respond; and the second is that it potentially allows
17 longer for the Tribunal to do some of its pre-reading before the hearing starts on
18 28th October. We would, together with the disputing CPs, prefer the date of 18th September.
19 That would then allow us just over two weeks to respond on 4th October, and then the
20 intervention skeleton arguments by 11th October. We do say that that is appropriate that the
21 parties then have good time in advance of hearing to reflect upon the skeletons as indeed do
22 the members of the Tribunal. We do collectively support the earlier dates.

23 BT has suggested that the later dates are appropriate because essentially “why not” appears
24 to be their position. We simply say that if it can be done earlier then that is all to the good.

25 THE CHAIRMAN: Yes. Mr. Thompson?

26 MR. THOMPSON: Sir, it depends how strongly I need to put it. In my submission, the
27 Tribunal's instinct is the correct one, that it is important that the skeleton arguments cover
28 the issues in a way that is helpful to the Tribunal. The timetable between the experts
29 concluding their deliberations and the date suggested by Ofcom is a very short one, and in
30 my submission it is much more useful - indeed I am slightly surprised that the disputing CPs
31 do not take the same view for everyone to have enough time to put their skeleton together
32 properly, rather than that Ofcom should have an extra week to read it, which does not seem
33 to us to be really necessary given the extent of the pleadings and the issues that have been
34 defined already.

1 To some extent, it interacts with one remaining point which is Ofcom's position on our
2 jurisdictional issue on interest. We are particularly unhappy about not knowing what
3 Ofcom's case is on that.

4 THE CHAIRMAN: That is a separate point which we will come to. Ofcom has asked for the
5 earlier date, which is 18th September and 4th October, as opposed to 27th September and
6 11th October. Is that right?

7 MR. PICKFORD: Just before ruling on this, Miss Gallafent is quite correct to say that we agreed
8 and came to a compromise in relation to the date of 18th. What has unfortunately slightly
9 changed in this hearing is that there is now a date of only the 13th for the agreed experts'
10 reports. We had anticipated, possibly mistakenly, that that was all going to be signed off by
11 the 6th, and therefore we do actually think, in view of the date that has now been set for that
12 of the 13th, that the 18th is going to be too short. I apologise to Ofcom for the fact that we
13 originally agreed to that date, but matters have changed.

14 THE CHAIRMAN: What about doing it on 23rd September for the appellants and then
15 11th October for Ofcom? That should give you enough time, should it not?

16 MR. JONES: Sir, what date would you anticipate for the intervention skeletons thereafter?

17 THE CHAIRMAN: On the 18th. If it is the 11th, I think it should be a week. I think Ofcom's
18 concern was having time to respond to the appellants' skeletons.

19 MR. JONES: Sir, for our part we are certainly with the suggested dates of the 23rd, the 11th, and
20 the 18th.

21 THE CHAIRMAN: Yes. Miss Gallafent, that should give you quite enough time between the
22 23rd and 11th October.

23 MISS GALLAFENT: Our only hesitant suggestion might be if it was possible to do it by Friday,
24 20th, which would give us the weekend also.

25 THE CHAIRMAN: I am sure you will be able to enjoy your weekend! No, the 23rd.

26 MISS GALLAFENT: But not as much as if I had the skeletons from the other parties!

27 THE CHAIRMAN: You can always read the pleadings! It will be the 23rd at 4 pm as usual,
28 11th October and 18th October, 50 pages, 70 pages, 20 pages. I take it that I do not need to
29 rule that it shall be 12 point type, 1.5 spacing, etc, I will leave that to your good sense, but
30 no cheating on those lengths! Some courts do indeed rule in those terms.

31 There is the important question about the jurisdiction on interest. Can someone please
32 explain that to me?

33 MR. THOMPSON: I am not sure how far you want an explanation of the substance of the case.
34 It relates to a similar issue to the Ground 5 issue. It is partly a matter of construction of

1 s.190(2)(d) itself which obviously expressly provide for interest. It is partly a matter of the
2 contractual position which does provide for interest which might be thought to be redundant
3 if Ofcom had the power itself to award it. It is partly a matter of the CRF and whether or
4 not the powers conferred on the national regulatory authorities include a power to award
5 interest.

6 THE CHAIRMAN: I understand the issue. What I am not quite clear about is how it has arisen at
7 this point but it is not in the pleadings.

8 MR. THOMPSON: It is in the pleadings because when we came to intervene on the interest
9 appeals of the CPs, we raised it as a pleaded issue, but Ofcom has not replied to our
10 statement of intervention. Although it indicated in correspondence that it was at least
11 leaving open the possibility of commenting on the issue of interest in a somewhat nebulous
12 way by 19th August, it is now suggesting that it will only comment on the issue of interest in
13 its skeleton argument.

14 THE CHAIRMAN: Have I understood this correctly: in the appeals of the CPs seeking interest,
15 in the response to those appeals, in the defence Ofcom has not challenged the jurisdiction?

16 MR. THOMPSON: No. They assert that they do have the jurisdiction.

17 THE CHAIRMAN: That is the position in the defence. In the Ofcom defence they do not
18 challenge jurisdiction. Your intervention in those appeals has challenged the jurisdiction.

19 MR. THOMPSON: Yes. Ofcom has taken a remarkably passive view on interest generally, and
20 so in a sense we are making the running in defending the decision on interest because
21 Ofcom has basically just sat on its hands on that question.

22 THE CHAIRMAN: They take a neutral line, yes. Ofcom has not pleaded this and so you do not
23 know their position is the point?

24 MR. THOMPSON: No. I think we suspect what it is, but we think it is unsatisfactory to ----

25 THE CHAIRMAN: There has been a letter written - is that right?

26 MR. THOMPSON: There have been various exchanges of correspondence on the issue of
27 interest, both because of the original form of the defence and subsequently. At one point
28 Ofcom was suggesting that they would leave open the possibility of some form of
29 “expression of view”, was what they said, by 19th August. I think the only thing they are
30 now intending to express a view on is jurisdiction and we think it would be helpful if they
31 did that before we have to formulate our skeleton.

32 THE CHAIRMAN: Yes, thank you. You do not, of course, have to take a view on these points if
33 you do not want to, but if you are going to perhaps you can help me as to the position.

1 MISS GALLAFENT: Sir, the way in which the matter arose is that in the 1206 and 1207
2 appellants' appeals, they proceed on the basis that Ofcom did have the jurisdiction to award
3 interest of course and that it ought to have done so in this case.
4 We, in our defence to that, indicated that we would propose to offer - and we have clarified
5 in correspondence subsequently if the Tribunal were to find it of assistance - as to what
6 Ofcom may have decided, a view not a decision of course, if it had been in possession of all
7 the evidence that has now been submitted in support of those appeals. No party is asking
8 for such a view, and in those circumstances we leave it entirely as a matter for the Tribunal
9 as to whether you would be assisted by us offering such a view. That is the view which was
10 discussed in correspondence, and an indication was given that were the Tribunal to indicate
11 that it would wish for such a view, and a number of parties have raised the question of
12 whether it is appropriate or not, and in particular whether the matter would be remitted to
13 Ofcom in which it would not be appropriate to offer at this stage. Were you to have
14 indicated that you wish for a view, we had indicated that we would provide by 19th August.
15 Those communications took place before BT's statement of intervention. It was in its
16 statement of intervention in the other appeals that BT raised for the first time the question of
17 the jurisdiction of Ofcom to award interest under the CRF and the Act.
18 The replies by the 1206 and 1207 appellants dealt with that issue. Both of them, not
19 unexpectedly, said that Ofcom did have the jurisdiction to award interest in these
20 circumstances. We have indicated that, as that is a matter that goes squarely to Ofcom's
21 jurisdiction, rather than its discretion or approach, we would wish to make submissions on
22 that point. There is of course no provision, and there was no direction, that Ofcom serve
23 any reply to any reply or reply to the statement of intervention by BT, which is why we
24 have not done.
25 In circumstances where the 1206 and 1207 appellants have already made the position clear,
26 and it is no surprise to anyone that our position is that we agree we have jurisdiction to do
27 so for very similar reasons, we do not see why it is necessary to add yet another round of
28 pleadings for Ofcom to set out its case in advance of the skeleton.
29 The point is made by BT in its note for today's hearing that it is unsatisfactory for BT to
30 have to put in its skeleton in advance of Ofcom's skeleton without knowing what our
31 position is. The way in which the skeletons have been structured is that BT initially will
32 only put in its skeleton as appellant. Of course, it is no part of BT's appeal that Ofcom does
33 not have jurisdiction to award interest. That only arises by way of BT's intervention in the
34 1206 and 1207 appeals.

1 So there is no question that BT will have to address it without knowing what Ofcom's
2 position is. Ofcom's position will be set out in its skeleton and then BT will be able to
3 respond to that in its intervention skeleton. So I am afraid that, from our perspective, we
4 simply do not see the need to have some further level of complexity in terms of the
5 pleading. I am not even quite clear what status the document might have. We think it can
6 be addressed sensibly in our skeleton. We understand that to be common ground and not
7 disagreed by both disputing CPs, who accept that it is appropriate to deal with it in that
8 fashion.

9 THE CHAIRMAN: Yes. Mr. Thompson, do you want to say anything in answer to that?

10 MR. THOMPSON: No, I think we have probably both put our respective positions fairly and
11 squarely. It is an odd situation that Ofcom has taken a decision and is being rather coy
12 about saying whether it defends it or not. We still think it is unsatisfactory not to know
13 exactly what Ofcom thinks on a point where it obviously does have a view and we think it
14 should be able to articulate that view, but is a matter for the Tribunal whether you think that
15 the rather short period we have to respond to the Ofcom skeleton argument where it will
16 reveal its hand, at least on this issue, is sufficient. We still take the view that it is not really
17 long enough.

18 THE CHAIRMAN: I have to say I think you will have had a fully argued position from the CP
19 appellants on jurisdiction which will make their position clear. That will no doubt be
20 challenging what you said in your statement of intervention, and then you will have a week
21 between the Ofcom skeleton and your answer in which to deal with any further points in so
22 far as it actually raises new points. I do not think one needs a further pleading in this case;
23 we will probably have quite enough to deal with, and the point made by Miss Gallafent is a
24 fair one. You will have the opportunity fully to deal with that when it has been raised by the
25 other appellants, and will be developed by them no doubt – now that you have put in your
26 statement of intervention – in their skeleton, so I think the issues will be well ventilated,
27 even well before 11th October, so I am not going to require any further pleading from
28 Ofcom.

29 Are there any other issues that anyone wishes to raise?

30 An order will be drawn up as usual, and I trust you will all apply yourselves to agree a
31 detailed timetable that one can work with, for all the factual witnesses and then the expert
32 witnesses.

33 I wish you all a good summer.

34