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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos. 1210/3/3/13 and 1212/3/3/13

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

20<sup>th</sup> June 2013

Before:  
THE HON. MR JUSTICE GERALD BARLING  
(President)  
MARCUS SMITH QC  
PETER FREEMAN CBE, QC (Hon)

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**(1) VERIZON UK LIMITED**  
**(2) VODAFONE LIMITED**

Appellants

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

**COLT TECHNOLOGY SERVICES**

Appellant

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

Mr Philip Woolfe (instructed by Towerhouse Consulting LLP) appeared for Verizon UK Limited and Vodafone Limited.

Mr Richard Pike (of Baker & McKenzie) appeared for Colt Technology Services.

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

Mr Daniel Beard QC and Mr Nicholas Gibson (instructed by BT Legal) appeared for British Telecommunications PLC (potential intervener in cases 1210/3/3/13 and 1212/3/3/13).

Mr Meredith Pickford QC (instructed by Webb Henderson) appeared for British Sky Broadcasting Limited and TalkTalk Telecom Group plc (potential interveners in case 1210/3/3/13).

Miss Alison Berridge (instructed by Towerhouse Consulting LLP) appeared for Everything Everywhere Limited, Hutchison 3G UK Limited, TalkTalk Telecom Group plc, Verizon UK Limited and Vodafone Limited (potential interveners in case 1212/3/3/13).

Mr Ewan West (instructed by the Legal Department, Competition Commission) appeared for the Competition Commission.

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1 THE PRESIDENT: Good morning everyone. It is nice to see so many of you here. I hope that is  
2 a measure of the extent of the agreement that has been reached between you on some of the  
3 matters. Who is going to kick-off?

4 MR WOOLFE: Sir, I believe it is for me to kick-off. I appear for Verizon and Vodafone in their  
5 appeal, what I will call the 1210 appeal. Mr Holmes appears for Ofcom with Mr Vinall, Mr  
6 Beard QC appears for British Telecom who are applying to intervene in that appeal. Mr  
7 Pickford appears for Sky and TalkTalk, who are applying to intervene as well. Mr West  
8 appears for the Competition Commission. In the Colt appeal Mr Pike appears for Colt, the  
9 appellants, and applying to intervene for Everything Everywhere Verizon, Vodafone and  
10 TalkTalk Group is Alison Berridge. I believe that is everybody who is appearing today.

11 THE PRESIDENT: It seems enough!

12 MR WOOLFE: In terms of running order, obviously there is the Tribunal's agenda but before  
13 getting to that I hope to deal with a couple of points of housekeeping, making sure you have  
14 documents that you need, and things that have been sent to the Tribunal, and perhaps  
15 recapping some points that are common ground for everybody in both appeals.

16 THE PRESIDENT: That would be helpful.

17 MR WOOLFE: First, in terms of papers, you should have a bundle containing the notice of  
18 appeal in the 1210 appeal, and they will be behind you. Similarly, a notice of appeal in the  
19 Colt appeal – there should be a bundle. You should have received applications for  
20 permission to intervene from BT in both appeals; Sky and TalkTalk in our appeal, and from  
21 Miss Berridge's clients in the Colt appeal as well.

22 THE PRESIDENT: Yes. Just remind me who Miss Berridge is representing?

23 MR WOOLFE: Everything Everywhere, Verizon, Vodafone and TalkTalk Group, and Hutchison  
24 3G Ltd as well, I apologise.

25 MR FREEMAN: (No microphone) You are giving it a catchy group name, are you not?

26 MISS BERRIDGE: We called it the "Communication Providers Group". THE PRESIDENT: Can  
27 we call it "The Group"?

28 MR WOOLFE: The "charabanc" or something.

29 THE PRESIDENT: Yes.

30 MR WOOLFE: And in our appeal you should have received letters from both Ofcom and my  
31 instructing solicitors, Towerhouse Consulting on behalf of Verizon and Vodafone on  
32 Monday, 17<sup>th</sup>, as the Tribunal requested in the agenda asking us to set out the extent of the  
33 agreement that had been reached as at that date. Do you have those in front of you? I do

1           have a bundle containing all the pre-CMC correspondence in our appeal. It is there if  
2           necessary, if you have those letters you have probably got them.

3   THE PRESIDENT: What date was the letter itself?

4   MR WOOLFE: 17<sup>th</sup> June, this Monday. There should be one from Ofcom

5   THE PRESIDENT: TP 14, yes.

6   MR WOOLFE: There should be one from Towerhouse Consulting the same day which attached a  
7           table, Annex A setting out ----

8   THE PRESIDENT: Yes.

9   MR WOOLFE: There was also a note from the Competition Commission the same day.

10   THE PRESIDENT: Yes.

11   MR WOOLFE: Then yesterday there was some further material sent through which was a note  
12           from me, which tried to bring you up to date as to where things were yesterday afternoon.

13   THE PRESIDENT: Yes, that is very helpful, thank you.

14   MR WOOLFE: Things have moved on still further. A draft order, which I hope we could use as  
15           a template for today. There is another table with that as well, but we probably do not need  
16           that, and a copy of a letter which my client sent to Ofcom yesterday as well, dealing with  
17           disclosure.

18   THE PRESIDENT: Yes, that is where you were trying to put right what you thought to be a  
19           misunderstanding?

20   MR WOOLFE: Yes, that is right, and I will update you in a bit as to where the parties have  
21           reached on that. Finally, a letter was sent by BT yesterday evening about 7.30, I believe,  
22           setting out their views on the ----

23   THE PRESIDENT: I have it but, I confess, I have not had time to read that.

24   MR WOOLFE: Right. Since it covers all the items on the agenda ----

25   THE PRESIDENT: The BT letter?

26   MR WOOLFE: The BT letter, maybe if you just have it on hand and you refer to it when we get  
27           to each point and you can see what their position is.

28   THE PRESIDENT: Okay. Now, you are really dealing with Verizon?

29   MR WOOLFE: And Vodafone, yes, but only as regards our appeal.

30   THE PRESIDENT: Yes, so we are inevitably looking for Verizon. I know you have an  
31           application ----

32   MR WOOLFE: We could talk through the entire agenda together. One thing I was going to say,  
33           what is common ground between everybody here, both parties and prospective parties, is  
34           that there is no actual overlap of issues between the two appeals.

1 THE PRESIDENT: Well, that is a comfort; that appeared to be the case. So it is agreed now that  
2 there is no overlap, therefore there is no reason why either case should be delayed in order  
3 to await the result of the other?

4 MR WOOLFE: It is certainly agreed by all parties it is not convenient for one to await the result  
5 of the other.

6 THE PRESIDENT: As I understand it, Ofcom's position is slightly different. There was an  
7 indication I read somewhere that should the Colt appeal be successful and passive remedies,  
8 as it were, come back into play, in other words, should Colt be successful and the question  
9 of active remedies be perhaps remitted to Ofcom, then that might have a knock-on effect on  
10 the existing price control, and therefore they would want to be in a position to, as it were,  
11 review the existing price control.

12 MR WOOLFE: I understand that to be Ofcom's position.

13 THE PRESIDENT: I will just check that I have put it correctly.

14 MR HOLMES: Sir, I am grateful. We agree that there are no overlaps as such between the issues  
15 which arise in the two appeals. The point that we were trying to raise in correspondence  
16 was simply this: if the Colt appeal is determined against us we will need to consider  
17 generally the price control applicable in this area and take a broad overview of regulation in  
18 the field. That should not affect the Verizon/Vodafone appeal, because the issues which  
19 arise in this appeal are issues of principle on which Ofcom will, nonetheless, require  
20 guidance, but it may have implications which will need to be considered when we come to  
21 consider remedy and relief in the Verizon/Vodafone appeal.

22 THE PRESIDENT: On that hypothesis, is it your understanding that it could theoretically affect  
23 the existing price control, rather than just a future price control, but the existing one could  
24 be ----

25 MR HOLMES: Yes, but we would need to look again at the existing price control but,  
26 nonetheless, the questions which arise in the Verizon ----

27 THE PRESIDENT: Still need to be resolved?

28 MR HOLMES: Still need to be resolved, indeed.

29 THE PRESIDENT: I understand that, that is very helpful. Speaking just for myself, I cannot see  
30 why, on that hypothesis, that if Colt was successful in some way and there was a result,  
31 there was a decision in Verizon, either confirming or not, I cannot see any obstacle to  
32 Ofcom being free there to do that.

33 MR HOLMES: No, Sir.

34 THE PRESIDENT: Make a full reconsideration, including the price control?

1 MR HOLMES: No, we agree with that, Sir.

2 THE PRESIDENT: You would have to.

3 MR HOLMES: Yes, indeed.

4 THE PRESIDENT: Mr Woolfe, sorry.

5 MR WOOLFE: Perhaps I could just carry on. It is also agreed that it is not sensible and  
6 convenient for any case to await the other, even allowing for this concern that Mr Holmes  
7 raises. My client has some slightly different views on that, but I do not think it is probably  
8 worth going into those now.

9 THE PRESIDENT: No.

10 MR WOOLFE: It is certainly agreed in our appeal that all the issues are price control issues and  
11 therefore should be referred. I understand it to be agreed in the Colt appeal between the  
12 respective parties in that appeal that it involves non-price control issues and therefore it is  
13 common ground between everybody that these should be case managed separately, with the  
14 Colt appeal staying in this Tribunal and the Vodafone and Verizon appeal being referred to  
15 the Competition Commission and with separate confidentiality rings, separate disclosure  
16 and separate directions.

17 Sir, I think that sets the scene for the CMC today. Obviously there is greater agreement  
18 perhaps in each individual appeal as well, but that is the overall framework.

19 THE PRESIDENT: That is very helpful. I think that was our impression but it is nice to have it  
20 confirmed. Where do we therefore go? What are main non-agreed issues?

21 MR WOOLFE: As I understand it, in relation to our appeal, as between my clients and Ofcom we  
22 have an effective agreement on everything, to this extent, which is that the only remaining  
23 issue yesterday was disclosure. I now understand that, as a result of discussions yesterday,  
24 we have moved to a stage where although there may be some remaining differences, we  
25 think the process should go on between ourselves and an order should be framed to allow  
26 for that. We can cover that in a couple of moments in more detail, but I think that is where  
27 things have got to between us and Ofcom.

28 There are some greater issues raised by BT in its letter of last night, but I would suggest that  
29 before we get to those it would make sense to perhaps deal with the issue of intervention, so  
30 that ----

31 THE PRESIDENT: Can I just hear what Mr Holmes says about disclosure?

32 MR HOLMES: My learned friend Mr Woolfe is absolutely correct, that on disclosure it looks as  
33 though agreement has been reached between us subject to finding a satisfactory form of

1 words for inclusion in the order, but we hope that that should be possible to do in short  
2 order following this hearing.

3 As it appeared to us, looking across the two appeals, there were three broad areas on which  
4 the Tribunal might benefit from submissions. The first is the interventions; the second is  
5 disclosure generally, not only the scope of disclosure, but also the mechanism by which  
6 disclosure is to take place, bearing in mind the interests of affected third parties whose  
7 confidential information is in play; and thirdly, the future conduct of both sets of appeals.  
8 That may be a way of grouping the issues, if that is convenient.

9 THE PRESIDENT: You are confirming that you have reached, Ofcom have reached, effective  
10 agreement on virtually everything apart from the wording of the order, and in particular on  
11 disclosure.

12 MR HOLMES: As regards the disclosure issue.

13 THE PRESIDENT: On that particular issue that surfaced in the papers.

14 MR HOLMES: Indeed, Sir. As between Verizon, Vodafone and ourselves, I think there is broad  
15 agreement.

16 MR WOOLFE: We may well need to come back, but the first stage is agreed and then we would  
17 need to make out a case for things in due course.

18 THE PRESIDENT: We want to avoid coming back if we can, because we want this all to go off  
19 smoothly on your appeal anyway, Mr Woolfe.

20 MR WOOLFE: In terms of efficient conduct today, I suspect it might be ----

21 THE PRESIDENT: Let us deal with the interventions.

22 MR WOOLFE: -- to run through in order of the agenda.

23 THE PRESIDENT: First of all, we have various applications to intervene in the two appeals. In  
24 Verizon, BT is applying and also Sky/TalkTalk. Are there any objections to interventions?

25 MR BEARD: Yes. Do you want me to go further?

26 THE PRESIDENT: I think we had better hear the application in that case. Who are you objecting  
27 to?

28 MR BEARD: Sky/TalkTalk. I do not think there is any issue in relation to BT, given that it is  
29 our prices that are being controlled effectively. The idea that we would not be intervening  
30 in these proceedings would be somewhat surprising.

31 THE PRESIDENT: BT is objecting to?

32 MR BEARD: We have real concerns about what we have seen. We got the application from Sky  
33 yesterday and it seems to us that it is seeking to broaden matters and deal with matters that  
34 are of somewhat academic interest to Sky. We think that is the wrong approach. I can

1 elaborate upon that, but that is the reason overall why we are objecting. I see the shadow of  
2 Mr Pickford falls heavily across my desk, so I will sit down.

3 MR PICKFORD: As it is our application ----

4 THE PRESIDENT: Yes, you should make it.

5 MR PICKFORD: -- it should be possible for us to make it and he can respond to it.

6 THE PRESIDENT: Yes, absolutely, I am not going to hear his objections until you have made it.

7 MR PICKFORD: Sir, members of the Tribunal, our application is made on essentially two bases.

8 The Tribunal will have seen the three grounds on which Vodafone and Verizon put their  
9 appeal. Ground 1 raises an issue of general importance about how Ofcom is to take account  
10 of the fact that BT's common costs which may be concerned with and arise in price controls  
11 can potentially be recoverable across a whole range of services falling outside the price  
12 control in question as well as within the price control in question. Indeed, that is the very  
13 essence of the issue in this case because what BT is saying is that Ofcom's reasons are as  
14 follows. They said in relation to TI services that there are some common costs that are  
15 associated with TI services, we do not think that materially they are going to be recovered  
16 outside the price control, the various other places, and so therefore they have to stay with TI  
17 services, and that is what is challenged by Vodafone and Verizon on a number of bases.  
18 Ground 1 says that Ofcom erred as a matter of principle in the way it went about  
19 considering that question, that it was wrong for Ofcom to be considering where those costs  
20 should be going to. All it needed to consider was that they should not reside with TI. That  
21 is a point of general importance, and it will, if Vodafone and Verizon are correct, apply  
22 across price controls generally, and it is on that basis that we put forward our first basis for  
23 intervention. Although we do not purchase TI services, my clients purchase very large  
24 quantities of other price regulated services from BT. They are the leading challengers to BT  
25 in the provision of broadband services. They are the number two and three players in that  
26 market respectively with approximately 9 million customers.

27 THE PRESIDENT: So if costs were allocated away from TI?

28 MR PICKFORD: That is really the second point. The first point is there is simply a general  
29 principle about how costs should be allocated in price controls taking account of the fact  
30 that there are other price controls going on at different times in relation to which the same  
31 costs might or might not be allocated. There is a general point of principle, and we would  
32 like to advance our position on that particular issue. That is the first point.

1 The second point is more specific to this particular appeal, which is that one of the  
2 implications of the Vodafone/Verizon appeal is that it is concerned that the TI services are  
3 not picking up these common costs.

4 They should be going, in particular, to other services and including services that my clients  
5 buy in very large quantities, namely, LLU/WLR services – that is local loop unbundling,  
6 wholesale line rental services. So we are concerned in that context to protect our interest to  
7 ensure that no findings are made, or anything is established by the Competition Commission  
8 that would lead to the conclusion that the appropriate place for those costs to end up are the  
9 services that we are purchasing because we say that the price of those services already  
10 reflects an appropriate apportionment of those costs.

11 MR SMITH: Mr Pickford, I am looking at para. 1 of your application, that is where your  
12 position may differ from that of the appellant?

13 MR PICKFORD: Indeed, because the reason why we cannot rely on the appellants to protect our  
14 interest is because their interest is in shifting these costs effectively away from the services  
15 they buy, TI services. Our interests are obviously to ensure that wherever they end up they  
16 do not then end up on the services that we purchase in large quantities to a greater extent  
17 than they already are there.

18 MR FREEMAN: Does this mean that if the appellants win you will no longer support them?

19 MR PICKFORD: It depends on what they say because obviously we have not yet got to the  
20 remedies stage of the hearing in the Competition Commission. At this stage it is very hard  
21 for us to say whether we will or will not be on their side. It is quite possible we will not be,  
22 at that point we may well diverge.

23 THE PRESIDENT: Is there a home for this part of the common costs that does not affect the  
24 other services that you buy?

25 MR PICKFORD: There are some potential homes, and there are some homes which would be  
26 ones we would agree with, and there will be some homes that we do not agree with.

27 THE PRESIDENT: You really do not know which you are supporting yet?

28 MR PICKFORD: We support Vodafone and Verizon in terms of some of the general principles  
29 that they raise about ensuring that there is a proper and rigorous basis for Ofcom to allocate  
30 common costs and that it goes about asking itself the right questions when it has common  
31 costs that potentially fall in relation to different services.

32 MR FREEMAN: So you are fine to support the principle so long as it does not affect you  
33 adversely?

1 MR PICKFORD: Of course the principle needs to be applied properly, and there is a narrow  
2 principle there and then there is its application which brings in certain facts, it brings in lots  
3 of economic analysis.

4 MR FREEMAN: And if it is applied properly there is a risk that your clients' interests will be  
5 adversely affected?

6 MR PICKFORD: If it is applied improperly, yes.

7 THE PRESIDENT: And you do not think it was applied properly?

8 MR PICKFORD: On my case.

9 MR FREEMAN: Yes, it becomes a rather fragile word, "properly", at that point, does it not?

10 THE PRESIDENT: You are supporting them to the extent you say it was not applied properly?

11 MR PICKFORD: We have some sympathy with some of the concerns that Vodafone raises in  
12 relation to the allocation of common costs in this case. We do not necessarily support  
13 everything that Vodafone says currently, there are a number of different points that it  
14 makes, and obviously it would not be for me now to set out precisely where we are behind  
15 Vodafone and where we think that Vodafone may have gone slightly too far. For instance,  
16 just to illustrate, there is one passage at para. 76.5 of their notice of appeal where they say  
17 there was simply no power for Ofcom to look at something, and we are not sure whether  
18 that is necessarily right. We think that might be going a little too far and we would need to  
19 consider our position in relation to that before we set out our position in our notice of  
20 appeal.

21 THE PRESIDENT: You do not have a notice of appeal.

22 MR PICKFORD: Statement of Intervention.

23 MR SMITH: Mr Pickford, that rather anticipates the question I was about to ask. It sounds, from  
24 what you are saying, that you appear to fall more into the category of appellant than  
25 intervener, and I wonder if you could help us on why you are intervening rather than  
26 appealing.

27 MR PICKFORD: I am sorry, I do not follow, Sir, as to why ----

28 MR SMITH: Normally, an intervener rows in behind one party or the other, so you say quite  
29 properly in your application for permission to intervene that you broadly support the  
30 appellants, but it seems from your submissions that that is a rather more nuanced position,  
31 and you may or may not be supporting them depending on what they choose to say.  
32 Certainly, when it comes to a reallocation, if the appeal is successful you are likely to be  
33 haring off in completely different directions?

34 MR PICKFORD: Yes.

1 MR SMITH: And it did seem to me that, having said that, you do not strike me as a typical,  
2 intervener, it looks like you are more like an appellant.

3 MR PICKFORD: With respect, Sir, we would say that is precisely why we should be permitted  
4 to intervene, actually we have a stronger case for intervention than somebody who sits  
5 directly behind an appellant and says: “everything that this appellant says we agree with”,  
6 because to that extent it is not clear why they necessarily need to be there to protect their  
7 interests.

8 We would not have appealed the decision that has been made here about TI products,  
9 because we do not purchase TI products, so in terms of the particular decision that was  
10 made on TI products, it would obviously have been inappropriate for us to have appealed  
11 that, and very odd for us to have done it given that we do not purchase them. But because  
12 the very nature of Vodafone’s appeal is that it seeks to put the recovery of common costs in  
13 relation to TI products in a wider context over recovery of common costs across other  
14 products which we do purchase, that is why our interests are now engaged in this appeal.

15 THE PRESIDENT: I would have thought you would be more likely to support Ofcom though,  
16 because you like the *status quo* and it seems to be rather odd that you are saying that you  
17 broadly support the appellants.

18 MR PICKFORD: That is true. Obviously to some extent our commercial interests are served by  
19 these particular common costs staying where they are, but we have a wider interest in  
20 ensuring that price controls are carried out on a proper and consistent basis, and that is why  
21 actually we think it would be somewhat self-serving of us simply to fall in behind Ofcom  
22 and say “Ofcom got everything right here, common costs should stay exactly where they are  
23 for all the reasons that Ofcom gave”, because, in truth, we cannot necessarily say that we  
24 do agree with all of the reasons that Ofcom gave. We might agree with some of them but,  
25 to some extent, we agree with some of the points raised by Vodafone and Verizon, and that  
26 is why we sit in a slightly awkward place for ourselves in that we are obviously not  
27 appellants, because we would not have appealed this decision.

28 THE PRESIDENT: You could have done on the basis of what you say because you did not like  
29 the principles that are raised.

30 MR PICKFORD: Ordinarily one would not necessarily appeal a decision because you do not like  
31 the reasoning in that decision.

32 THE PRESIDENT: If it affects your interest, you could, you would be the person affected, I  
33 suppose, arguably, because you think if that was applied in other respects, that mistaken  
34 application of general principles then we would suffer.

1 MR PICKFORD: The difference, of course, is that it is merely an Ofcom decision, although  
2 Ofcom might rely on it later on it is not going to be binding and we would have an  
3 opportunity to appeal it to the Tribunal in that later context, when it then applied to us. The  
4 problem, of course, we have now is that because it has been appealed by Vodafone and they  
5 are asking the Competition Commission to rule on those principles, and that then may well  
6 establish a precedent that does then bind us in a future case, and that is why it is important  
7 for us to be here now to ensure that our interests are protected at this time precisely because  
8 of the greater authoritative effect of a ruling from the Competition Commission on these  
9 things, then there maybe a decision which did not directly affect us in terms of the price  
10 control, that we did not wholeheartedly agree with.

11 MR FREEMAN: I am getting muddled, Mr Pickford, between the principle and the possible  
12 adverse effect on your clients. Are you saying that if this reference to the Competition  
13 Commission came out in a way that allocated the costs under a formula which was not in  
14 your clients' interest at that point there could be a further decision on that, applying the  
15 price control on those principles, and at that point you might become an appellant against it,  
16 is that what you are saying? So you are an intervener for now and an appellant in the  
17 future?

18 MR PICKFORD: In this appeal we are certainly purely an intervener, and if I could distinguish  
19 between the point of principle and the specific point of application because they are  
20 different, but they do interrelate. The point of principle is that one conceivable outcome of  
21 this appeal is that there is not a particular decision saying these costs should be allocated to  
22 LLU services, so our particular concern on the facts does not arise.

23 MR FREEMAN: Not yet, but it could arise.

24 MR PICKFORD: Yes, but I am positing a case where the outcome is that it does not arise, in  
25 order to distinguish what our other concern is.

26 MR FREEMAN: Some other group of clients suffer.

27 MR PICKFORD: Possibly.

28 MR FREEMAN: But you do not worry about them.

29 MR PICKFORD: I am certainly not here to represent their interests if they are. We are assuming  
30 that that does not arise, so even if that does not arise, we still have an interest in this appeal  
31 because there are general points of principle that are raised, in particular in ground 1 of  
32 Vodafone and Verizon's appeal, where they say that Ofcom simply asked itself the wrong  
33 question. They say that Ofcom was too concerned in ensuring that these common costs  
34 would definitely be recovered and picked up somewhere, and therefore because it could not

1 necessarily find the correct home for them it said: “I’m sorry, they will all have to reside  
2 here with TI services.” We have some sympathy with some of the points that Vodafone  
3 raise in that context, in particular because one of the things it says is that as long as a  
4 consistent approach is taken across all price controls there is an opportunity for BT to  
5 recover its common costs, because it potentially can recover them in the other non-price  
6 controlled arenas. So even if they are not picked up in particular price controls because  
7 they are common across a range of services that BT provides, including non-price  
8 controlled services, they can arise and be recovered there, and we agree with that point. So  
9 we consider that Ofcom’s particular concern about making sure that they are allocated to a  
10 particular basket is, to some extent, overstated. So we fall behind Vodafone on that  
11 principle, and that is an important issue because although it does not lead, necessarily, to the  
12 conclusion that these costs definitely go to LLU, nevertheless, when the next price control  
13 for LLU comes around, if that principle has been determined in Ofcom’s favour or in  
14 Vodafone’s favour it may well have effect – indeed, we think it is very likely to have effect  
15 – on how the common costs are allocated in that next LLU/WLR price control.

16 So, effectively, the first ground is looking forward to the next price control, and is  
17 concerned about the implications of what the decision in this case will be for that, because  
18 there are points of general principle.

19 The second concern is that it may be that one party, perhaps BT, encourages the  
20 Competition Commission in this case to say: “Even if they do not go to TI, they should end  
21 up being allocated to a greater extent to LLU/WLR services, so it is a more specific concern  
22 and, in that context, we would obviously want to be there to explain our view as to why they  
23 should not.

24 If I could go on to explain a further point that arises in this context. A point which has not  
25 been made by Vodafone and Verizon, presumably because they do not purchase LLU/WLR  
26 services to any likely extent that my clients do is that we believe there is a mistake in the  
27 decision as it stands, because part of the reasoning that Ofcom adopted is that they said in  
28 relation to the excess common costs, as they have been defined, they do not find themselves  
29 recovered to a material extent elsewhere in the future and therefore they should reside with  
30 TI services.

31 Our understanding from the preliminary advice that we have had from our expert,  
32 Mr Duckworth of Frontier Economics, is that in fact already Ofcom’s price control for  
33 LLU/WLR services takes account of the migration of customers from TI services to other  
34 services, such as LLU/WLR. Therefore, in fact, at least a proportion of the disputed

1 common costs are going to be recovered in any event from services that my clients  
2 purchase. Therefore, to the extent that they are recovered also from TI services and  
3 Vodafone and Verizon purchase there would be double recovery.

4 THE PRESIDENT: How do we know that they are the same costs though? Just because a  
5 proportion has gone to those, does that mean more could not go? I saw what was quoted in  
6 your application, but I did not completely grasp it. Are you saying that if any of these costs  
7 has gone to WLR/LLU services then that indicates a mistake on the part of Ofcom?

8 MR PICKFORD: Certainly in terms of a material quantity, yes. Ofcom's reasoning is essentially  
9 that, to any material degree, there is not recovery elsewhere and therefore it is that they  
10 should be picked up here. We believe that that may be a mistake. Mr Duckworth has been  
11 able to come to that provisional conclusion on the basis of the publicly available version of  
12 the LLU/WLR model. He cannot confirm it conclusively without seeing the confidential  
13 version, which has the actual numbers in it and shows precisely how the costs are allocated.

14 THE PRESIDENT: That is a different part of the model or a different disclosure to the one that is  
15 sought by Verizon?

16 MR PICKFORD: It is. This point has not been picked up by Verizon. They are the purchasers of  
17 the TI services. We are the purchasers of the LLU/WLR services.

18 THE PRESIDENT: This would be an appeal point, would it not, because that is effectively  
19 attacking Ofcom's decision on the basis that there is an error which is not an error that is  
20 raised in the appeal and it raises separate issues.

21 MR PICKFORD: We say it does not raise separate issues, it is a further reason why Vodafone are  
22 right. Their general point of principle, particularly on Ground 2, is that there are a number  
23 of mistakes by Ofcom as to where these costs could be picked up outside TI services. They  
24 challenge Ofcom's conclusions that the only home for these costs is TI because they are not  
25 being picked up elsewhere.

26 They challenge it on a number of factual bases. We say there is an additional factual basis.  
27 It is exactly the same point that has been raised by Vodafone and Verizon, but there is an  
28 additional factual basis which they have not yet picked up, which is that actually we believe  
29 that they are likely to be being recovered directly through a price control in relation to  
30 LLU/WLR. That is clearly a highly material and important consideration. If we are right,  
31 then it would be quite wrong for the Competition Commission to be considering these  
32 issues on the assumption that these costs are not being picked up elsewhere, when in fact  
33 that is incorrect and they are being picked up elsewhere.

1 MR FREEMAN: So what is the effect on your clients of this further factual error – alleged  
2 factual error, I should say?

3 MR PICKFORD: In this context in relation to TI services, none, which is again why we did not  
4 appeal. We did not appeal it because we do not purchase TI services.

5 MR FREEMAN: If Mr Duckworth is right then presumably something is wrong with the  
6 WLR/LLU price control – is that right?

7 MR PICKFORD: No, we would say that, if Mr Duckworth is right, something is wrong with the  
8 TI price control because it proceeds on an assumption ----

9 THE PRESIDENT: They may both be wrong, but is Mr Freeman not right that there is too much  
10 cost in the WLR/ LLU price control?

11 MR PICKFORD: The WLR/LLU price control is not being appealed here.

12 MR FREEMAN: It has been much litigated – would that be fair to say?

13 MR PICKFORD: It has.

14 MR FREEMAN: So one could assume that all possible factual errors will have been explored  
15 with remorseless attention. There is another one, you are saying, that has got somehow  
16 missed in this process – is that right?

17 MR PICKFORD: I am not at all, sir, because of course we do not say that it is an error in the  
18 WLR/LLU price control for these costs to be being picked up.

19 THE PRESIDENT: You say it is an error in this statement because it is contrary to something  
20 which is stated in the statement?

21 MR PICKFORD: Exactly.

22 THE PRESIDENT: So right or wrong, that is a matter that can easily be clarified, is it not?  
23 Ofcom would say, “Tell us”, if that ----

24 MR PICKFORD: They will no doubt say, “No, you are wrong, and we believe there is no  
25 problem”. We consider that there is a mistake there and that is obviously one of the things  
26 that the Competition Commission would need to explore in the event that it is going to deal  
27 with any of these issues. The whole premise to Ofcom’s Decision is that the costs are not  
28 being picked up elsewhere.

29 MR FREEMAN: Will it not be possible for us to consult the previous WLR/LLU cases to see  
30 whether what you are saying is right or not?

31 MR PICKFORD: I very much doubt it, Sir, because, as I said, this has not been a point of appeal  
32 in those cases because we are not saying it is wrong. We are not appealing against the  
33 WLR/LLU price control obviously ----

1 THE PRESIDENT: You, but you are effectively trying to appeal against this one because it is a  
2 separate point, it seems to me.

3 MR PICKFORD: With respect, Sir, we are not appealing against it, we are simply saying that on  
4 this issue, on the factual errors that have been picked up by Vodafone, there is a clear  
5 further factual error – at least on our provisional view there is a further factual error.

6 THE PRESIDENT: Can we just hear what Mr Holmes' initial reaction to this is just so that we  
7 can clear the air, if possible, on that, Mr Pickford, for a moment.

8 MR HOLMES: On this specific issue or?

9 THE PRESIDENT: Just on this factual error point. I have not looked at that bit of the statement  
10 that Mr Duckworth apparently has picked up on.

11 MR HOLMES: Sir, we received this application for permission to intervene late yesterday  
12 afternoon.

13 THE PRESIDENT: This was the first you knew of this.

14 MR HOLMES: We have no position on the merits as yet. The difficulty that we have with this  
15 part is that it does not appear to be within the scope of the Verizon/Vodafone appeal.

16 Mr Pickford very candidly says that this is not a point that is being raised by Verizon or  
17 Vodafone.

18 We also have difficulty in seeing where the sufficient interest arises in relation to this point  
19 because, as Mr Pickford says, he does not allege any error in LLU/WLR which his client  
20 purchases in large quantities. He alleges an error in this price control, the inputs of which,  
21 as I understand the position, are not substantially purchased by his clients. So even if an  
22 error were shown in relation to this price control, we fail to see how his client has an  
23 interest in raising it.

24 MR SMITH: Mr Holmes, this point of Mr Pickford, he seemed to be concerned about the risk of  
25 inconsistency between different price controls and the effect of this appeal on future price  
26 controls – in other words, his client's interests in intervening seem to be rather more broadly  
27 based. I wonder if you could help us on the significance that we should attach to that?

28 MR HOLMES: Sir, to our mind, that raises a further concern about the scope and direction of this  
29 proposed intervention. It appears to relate to a concern about the knock-on effects of the  
30 present appeal on possible future price controls which are not in issue here and on which his  
31 client could, if it thought fit, raise an appeal in due course.

32 Indeed, in relation to the more specific and grounded concern about re-allocation of costs to  
33 LLU/WLR, it appeared to be wholly speculative at this stage, and not to rest on any specific  
34 that Verizon and Vodafone were yet making, but on a concern about submissions that BT

1 might in due course make as part of their intervention. As we see it, that cannot be a basis  
2 for justifying an intervention at this stage.

3 There is a further point that I should perhaps have raised in relation to the third, the specific  
4 argument. We had difficulty in seeing where it would fit within the reference questions as  
5 currently drafted, and it would also entail, of course, disclosure to an intervener of material  
6 that has not been sought by the appellant which, as it appears to us, raises a further concern  
7 that this may simply derail and destabilise the appeal that is fairly unpredictable at this  
8 stage.

9 THE PRESIDENT: Just leave aside the questions of sufficient interest and everything like that of  
10 Sky and TalkTalk. It sounds like what is being said is that there has been, as it were, a mis-  
11 statement in the statement saying there is no material allocation to those other services of  
12 these costs. That is something presumably that could be verified one way or the other by  
13 consulting the appropriate people in Ofcom in due course. My concern is that if the matter  
14 – and we obviously have not decided what to do about Sky’s application yet – did not form  
15 part formally of the proceedings, would that put the CC in a bit of predicament if this point  
16 was known about?

17 MR HOLMES: I would need to take instructions on that, but as it appears to me insofar as there  
18 has been no factual error of this nature identified by any appellant when it could indeed  
19 have been raised by an appellant, it is difficult to see why it should raise any difficulties for  
20 the Competition Commission or arise in this appeal at all. They will not be looking at the  
21 LLU/WLR modelling which I should say is the subject of a current and pending  
22 consultation. They will be looking at the modelling for this price control and if there is any  
23 error in the LLU/WLR price control, not the current control because as has been pointed out  
24 that was very expensively litigated and no stone was left unturned, but if at the end of the  
25 current consultation process the next LLU/WLR statement is claimed to contain any error  
26 by reference to the allocation of costs contained in this price control then, of course, there  
27 will be scope for Mr Pickford’s clients to appeal at that stage.

28 MR SMITH: Mr Holmes, it does seem to me I think you have made oblique reference to para. 14  
29 of Sky/TalkTalk’s application to intervene. There does seem to be a considerable danger if  
30 we were to follow Mr Pickford’s course, and I am sure you will address us on this, of the  
31 Competition Commission being required effectively to look across multiple price controls,  
32 whereas the impression that I am getting is that Ofcom sees each decision as a separate  
33 decision, which will be subject to separate appeal if the parties affected are so advised?

1 MR HOLMES: Yes, there are, of course, cross-cutting questions and broader points of principle  
2 which will emerge over time, but those of course could be challenged in relation to each  
3 individual price control and if one imagines the converse situation in which in each price  
4 control appeal parties who have interests in other price controls and purchase other inputs  
5 can at that stage raise issues in relation to those other price controls and I think the  
6 Competition Commission's task, which is already a demanding and a difficult one, would  
7 become still more difficult.

8 MR FREEMAN: And presumably Ofcom in a Competition Commission examination would  
9 point out possible knock-on effects or the way in which issues would read across to other  
10 price controls. I seem to recall that that is what they do.

11 MR HOLMES: Sir, I am grateful. Of course, first of all, in the interests of arriving at the right  
12 result it is in Ofcom's interest, and it is appropriate that Ofcom, as a public authority, should  
13 draw the Competition Commission's attention to any wider issues that arise in relation the  
14 other price control work which is ongoing.

15 THE PRESIDENT: We do not want to get too jumbled, Mr Woolfe, we interrupted Mr Pickford  
16 in his application ----

17 MR WOOLFE: I am concerned from some of the questions from the Tribunal and some of the  
18 points made by Ofcom, that maybe there is a misunderstanding as to how this relates to our  
19 notice of appeal and therefore, it might be a matter of quite some importance, that I can  
20 explain how the point Mr Pickford made does relate to the points raised in our notice of  
21 appeal, and it will be fairly short, if I could just take you ----

22 THE PRESIDENT: All right.

23 MR WOOLFE: If you turn to para. 68 of our notice of appeal. It quotes from para. 19.361 and  
24 19.362 of the statement. Essentially, this is part of Ofcom's reasoning, having these  
25 common costs under consideration, for deciding why it chose to allocate them to TI  
26 services, and it says:

27 "Given current allocations of common costs, we consider it unlikely that the  
28 common costs associated with migrating leased lines services will be recovered  
29 from other services. These common cost allocations are partly a result of past  
30 regulatory decisions in other markets. We consider that it would not be  
31 proportionate to re-evaluate BT's common cost allocation across all services and  
32 reopening other charge controls ..."

1 We are not saying that Ofcom should reopen other charge controls; we are indeed saying  
2 that you should look narrowly at the charge control under consideration and apply an  
3 appropriate amount of common costs to that charge control.

4 THE PRESIDENT: I understand that.

5 MR WOOLFE: Although we do not specifically take the point that Mr Pickford raises, that is  
6 true, however, at para. 94.2, our Ground 3 in general is a failure of justification, because we  
7 say that para. 19.361 that you looked at is just pure assertion, and Ofcom has not looked  
8 under the surface, and we set out specific factual errors at Ground 2, but in general we raise  
9 a point at Ground 3, and 94.2 in particular that Ofcom presents no proper analysis or  
10 evidence to establish that BT would in fact be able to recover its common costs from other  
11 services, and we refer there to the expert evidence of Mr Mantzos. He comments briefly, I  
12 think at para. 8.7.2, I appreciate not everybody in the room will have seen that, but he points  
13 out that there is an assertion by Ofcom and it is not obviously true given the variables to  
14 maintenance from cost allocation.

15 THE PRESIDENT: That is not quite the point that he is making.

16 MR WOOLFE: No, it is a different point, I accept that, but it is related because we criticise a  
17 failure of justification on the part of Ofcom, and Mr Pickford goes further and says, in fact,  
18 not only is it unjustified but there is a particular reason why we know it is wrong. It is a  
19 different point, I accept that, but I just thought it might assist the Tribunal to understand the  
20 extent to which it relates to what we have said.

21 MR HOLMES: Sir, I do not want to add to the jumble, but if I might just address the two  
22 passages to which Mr Woolfe has drawn your attention?

23 THE PRESIDENT: Yes.

24 MR HOLMES: As we see it the text in para. 68 neatly illustrates the point that I was discussing a  
25 moment ago with Mr Smith, the concern that where there is an allocation of common costs  
26 across a number of different price controls that the Competition Commission's task must  
27 necessarily focus on the specific price control before it, otherwise there is a real risk of it  
28 being faced with an impossible task.

29 Insofar as the Competition Commission is being asked to reconsider cost allocation across  
30 the piece for specific bits and pieces of cost allocation, as between different price controls,  
31 that could very quickly become difficult. It was not a task that Ofcom felt able to  
32 undertake, and it would be difficult to see how, when it is not challenged as Mr Woolfe  
33 pointed out, it could reasonably be undertaken in this appeal.

1 The second point in relation to para. 94, we say neatly illustrates why Mr Pickford's  
2 intervention is an appeal in the clothes of an intervention. As Mr Woolfe points out, the full  
3 extent of their appeal is captured in 94.2, it alleges a lack of analysis, it does not allege any  
4 specific factual error. It does not go on to make the point which Mr Pickford is now seeking  
5 to make by way of an additional argument - as we see it an argument outside the scope of  
6 the notice of appeal, which it should not be for an intervener to make. Had Mr Pickford  
7 wished to do so, or his client wished to do so it could, of course, have appealed on that  
8 point, but there is no appeal before the Tribunal.

9 THE PRESIDENT: Thank you, Mr Holmes. Mr Pickford, you can carry on now. I thought we  
10 had just better see what Ofcom's reaction was to the suggestion there was a mistake.

11 MR PICKFORD: I am very grateful, and a number of points have been raised by Mr Homes,  
12 which I can obviously seek to address as I progress the rest of my opening submissions for  
13 my application.

14 It is probably important, I think, to take a step back, because a number of quite profound  
15 points of principle have been raised about what an intervener's role is in proceedings. Now,  
16 we quite accept that we are not here as appellants, but there are three grounds of appeal that  
17 have been raised and we have, as I explained, effectively two broad interests. One of those  
18 broad interests goes to the point of principle in Ground 1. I think we are relatively clear  
19 about that. The second goes to where costs maybe reallocated. There is a sub-issue within  
20 that which arises, particularly in relation, we would say, to Ground 2 of Mr Woolfe's  
21 appeal. We do not consider that our additional point that we have been discussing is part of  
22 Ground 3, although it is obviously highly related to it, we consider it is part of Ground 2,  
23 which is where he says, at para. 79 of his notice of appeal, that:

24 "... even if Ofcom's approach was not wrong in principle for the reasons set out  
25 under Ground 1 above, Ofcom erred in fact in concluding that, if the Excess  
26 Common Costs were not allocated to TI services BT would not be able to recover  
27 those common costs from other services."

28 That is the point that is made in Ground 2.

29 He then goes on to explain a number of reasons why he says that that error has been  
30 committed, a number of factual errors falling within the scope of Ground 2. Our point is  
31 simply a further 79.4. on his list, which is there is a further factual issue here going to the  
32 same ground of appeal, namely that there is an error of fact in relation to whether TI  
33 services will be recovered elsewhere.

1 If one steps back for a moment and thinks: what is the situation going to be in the  
2 Competition Commission if it is asked to address Ofcom's reasoning that these costs are  
3 not being recovered elsewhere, if it has to be blind to our point that, in fact, they are being  
4 recovered from elsewhere. Mr Holmes suggests that there is a grave problem, and  
5 essentially the argument being advanced against our intervention is we are going to derail  
6 the proceedings, it is all going to become much more complicated because of our  
7 intervention. Well, intervention necessarily leads to a little bit of complication, but we  
8 would say it is quite wrong to suggest that we are trying to open up issues outside the scope  
9 of this appeal. We do not seek in any way to open up the LLU/WLR price control. We take  
10 it as a given. We are not challenging it. We are not saying any part of it is wrong. We are  
11 simply saying that, insofar as in the decision in the part that Mr Woolfe took you to, where  
12 Ofcom was saying: "We do not think any of these costs are being picked up elsewhere", we  
13 believe that that is incorrect. That is a highly material consideration for the Competition  
14 Commission to take into account when it is considering the competing views of Ofcom on  
15 the one hand and Vodafone and Verizon on the other. It has been suggested that this is  
16 perhaps a straightforward point that could be factually clarified and everything would be all  
17 right, and we do not need to be there, but we would suggest, with respect that although it is  
18 not a particularly substantial point it is one on which a very short and limited amount of  
19 expert evidence would materially assist the Competition Commission.

20 THE PRESIDENT: But you want disclosure which is additional, and I cannot quite recall where  
21 it is, I think it is mentioned in your application.

22 MR PICKFORD: It is. I can come on to that, and as you have raised it, Sir, I will address it now.  
23 The disclosure that we are seeking is that the confidential version of the LLU and WLR  
24 charge control model that contains two elements is produced to us, the volume forecasts for  
25 components of TISBO and AISBO in the LLU model, in comparison with the assumption in  
26 the LLCC model.

27 THE PRESIDENT: That surely is expanding this whole exercise looking at a different model.

28 MR PICKFORD: It is looking at a different model, but one has to remember, Sir, that of course  
29 as Mr Holmes concedes, this price control is set in a wider context and, in particular, in the  
30 context of Ofcom's wider view that these costs are not being recovered elsewhere. So one  
31 can only see whether that is correct or not by looking at that elsewhere, and that is the  
32 LLU/WLR model. We are not seeking the entirety, we are seeking two very discrete parts  
33 of it. It has already been said by Mr Holmes in relation to the very similar disclosure sought

1 by Vodafone and Verizon of a limited part of a model that there is no particular impediment  
2 to doing that. They simply need to find an appropriate form of words.

3 We are seeking something which is materially similar, indeed it is materially the same, it is  
4 just a different part of a different model. It is of the very same nature. It is part of a  
5 financial model which is exactly the kind of disclosure that is made time and again in  
6 Tribunal proceedings. We would concede that it is unusual certainly for disclosure to be  
7 necessary of another model which is not the model that is actually relating to the price in  
8 dispute. We would accept that. The reason is because this appeal is a little unusual. This  
9 appeal is one which is saying that there are problems with the way in which common costs  
10 have been allocated in this particular context because there are errors in relation to where  
11 these common costs could fall elsewhere. Vodafone and Verizon have identified a large  
12 number of them in their Ground 2. All we say is that they are no doubt right about a  
13 number of those, and they have referred point 2 as part of that Ground.

14 We are not seeking to reopen a much wider issue about the LLU/WLR control because that  
15 is a given. It is an issue which arose in this very price control that we are concerned with,  
16 LLCC, as explained at para.19.361 of the Determination, which is quoted at para.68 of the  
17 notice of appeal:

18 “Given the current allocations of common costs, we consider it unlikely that the  
19 common costs associated with migrating leased lines services will be recovered  
20 from other services.”

21 That sentence we say is wrong, and that is fundamental to Vodafone’s appeal. Vodafone  
22 say why it is wrong. That is what they are challenging, that is what their Ground 2 goes to,  
23 and we say they are right for an additional reason.

24 To come back to the nature of what an intervener is permitted to do, quite clearly an  
25 intervener should not be marching off and making entirely new points that have nothing to  
26 do with the grounds of appeal. Equally, the intervener cannot properly be expected merely  
27 to say nothing at all which is in any way different from the principal party, otherwise, by  
28 definition, there would be no reason for them to be there at all.

29 THE PRESIDENT: So you say you are supporting Ground 2 on that point?

30 MR PICKFORD: We are certainly supporting Ground 2 on that point, yes, that particular one  
31 issue. Even if - and my submissions are that we should be entitled to advance that point for  
32 the reasons I have explained, and that it falls within the scope of Ground 2, it is simply part  
33 of that - we were not to be permitted to advance that point that does not mean that we  
34 should not be permitted to intervene for the two reasons that I gave, namely the general

1 point of principle about how common costs are to be re-allocated between different price  
2 controls, which is Ground 1 of Vodafone's appeal, and secondly, to protect our interests to  
3 ensure that nothing is said by the Competition Commission that leads to something which  
4 Ofcom is required to act on ----

5 THE PRESIDENT: Re-allocate to others.

6 MR PICKFORD: Re-allocate these costs to the services that we purchase. We say it would be  
7 quite unusual for us not to be allowed to be present to protect our interests against that.  
8 Hopefully, certainly from what has been said by Ofcom, they would be presumably urging  
9 the Competition Commission not to say anything about that re-allocation. They may well  
10 be saying, "No, you should not go there, the only thing we are concerned with here, very  
11 narrowly, is TI, it does not arise, leave that to us, we will deal with that in the future". If  
12 that is what happened and if that is what ultimately the Competition Commission accepted,  
13 then hopefully our interests would have been protected.

14 We simply cannot know at this stage what is liable to develop. Mr Holmes suggests that  
15 therefore we should not be permitted to intervene now in order to protect our interests in the  
16 future. We say that plainly cannot be right. The CAT procedure is that interventions are  
17 made, quite properly, at the beginning of an appeal, so everyone knows where we stand.  
18 We, if we are permitted to intervene, receive the relevant papers. We can see what is going  
19 on and we can see if and when it is necessary for us to step in to protect our interests. Of  
20 course we would do so proportionately and with the utmost respect to ensure that the  
21 proceedings are not derailed.

22 The Competition Commission has expressly in the past endorsed and commented  
23 favourably on Sky and TalkTalk's intervention in the previous appeal because of the fact  
24 that we were highly concise and limited in our intervention. We do not intend to do any  
25 differently in these proceedings. We are simply there to protect our particular interests that  
26 I have explained that arise.

27 I am just trying to ensure that I have gone through the various points that have been raised  
28 in relation to the appeal. Certainly we say the model should not be an issue. Exactly the  
29 same point of principle arises in relation to disclosure to Vodafone and apparently there is  
30 no difficulty with it.

31 We are not opening up the LLU/WLR price control. It is precisely because of the unusual  
32 nature of these proceedings which, to my knowledge, for the first time raised this very issue  
33 of cross-price control cost allocation, means that we need to be here, both for the point of  
34 principle and to protect our interests in relation to anything that is concretely said about

1 WLR/LLU. Of course, it would be wrong to conclude in relation to that that we could  
2 sufficiently protect ourselves by simply appealing a future decision. Once the Competition  
3 Commission has potentially said something which is adverse to our interests, which it  
4 would not have said had we made submissions to it, about where the costs should go, it is  
5 too late because Ofcom will necessarily act on that, whereas it would not have acted on it  
6 had we been there to tell them to take a step back and remember that, in fact, they should  
7 not be giving an opinion about where those particular costs should be going, for example.

8 THE PRESIDENT: Someone made a point that suggested that the questions that are being,  
9 hopefully, agreed would somehow not cover this point.

10 MR PICKFORD: In so far as that is an issue it would simply fit within Question 2. It would be  
11 for reasons set out in the paragraphs of Vodafone and Verizon's notice of appeal which is  
12 referred to in Question 2, and additionally the reasons set out in paragraph X of our  
13 statement of intervention which raises a further example of the same type of error of fact  
14 that is raised by Vodafone and Verizon. So there is no particular difficulty with that.  
15 The Tribunal's own Rules contemplate that interveners may even seek different relief from  
16 an appellant which they are supporting. They can pursue their own relief. We are not  
17 seeking any different relief here. I think I do not need to repeat the basis on which we are  
18 seeking to intervene.

19 THE PRESIDENT: No, it is very clear now.

20 MR PICKFORD: It clearly anticipates that an intervener's role is not necessarily entirely on all  
21 fours and entirely sitting behind any one party in those proceedings because, for obvious  
22 reasons, commercial interests may vary. That does not mean we should have been  
23 appellants. Had there been no Vodafone and Verizon appeal, we would not need to be here  
24 at all. We do not mind about the TI services, we simply care about the implications.

25 MR SMITH: Mr Pickford, can I ask you this: let us suppose that the CC is persuaded that the  
26 allocation of common costs is wrong in this case, and it makes a determination to that effect  
27 which is then adopted by the CAT in this appeal and then feeds into future price/costs  
28 controls made by Ofcom which then adversely affect your client's interests in the future,  
29 are you saying that your clients would be precluded in some way from appealing the issues  
30 in that price control at that time?

31 MR PICKFORD: We could appeal them again but we would face two problems. Firstly, we  
32 would have been seriously prejudiced by the fact that we were even having to make that  
33 appeal when, if we are correct, we could have averted the whole problem by making our  
34 submissions to the Competition Commission now to ensure that nothing erroneous was said.

1           Either we are right or we are wrong. If we are right the Competition Commission should  
2           not be saying what we are positing is harmful to my clients now.

3 MR FREEMAN: Just to interrupt you, that assumes that, if you say it, the Competition  
4           Commission will automatically adopt it. They might consider what you said and decide to  
5           reject it. That is possible, is it not?

6 MR PICKFORD: It may, and that is obviously a risk that anyone seeking to partake in litigation  
7           always takes.

8 MR FREEMAN: You seemed to be assuming that you only had to say something and it would  
9           automatically be adopted.

10 MR PICKFORD: I wish obviously that were the case. This morning is obviously demonstrating  
11           otherwise. We say we are prejudiced by not having the right to able to advance those  
12           submissions to persuade the Competition Commission to accept them.

13           The first problem we face is that we are prejudiced by the fact that we would have to bring a  
14           whole appeal ourselves to, we say, correct an error that should never have arisen, because  
15           had we been there and allowed to make submissions in the first place there would not be a  
16           problem. That is the first point.

17           Secondly, of course, what would immediately be said against us in that future appeal is,  
18           “There is authority here from the Competition Commission, they have already spoken on  
19           this and they have decided X, Y and Z”. Indeed, had we not been here today I can well  
20           anticipate another submission would have been is, “Had you had any concerns about what  
21           they might be saying on the subject you should have intervened”.

22 THE PRESIDENT: You would be able to say you tried, would you not?

23 MR PICKFORD: We would be able to say we tried in that context, but there would be authority  
24           against us on the point already. So we would have to persuade the Competition  
25           Commission that they were wrong the first time and to overturn their views previously.

26           Obviously that is, in practical terms, at the very least a more difficult task than going now,  
27           when the issue arises for the first time, and putting our case forward on that point.

28           In the context of many interventions that I have seen in this Tribunal, and there have been a  
29           large number, I would submit that we have an overwhelming case for intervention relative  
30           to many such cases as have been advanced, notwithstanding the heavy sighing to the left of  
31           me.

32 MR SMITH: Just to test this a little further, let us suppose you were given permission to  
33           intervene, make your points to the CC who, unaccountably, fail to take them into account  
34           and disagree with them and that is then relied upon in the future for price control, do you

1 say that you would be precluded from appealing that again, or only that such an appeal  
2 would be very difficult?

3 MR PICKFORD: It would certainly be very difficult having advanced those points and having  
4 lost them once. I have to say I have not formed a concluded view on whether we would  
5 necessarily be precluded.

6 MR FREEMAN: Might it not be better not to advance them at all then? Would you not have a  
7 clean sheet to appeal from?

8 MR PICKFORD: No, sir, not at all, because they are potentially live in these proceedings and the  
9 time always to strike in relation to points that may arise is when they arise for the first time  
10 not when they have been decided against you.

11 THE PRESIDENT: I think we have got now the thrust of that, which you have very helpfully  
12 explained. I am just a bit anxious about the time, because we have got to hear from  
13 Mr Holmes and Mr Beard on this issue. Is there anything else, as it were, on the application  
14 to intervene?

15 MR PICKFORD: No, Sir, I think if I have picked up the various points at least to the satisfaction  
16 of the Tribunal, that I have at least addressed you on them, then I am happy to sit down and  
17 hear what Mr Beard and Mr Holmes have to say further.

18 THE PRESIDENT: Thank you for that. I do not know who would like to go first?

19 MR HOLMES: Sir, you have heard basically my submissions. I have two very short points to  
20 make. Firstly, there was a point on which I said I would take instructions, which was  
21 whether a pure factual error were found to have been made on the basis of our consideration  
22 of the points that have been raised, would we correct it? Sir, as you will be aware from  
23 previous price controls it has always been in Ofcom's practice where a material factual error  
24 is identified incidentally in the course of proceedings, to correct it and, where it is feasible  
25 to do so, to correct it immediately before the exhaustion of the appeal, and if it gives the  
26 Tribunal any comfort that would be our course in this case as well. We will look at what  
27 has been said ----

28 THE PRESIDENT: Inquiries will no doubt be made.

29 MR HOLMES: Yes.

30 THE PRESIDENT: You would not want, in any circumstances, would you, to allow the  
31 Competition Commission to approach this on a basis that was ----

32 MR HOLMES: On a wrong factual basis.

33 THE PRESIDENT: Yes.

1 MR HOLMES: Indeed, Sir, yes. The second point concerns the scope. As a general matter, a  
2 number of the reasons for the proposed intervention were premised on how arguments  
3 might develop, what points might be made by BT or Ofcom during the course of subsequent  
4 Competition Commission proceedings, and they do, on the whole, appear to go primarily to  
5 remedy.

6 Mr Pickford said that it would be difficult or impossible under the Tribunal's Rules for him  
7 to intervene at a later stage and that the time for intervention under the Tribunal's Rules is  
8 now, at the start of the process. Just in case it is of assistance we would note that, at para.  
9 10.8 of the Guide to Proceedings, it is specifically stated that interventions may sometimes  
10 be permitted at a later stage of a case, where a specific issue arises, for example as to  
11 remedy.

12 THE PRESIDENT: If Sky/TalkTalk are going to intervene surely they ought to be able to  
13 intervene now, it would just clog everything up, would it not?

14 MR HOLMES: The difficulty we have is it is very unclear either what the scope of their  
15 intervention will be, or what the direction of their intervention will be, because it is  
16 premised on so many speculative points about how proceedings might develop further down  
17 the line. So we have had general concerns about whether there is a matter here that should  
18 be brought and, in particular, we have a concern that new arguments are being introduced. I  
19 should perhaps also add that, of course, under the Tribunal's rules permission would be  
20 required to amend a notice of appeal to include an argument as well as a ground. So the fact  
21 that there are a list of arguments to which his clients' argument could be added within  
22 Ground 2 ----

23 THE PRESIDENT: Surely, on that basis no intervener could ever raise a further argument in  
24 support of an existing ground without some amendment to the notice of appeal? Is that not  
25 what the statement of intervention is for?

26 MR HOLMES: Sir, I take your point but, of course, there must be scope for interveners to present  
27 matters in their own way and with regard to their own commercial interests and their own  
28 knowledge. I see the force of your point.

29 THE PRESIDENT: I do not think it would mean that Verizon would have to amend their notice  
30 of appeal, would it, because they are not relying upon this, it is actually the intervener who  
31 says: "And there is another reason they got it wrong".

32 MR HOLMES: That is true, Sir, but there are arguments and there are arguments and the  
33 Tribunal, in our submission, when deciding whether or not to exercise its discretion to admit

1 an intervention should consider what implications a proposed new argument would have for  
2 the scope of the appeal, much as they would on an application to amend a notice of appeal.

3 THE PRESIDENT: Yes.

4 MR HOLMES: In that regard it is telling that disclosure is sought that goes beyond anything that  
5 is sought by the appellant that raises new factual and modelling points that the Competition  
6 Commission will have to contend with and that would, indeed, require an amendment to the  
7 reference questions. So this is an argument of a fairly substantial kind that could have  
8 implications for the Competition Commission's work load.

9 The other, final, point is, and forgive me if I missed it, but I did not understand how Mr  
10 Pickford met my point that there is no sufficiency of interest here, because this relates to an  
11 input that his client does not purchase on any substantial scale.

12 THE PRESIDENT: Yes. Do you want to say anything on his first two points? He wants to  
13 intervene on the general principle which he says is sufficiently important to affect a lot of  
14 things?

15 MR HOLMES: Only, Sir, that there he does appear to be rowing in behind, if I understand  
16 rightly, although the proposed intervention is still unclear as to its scope and direction, and  
17 that is a general matter of concern to us. But, if we understand rightly, on the general point  
18 of principle it is his clients' intention to agree with Verizon and Vodafone and we do not  
19 understand at this stage what the intervention would add.

20 THE PRESIDENT: No, but do you object to his intervention looking at the general principle ----

21 MR HOLMES: Sir, at this stage we do not see a basis for the application for permission to  
22 intervene.

23 THE PRESIDENT: What about the second Ground of intervention, which is the one where he  
24 says: "If there is a disturbance it would affect the products that we do buy in great number  
25 from BT – or could affect it in the future"?

26 MR HOLMES: Two points. First, this concerns a separate price control which will shortly be the  
27 subject of consultation and on which his client will have a full right of appeal, and will not  
28 be precluded from taking any points. Insofar as the Competition Commission reaches  
29 conclusions that are *per incuriam* because particular issues relevant to another price  
30 control appeal have not been fully ventilated before them, they will have a full right of  
31 appeal, and it is much more appropriate for good order, and a manageable appeal process to  
32 take price controls one by one and not try to enlarge the Competition Commission's task to  
33 consider the implications of this price control, for other price controls that can be appealed  
34 later. That is the first point.

1 The second point is that we understand the second Ground is premised on BT potentially  
2 raising an argument at some later stage that costs should be reallocated in a particular way  
3 and that at this stage is wholly speculative, and is perhaps a matter that would be better  
4 raised at the remedies stage by intervening again if necessary, without clogging up the  
5 Competition Commission's procedure with an additional statement of intervention from the  
6 outset with attendant expert evidence.

7 MR FREEMAN: Mr Pickford has a sort of economy of process point, does he not, which is that  
8 it is better to head that sort of issue off at the pass rather than let it grow and fester?

9 MR HOLMES: It is a bit unclear whether the issue will even arise, so it seems like a very  
10 cumbersome thing to launch the process of an intervention with all of the attendant expert  
11 evidence, when it is still not clear whether it will. But there is obviously a countervailing  
12 consideration which is that a whole range of parties, because of the cross-cutting nature of  
13 price control appeals, a whole range of parties may have a point that they would want to  
14 make in relation to the price control for inputs that they will purchase, which is not under  
15 appeal, and there is just a risk to the manageability of these appeals if the idea is that they  
16 should all troop in whenever a point that potentially affects another price control is raised.  
17 So, I see the point that it might be sensible to take a point at an early stage, but against that  
18 there is the concern about manageability of procedure and keeping the appeal within  
19 manageable bounds.

20 Secondly, there is the point that you have already raised with me, rightly, that Ofcom will,  
21 of course, endeavour to raise broader considerations and broader perspectives so that the  
22 Competition Commission is properly informed and Ofcom has an obvious interest in doing  
23 that in the context of every price control appeal.

24 MR FREEMAN: So your answer is cross the bridge when you come to it, is that right?

25 MR HOLMES: Yes, indeed.

26 THE PRESIDENT: Thank you, Mr Holmes. Mr Beard?

27 MR BEARD: I will try to deal briefly with what I understand to be three points from Mr  
28 Pickford. He says that there is a sufficient interest because of matters of principle that arise  
29 in this case because he is not interested in the actual product at all. The second is that some  
30 issues could arise in relation to remedies matters, and the third point is this point about a  
31 mistake.

32 But the starting point has to be going back to the relevant legal test in rule 16(1): "Any  
33 person who considers he has a sufficient interest in the outcome may make a request to the  
34 Tribunal for permission to intervene ... and the Tribunal considers that and may permit it".

1 It is interesting in 16(5) it says: “The request must contain a concise statement of the  
2 matters in issue in the proceedings which affect the person making the request”. There is a  
3 present tense there that does not really apply to Mr Pickford because the matters in the case  
4 do not actually affect him. It is if a range of things might happen in relation to other things  
5 that might at some point in the future affect him, and I will come back to the futurity issue.  
6 5(b): “The request must contain the name of any party whose position the person making  
7 the request intends to support.” We have listened with interest as to precisely who Mr  
8 Pickford is or is not going to support in relation to various parts. We remain slightly  
9 unclear in relation to those matters.

10 But, dealing with the three grounds in turn, the issue of principle is plainly no basis for a  
11 sufficient interest. It would be a licence for any communications provider who might  
12 potentially be buying something from BT where there is a price control in play or, indeed,  
13 not a price control in play, just buying stuff from BT where there might be issues of cost  
14 allocation considered in some price control at some point in the future that they have a  
15 sufficient interest to turn up. That is not a sufficient interest.

16 If I may, I am just going to hand up three documents. The first is just the Tribunal’s  
17 Judgment in *EE* in relation to an intervention. The second is just a European Court  
18 Judgment dealing with these sorts of issues. If I may, just dealing with the *EE* authority, the  
19 key issue that I simply want to highlight there is the consideration of the way in which  
20 appeals and interventions in appeals should be handled. In this case *EE* was permitted to  
21 intervene in relation to matters concerning WLR/LLU. Paragraph 5:

22 “Parties should not expect that the Tribunal will automatically grant permission to  
23 intervene wherever a party is potentially affected by the outcome of proceedings in  
24 its capacity as a purchaser of the relevant services.”

25 That is somewhat ironic because, of course, Sky is not a purchaser of the relevant services.

26 “Even if the other parties do not object, sufficient reasons must be advanced to  
27 allow the Tribunal properly to determine whether a proposed intervener has a  
28 sufficient interest and whether allowing the intervention would be consistent with  
29 the just, expeditious and economical conduct of the proceedings. This is  
30 particularly the case where the potential intervener has not itself challenged the  
31 decision on its own appeal and where it seeks to intervene in support of an  
32 appellant, as opposed to the regulator. It would generally be the case that the  
33 appellant would be well placed to make all relevant submissions in support of its  
34 appeal.”

1 That is echoed in para. 10.5 of the Tribunal's own Guidance in relation to interventions.  
2 The second matter I just take the Tribunal briefly to is there is an awful lot of learning at a  
3 European level in relation to interventions in the European Courts.

4 THE PRESIDENT: Do we need to look at that?

5 MR BEARD: All I was going to highlight was that there is consistent authority saying where you  
6 are interested in the outcome of arguments that is not an interest for the purposes of Article  
7 40 of the Statute of the Court of Justice.

8 THE PRESIDENT: They have their own Statute.

9 MR BEARD: Yes, although the terms "interest" and "sufficient interest" clearly mean relevantly  
10 similar things in these circumstances. What is being said there is lots of people can have  
11 concerns about the outcomes of arguments because they may be applicable in all sorts of  
12 circumstances.

13 THE PRESIDENT: I do not think we need to start looking at a lot of European authorities to  
14 decide a point which is essentially a point of discretion in case management.

15 MR BEARD: Obviously it is, but what is instructive is that the way in which the European  
16 Courts have considered the question of interest narrows the circumstances and particularly  
17 precludes ----

18 THE PRESIDENT: They are very restrictive on intervention, we all know that, much more so  
19 than we are.

20 MR BEARD: It is entirely consistent with the approach in *EE*, and in those circumstances ----

21 THE PRESIDENT: In that case *EE* will do us, will it not.

22 MR BEARD: I am delighted that we do not need to go any further.

23 THE PRESIDENT: I am not stopping you, Mr Beard, but honestly, there has to be a limit to what  
24 we need to look at on this point.

25 MR BEARD: I am sure there is no limit, but we will try and curtail it nonetheless. The point  
26 being that essentially the first application is one saying that the general thrust of the legal  
27 argument that is being developed by Verizon is one that we have an interest in not in  
28 relation to these specific products, that is simply not a sufficient interest. There is no issue  
29 there, and in those circumstances that basis for the intervention must be rejected.  
30 The second point is in relation to it may be down the line some sort of remedies could be of  
31 concern to us and that if they are then we would want to be able to say something about it  
32 because it is possible that it might preclude us in relation to any potential appeal we might  
33 be thinking about making.

1 THE PRESIDENT: It is a bit more than that, he is saying that if it is going to be moved from here  
2 it has to be moved somewhere. Verizon are keen to move it. The effect of Verizon's appeal  
3 is maybe, if they are right, to move these common costs somewhere else and we buy a lot of  
4 the services where it is likely to be moved to.

5 MR BEARD: But undoubtedly there is a degree of futurity about the consideration, because it  
6 depends on Verizon's succeeding in its application and the Competition Commission  
7 deciding that it will carry out the analysis of the reallocation of these costs, reach a  
8 conclusion on those matters and then hand it back to the CAT. Mr Holmes has already  
9 indicated, it is perfectly open, if that point were to be reached in a remedial process, for the  
10 intervention to be made at that point. That might just be understandable, but it is no  
11 economy of process to allow an intervention now which is talking about piling in vast  
12 amounts of material from an expert and asking for disclosure of a wholly different model in  
13 relation to a wholly different price control. As Mr Holmes has said, the speculation about  
14 whether or not they would want to intervene and say something at that point is still  
15 speculation because of course in relation to the fact that any issue about this impacting upon  
16 Mr Pickford's clients, the price control in relation to WLR/LLU is still rolling on.  
17 Of course, in all price controls there is a degree of change and development. The approach  
18 that is being taken here is that once a decision is made in one price control it effectively  
19 carries over into another.

20 THE PRESIDENT: I am sorry, Mr Beard, can I just interrupt there. You mentioned disclosure,  
21 but the disclosure, unless I am getting very confused, is related to the third point, but you  
22 are on the second point at the moment.

23 MR BEARD: What I am talking about is the procedural economy that is suggested of  
24 Mr Pickford coming in now, because it will all be much smoother if Sky is able to pile in an  
25 expert report and seek disclosure of an entirely separate model in relation to different price  
26 control, because that would ease the process before the Competition Commission, a  
27 submission that is apparently made without any sense of irony. That is not economy in any  
28 reasonable sense. Economy would be to say, "You do not intervene at this stage, if the  
29 various matters that would be necessary to come to pass for your hypothetical interest to  
30 arise do come to pass, then feel free to make an application at that point. We do understand  
31 your point". It will not keep them out of these matters.  
32 Indeed, as I say, and as Mr Holmes has said, there is a question here about how real this is,  
33 given that the WLR/LLU consultation, which really is what concerns Sky and TalkTalk

1 because that governs the products that they actually buy, is being considered at the moment  
2 and will be dealt with. So it is effectively premature to allow intervention.

3 It is entirely contrary to an economy of process. We have already spent an hour and a half  
4 discussing quite what the modalities of Sky's intervention are going to be, quite how they  
5 are going to put their case in relation to these points. One can only wonder at the creativity  
6 of submissions and indeed the length of them that are going to be made if these are matters  
7 are allowed to be raised by way of intervention.

8 That then leaves us with the third point, which is the mistake issue, which essentially has  
9 already been covered by my learned friend Mr Holmes. Ofcom will look at whether or not  
10 there is any mistake. If there is, obviously Ofcom, as a conscientious Regulator, is going to  
11 look after these matters. But in any event, it is a new issue that could and should have been  
12 dealt with by way of a separate appeal if that is what Sky and TalkTalk really wanted. It is  
13 obvious from Mr Pickford's traversing of the Verizon pleadings that it should have been  
14 dealt with as a separate independent issue and was not by Verizon. Mr Woolfe's  
15 intervention simply went to reinforce that point. In those circumstances, to let an  
16 intervention go ahead which is seeking disclosure of a much wider set of information,  
17 which is deeply sensitive and relates to a separate price control, is a matter of some concern.  
18 Mr Pickford's submissions depend on all sorts of things happening in the future which may  
19 not come to pass, and he will be able to protect himself in relation to them. It will disturb  
20 and slow and confuse the process before the CC and it is fundamentally wrong that the  
21 approach to intervention should be predicated on the way in which Mr Pickford puts it, that  
22 there is effectively an interconnectedness between any call in relation to a cost allocation  
23 mechanism here and where cost allocation might potentially be made in the future. It would  
24 mean that anyone could come through the door and demand to come and play before the  
25 CC. That is not the way that the sufficient interest test in Rule 16(1) should be applied in  
26 this case.

27 Unless I can assist the Tribunal further, those are my submissions.

28 THE PRESIDENT: Does anybody else want to join the fray? No, right, Mr Pickford?

29 MR PICKFORD: Sir, the position that was adopted in opposition to this intervention by BT and  
30 Ofcom is essentially that it is a "heads we win, tails you lose" approach, because what  
31 Mr Holmes and implicitly Mr Beard say is this: "On a general point of principle, you  
32 cannot come in on that, because you seem to be sitting behind Vodafone and Verizon, so  
33 there is no need for you to be here", whereas on the second point, "You seem to be wanting  
34 to add something to Vodafone and Verizon, so that cannot possibly be right because you are

1 seeking to expand these proceedings, that is the reason why you cannot come in". On the  
2 basis of that reasoning no interventions would ever be permitted. The whole point is that  
3 we sit, quite rightly, with our own distinct interests that would not be protected by parties  
4 that purchase a different combination of services.

5 Mr Holmes has also adopted a somewhat split personality on the issue of the question that  
6 we raise about whether there is a mistake in relation to what happens on LLU price control.  
7 On the one hand he says that this is a very big and complex issue which the CC should not  
8 possibly be asked to look at it because it would massively expand the scope of proceedings.  
9 On the other hand, he also says, "Do not worry that, we will deal with it and we will provide  
10 submissions in relation to this issue". Again, those two positions are inconsistent and  
11 irreconcilable with one another.

12 We cannot rely on what Ofcom say in relation to the position. Just as Vodafone has had to  
13 challenge Ofcom's reasoning in certain respects, we may not agree with Ofcom's  
14 description of what it has done. We may say it has done something differently, and  
15 ultimately it will be for the CC to decide that issue.

16 On the issue of the procedural economy and what happens in relation to remedies, there are  
17 a number of points that have been picked up. Firstly, it is said that we can always come in  
18 much later on, "Do not worry about, just come in for remedies if your interests are in any  
19 way impacted then". That simply is not going to work. For a start, in order to know  
20 whether our interests are going to be impacted or not, we need to be a party to the  
21 proceedings, we need to see what is going on, we need to see the pleadings, we need to be  
22 part of confidential proceedings in front of the Competition Commission. Competition  
23 Commission proceedings are not public, so it simply would not work for us to say, "You  
24 can wait and see what happens and if you need to you can apply". We will not know what  
25 has happened.

26 The ordinary course in all of these types of cases is that intervention happens as  
27 contemplated in the Tribunal's Rules in the ordinary way at the beginning, so we are able to  
28 protect our interests if needs be. If we do not need to say anything, we will not.

29 In relation to the other question that arises, where it is suggested, "You can always protect  
30 your interests in some future appeal", we have already addressed the matter of the  
31 LLU/WLR, and I have explained in answer to various questions from the Tribunal in my  
32 earlier submissions why we say that would not be sufficient, we would be prejudiced by  
33 having to do it that way.

1 In any event, there is a further issue, which is as highlighted in our application at para.50.  
2 We do not merely also purchase local loop unbundling and wholesale line rental, we also  
3 purchase ethernet services. Ethernet services are part of the LLCC which we are concerned  
4 with in this case.

5 Currently, the debate centres on the TI services, not the ethernet services. The TI and  
6 ethernet services are both part of LLCC, and so if the outcome of the proceedings was that it  
7 was said, “Oh, well, in fact, some more common costs should be allocated instead to  
8 ethernet services”, now would be the time to stick up a hand and say that we disagree with  
9 that because there will not be a further appeal in relation to that issue. That is all part of  
10 now.

11 MR BEARD: Sorry, just on that, it was not raised at all in opening, this point on ethernet. There  
12 is no appeal in relation to ethernet at all. This is another example of the ambit ----

13 THE PRESIDENT: No, but this is the “sufficient interest” point.

14 MR BEARD: Yes, but ethernet is not under appeal, so how is it of sufficient interest in relation to  
15 a product that is not purchased by Sky to start saying, “Ah, well, there is something that is  
16 not under appeal and we would like to bring it in”. If that were a real concern ----

17 THE PRESIDENT: It could be affected. The point is that whereas the LLU/WLR cannot be  
18 affected by what happens because it is a separate price control, he is saying this price  
19 control includes ethernet which he does buy.

20 MR BEARD: If that were the concern, then obviously that is a matter he should have appealed,  
21 because it is covered by this price control.

22 THE PRESIDENT: I think at the moment he is saying it means that it adds to his sufficient  
23 interest or he claims it to be of sufficient interest.

24 MR PICKFORD: Sir, we obviously would not have appealed it because we were content with the  
25 status quo in terms of the outcome, and had there been no appeal here we would not need to  
26 be here. Our concern is, if successful, Vodafone’s appeal may lead to re-allocation. Indeed,  
27 it is the implicit premise of their appeal, that there probably should be some re-allocation of  
28 common costs away from the services they buy to other services, the services that we buy,  
29 some in this price control, some in other price controls.

30 In terms of economy of process, Mr Beard has suggested that I am arguing that it is  
31 economical for us to be able to seek disclosure. That is not the argument I made, with  
32 respect. That has confused two separate issues. Obviously we accept that some small  
33 amount of further disclosure will lead to a further complication in relation to these

1 proceedings, but it is modest and it is proportionate and it is appropriate in the context of  
2 adding to Ground 2.

3 The economy point goes to our ability, quite irrespective of that issue, to be able to be  
4 present in these proceedings to protect our interests in relation to any remedies that may be  
5 effectively imposed by the CC. It is not merely an economy of process, it is also an issue of  
6 our rights and prejudice to us because if we are not able to make those submissions then we  
7 may be materially prejudiced by decisions of the CC which go against our interests. To  
8 suggest that this is a floodgates scenario and if we are permitted so will everyone, that is  
9 simply wrong. We are BT's, as I understand it, two biggest customers. That is a material  
10 part of the reason why we have a very, very strong interest in being here, to ensure that our  
11 interests in relation to the purchase of services to which these are the common costs are  
12 protected.

13 Obviously if there was someone before the Tribunal that had some very, very distant  
14 concern that was not really part of their business, they would be material considerations to  
15 take into account and the Tribunal might consider that in those circumstances it was too  
16 remote. We are not too remote, we are integrally involved in this industry. We purchase  
17 the other services to which common costs may get allocated in very large quantities. We  
18 are, we would submit, parties with a more than sufficient interests.

19 I have nothing further to add, unless there are any questions from the Tribunal.

20 THE PRESIDENT: Mr Holmes, did you want to say something?

21 MR HOLMES: It was simply to say, Sir, we do not understand how this appeal could possibly  
22 dig up the cost allocation to ethernet because it is not under appeal. We do not understand  
23 how any sufficient interest arises from the fact that ethernet happens to be in the same price  
24 control. Verizon and Vodafone accept the costs allocation as regards ethernet and the  
25 common costs resulting from migration to ethernet.

26 THE PRESIDENT: If the appeal was successful is it your position that anything that Ofcom was  
27 required to do as a result of that could not include something that would affect the ethernet?

28 MR HOLMES: I am wary of saying never, because one does not know quite how ----

29 THE PRESIDENT: I just want to know in principle.

30 MR HOLMES: In principle it is just outside the scope of the notice of appeal, Sir. How could the  
31 CC or the Tribunal ----

32 THE PRESIDENT: If they disturb the TI and succeed in that and the CC think that it was wrong  
33 and the costs should be allocated, could they not require them to be allocated to ethernet?

34 MR HOLMES: Only if someone was appealing and saying that the costs should have gone ----

1 THE PRESIDENT: They are appealing, they are appealing TI. They have to go somewhere, do  
2 they not? Could Ofcom be required by the CC, theoretically, and I am only talking about  
3 theoretically, to re-allocate the costs to the ethernet?

4 MR HOLMES: Personally I struggle to see how. The costs could go to a number of different  
5 locations, but within this price control a certain amount of costs is attributable to ethernet  
6 and that conclusion is not challenged. Even if it were accepted that too much common costs  
7 had been left within TI I do not see that the Competition Commission could reach a  
8 conclusion that those costs should have gone to Ethernet when everyone accepts that that  
9 bucket of costs ----

10 THE PRESIDENT: You are saying that the Competition Commission's remedy, as it were, or the  
11 Competition Commission's instructions, or the Competition Commission's Report – I do  
12 not know technically what it is – if those were successful could only require costs to be  
13 taken out of the price for TI and those costs would just have to float off into the limbo,  
14 would they?

15 MR HOLMES: Yes, Sir. My learned friend, Mr Vinall, is just drawing my attention to para. 73  
16 of the Verizon/Vodafone notice of appeal.

17 THE PRESIDENT: I think what he seems to be saying is that they did take some out for  
18 migration to Ethernet, but they did not take any costs out, is that right? That is what they  
19 are saying, that you did not take any costs out for migrated other services.

20 MR HOLMES: There is a chorus of nodding behind which seems to suggest that we are on the  
21 right tracks.

22 THE PRESIDENT: I think that might even be accepted, actually, and it should have done.

23 MR HOLMES: Yes.

24 THE PRESIDENT: So on that basis you say it cannot therefore affect.

25 MR HOLMES: So the fact that they buy Ethernet does not seem to us to confer a sufficient  
26 interest, because ----

27 THE PRESIDENT: It cannot be affected?

28 MR HOLMES: It cannot be affected, yes, Sir.

29 THE PRESIDENT: Mr Pickford, is that a complete answer to that point?

30 MR PICKFORD: Sir, it is not a complete answer in that, of course, one of the difficulties we all  
31 have currently is that we do not know what the Competition Commission will ultimately  
32 decide, but one of the possibilities is that by upsetting the applecart in relation to the  
33 allocation of costs in relation to TI the Competition Commission decides that in fact there  
34 should be some general reallocation and that perhaps some more costs should go to

1 Ethernet. Obviously, we are not suggesting that Vodafone is saying that; we hope that it  
2 does not.

3 THE PRESIDENT: The question is whether that could happen, that is what I was asking Mr  
4 Holmes about.

5 MR PICKFORD: It seems to be at least a theoretical possibility ----

6 THE PRESIDENT: Well, it seems to be not ----

7 MR PICKFORD: -- because Mr Holmes said he was not willing to totally rule out of account the  
8 possibility that there could be some reallocation in the future, and the disturbance ----

9 THE PRESIDENT: Yes, but in another price control or in the amendment, in the hypothetical  
10 amendment of this price control?

11 MR PICKFORD: It obviously depends on what the Competition Commission decides about the  
12 general principles of how these common costs should be allocated. Certainly, the more  
13 likely result would appear to be that they are going to be allocated to LLU/WLR, and that is  
14 obviously the principal concern that I focused on, but I just wanted to make it clear that was  
15 not the only service that we bought in case there was any misapprehension about that.

16 MR FREEMAN: As it is Ofcom's decision and Ofcom's price control on the Ethernet issue, you  
17 could probably count on them to say to the Competition Commission that this has already  
18 been dealt with and it is not for the Competition Commission to try and re-enter that  
19 territory. Would that not be a fairly safe bet?

20 MR PICKFORD: We would always obviously ----

21 MR FREEMAN: Does it need you to say it?

22 MR PICKFORD: All parties always obviously hope that Ofcom will see the public interest in a  
23 way that coincides exactly with their view. The whole reason we have appeals is that  
24 sometimes there are divergences of view, and Ofcom's view does not necessarily marry up  
25 entirely with ----

26 MR FREEMAN: But this would be an aspect of a price control decision which has already been  
27 made and which has not been appealed.

28 MR PICKFORD: That is correct. It does not mean that it can be necessarily subject to ...

29 MR FREEMAN: Everything is possible, but we have to rate to probabilities.

30 THE PRESIDENT: I think it is probably likely we will want to reach a decision on this now and  
31 then everyone knows where we are, so we will retire for ten minutes or so to see if we can  
32 do that.

33 (Short break)

1 THE PRESIDENT: Mr Pickford, we are not going to allow the application to intervene, and we  
2 will give our reasons as soon as possible, almost certainly early next week.

3 MR PICKFORD: (After a pause) Sir, may I just take instructions for one moment?

4 THE PRESIDENT: Yes.

5 MR PICKFORD: Sir, may I be permitted to leave with the Tribunal's permission.

6 THE PRESIDENT: Of course, yes. You are, I think, involved in the next application but you are  
7 separately represented, is that right?

8 MR PICKFORD: Yes, one of my clients, TalkTalk is separately represented in the next one.

9 THE PRESIDENT: In the group, as part of the group?

10 MR PICKFORD: That is correct.

11 THE PRESIDENT: Yes, of course.

12 MR PICKFORD: Thank you.

13 THE PRESIDENT: Now, is it convenient to deal with the next application to intervene, which I  
14 think is by the group? I know that is in a different appeal, but is that going to inconvenience  
15 people? I suspect we are going to be in the afternoon, probably, are we not?

16 MR WOOLFE: Actually, I think there might be a surprising degree of agreement that we might  
17 get through it. We are really, I think, in the Tribunal's hands as to what it wants to do and  
18 the order it wants to run things. Given that Mr Pickford is now departing there is no  
19 pressing reason to take anything in any particular order.

20 THE PRESIDENT: I cannot remember now, is the application by the group contested?

21 MR HOLMES: Not by us, Sir.

22 MISS BERRIDGE: I understand it is not contested by any of the potential parties.

23 THE PRESIDENT: Who represents the group?

24 MISS BERRIDGE: I do.

25 THE PRESIDENT: Do you want to make the application to us now?

26 MISS BERRIDGE: Only if you think it necessary.

27 THE PRESIDENT: I think we do, actually, because we were anxious that these matters should be  
28 kept within bounds.

29 MISS BERRIDGE: Absolutely.

30 THE PRESIDENT: We have got your very helpful written application, but are there any points  
31 you want to highlight from that?

32 MISS BERRIDGE: I think first it would be helpful to highlight how the five interveners, the  
33 members of the group, intend to co-ordinate themselves to give you comfort that this is not  
34 five separate interventions, this is a single joint intervention.

1 THE PRESIDENT: We understand that you are applying just for one intervention. Also, we  
2 understand that you are applying to intervene only in writing at this stage.

3 MISS BERRIDGE: That is right, and not to call any expert evidence.

4 THE PRESIDENT: Yes. Just tell us in a nutshell what you bring to the feast.

5 MISS BERRIDGE: First, all of the members of the group have a very direct interest in the appeal  
6 as either direct or indirect purchasers of the PIA services that would be available if the  
7 appeal were successful. They also bring a very distinct and different perspective to what  
8 Colt itself can bring to the appeal because they operate across different markets in this area.  
9 So, for example, three members of the group are mobile operators and would use these  
10 services primarily for mobile backhaul services, which are very distinct, and they mean that  
11 the services are bought in a different way, they are brought in a very aggregated and  
12 managed way, and they also face different challenges because they are anticipating this  
13 huge increase in demand for mobile backhaul services as, for example, 4G is introduced.  
14 So by coming from different sectors of the industry, they bring different perspectives on the  
15 importance and usefulness of increased competition for those services.

16 There is also a value in having a significant number of parties represented, because one of  
17 the issues in the Colt appeal is the extent of demand for PIA services which Colt argues that  
18 Ofcom assessed incorrectly. Obviously, having five parties, each of which can talk to their  
19 own projected demand over the period would enable that issue to be understood much more  
20 comprehensively than if only Colt were represented.

21 THE PRESIDENT: Why can you not just feed that through to Colt so that they can put it forward  
22 as a matter of either agreed facts or part of their evidence?

23 MISS BERRIDGE: There are confidentiality issues around those demand projections for one  
24 thing.

25 THE PRESIDENT: We are going to have to have a confidentiality ring in any event, are we not?

26 MISS BERRIDGE: Yes, I think the more important point is having a different perspective and  
27 understanding from operating in different sectors of the market, and those do present  
28 different challenges and mean that the proposed PIA remedy would have a different impact  
29 on members of the group.

30 THE PRESIDENT: It is an impact you support though? You are not saying that the different  
31 impact is a bad thing, you support Colt?

32 MISS BERRIDGE: Yes, they can provide different reasoning why the increased competition and  
33 innovation in those services can be of benefit to them and to their customers.

1 If you would like more detail on that than is in the request itself, we have brought some  
2 extracts from the five parties' responses to consultation, although it is not obviously  
3 addressed directly to this question, where they start to describe some of their different  
4 perspectives.

5 THE PRESIDENT: But that could just be put before the Tribunal, could it not? Or it could be  
6 used by Colt as part of their case. That is what I am saying, really, I just wonder why we  
7 need to have an intervener to tell us that.

8 MISS BERRIDGE: The parties would not wish to rely on what they had said in consultation  
9 only. I was only suggesting showing it to you as the beginnings of the indication as to why  
10 they have a different interest and perspective. I think it is difficult to say exactly now and  
11 not being part of the proceedings what, in particular, they could bring specifically. It is  
12 being part of them and seeing the documents, and being within the confidentiality ring that  
13 allows them to actually show and demonstrate those different perspectives.

14 THE PRESIDENT: (After a pause) Miss Berridge, I think we have probably heard enough now,  
15 we will allow your intervention on the limited terms that it is to be in writing only and kept  
16 as short as possible, but obviously dealing with the additional points from your own  
17 perspective, and then we will take it from there. If you want any further participation than  
18 that, such as coming to the oral hearing then you will have to make another application.

19 MISS BERRIDGE: Thank you, I am grateful.

20 MR HOLMES: Sir, there is one specific point on which we do take a different position.

21 THE PRESIDENT: I thought it was ----

22 MR HOLMES: In relation to the intervention itself, but on their application to put in a reply.

23 THE PRESIDENT: No, well we will come to that. We are not dealing with timing or anything  
24 or, indeed, additional documents. Do not worry, we have not lost sight of that point. So  
25 that has dealt with that. Now, Mr Woolfe, you were making optimistic noises a minute or  
26 two ago?

27 MR WOOLFE: Simply scanning down the agenda it seems to me that we have confidentiality  
28 and disclosure, extent of overlap.

29 THE PRESIDENT: Tell me what is not agreed now.

30 MR WOOLFE: I think in our appeal we have probably reached effective agreement for today on  
31 confidentiality and disclosure. I think we will need to canvas it before the Tribunal.

32 THE PRESIDENT: Shall we deal with timings then?

1 MR WOOLFE: I think maybe we should address timings after we have done confidentiality and  
2 disclosure. What I just wanted to highlight is that overlap and specified price control  
3 matters, that is all essentially agreed.

4 THE PRESIDENT: You thought you told us that you had agreed confidentiality subject to the  
5 wording?

6 MR WOOLFE: I am not entirely sure Mr Beard has agreed, but if I explain to you where we have  
7 reached agreement with Ofcom and then it will allow Mr Beard to make his point of view  
8 known, and I think it might be quite short.

9 THE PRESIDENT: Right, shall we deal with that now then?

10 MR WOOLFE: Yes. Essentially, to explain why we want the disclosure very briefly, we allege  
11 in Ground 2, as you will already have seen in Mr Pickford's submissions, different sets of  
12 errors in respect of, on the one hand common costs in relation to the local access network,  
13 and common costs which do not relate to the local access network.

14 In order to be able to quantify the impact of those two different sets of errors we need to  
15 understand what proportion of common costs relate to each of those two groups. This is not  
16 material which will allow us to plead additional grounds of appeal or to amend our grounds  
17 of appeal. We are not going to be alleging any additional errors off the back of this  
18 material. It goes essentially to remedy.

19 THE PRESIDENT: You want to know what proportion of common costs has been allocated to  
20 each of those?

21 MR WOOLFE: Yes, this is to different parts of BT's physical network and business, as it were,  
22 and so therefore what proportion of the common costs that have been allocated to TI  
23 services arise from, on the one hand, the local access network and, on the other hand, other  
24 matters. As I say it goes to the issue of what adjustment to the price control is actually  
25 made at the end of the day if our errors are made out in the Commission.

26 THE PRESIDENT: You need it just for the remedy, do you?

27 MR WOOLFE: Essentially, that is right. We are not proposing to allege any other grounds or to  
28 amend our grounds off the back of that material.

29 In terms of how we get that information, as I understand it, there are three relevant levels of  
30 information, two of which are held by Ofcom and one of which is not. I say "relevant",  
31 relevant or potentially relevant. One is information about these common costs held at what  
32 is called the service level, the second is at component level, and the third is at a sub-  
33 component level. In a sense, we are still at the early stage of working out precisely what we  
34 need in order to be able to calculate the proportion.

1 As I understand it, Ofcom hold the first two of those sets of information. I understand it is  
2 basically BT's information and Ofcom have it. Their position, as I understand it, is that  
3 they are content to disclose relevant parts of that information to us, subject to BT having the  
4 right to have input and they do not hold the third level of information, and therefore if we  
5 want it we will have to get it from BT.

6 THE PRESIDENT: Yes, so only BT have that?

7 MR WOOLFE: Exactly. We do not have a great desire to obtain a whole load of irrelevant  
8 information. What we want is actually quite narrow. What Mr Holmes, as I understand it,  
9 was going to propose was that a similar procedure be adopted as is being proposed in the  
10 Colt appeal, which is mainly that Ofcom should notify the parties whose confidential  
11 information it is by early next week, and then in this case BT would have seven days to  
12 explain to the Tribunal whether they object and, if so, on what grounds, and if BT does  
13 object essentially it would then be for the Tribunal to decide, but Ofcom would not be  
14 obliged to disclose the information pending the order of the Tribunal.

15 We would be broadly content with that, save that we think that seven days may not be  
16 constructive in this case because we may need to engage with BT to try and agree matters  
17 and avoid coming to the Tribunal at all, so we would say 14 days would be more  
18 appropriate, because we would be optimistic that we can agree an appropriate set of  
19 information to be disclosed.

20 THE PRESIDENT: We need to make sure that this appeal does not, as it were, drag on. In an  
21 ideal world, we want both appeals coming together at the same time?

22 MR WOOLFE: That is why I emphasised that we are not looking to amend our notice of appeal.  
23 This goes to remedies before the CC. Therefore, provided we get this disclosure sorted out  
24 in the summer it will be there for where it is needed come the autumn and the CC is looking  
25 at any relevant issues. So the process of this discovery should not hold up the parties in  
26 completing their pleadings and starting off before the CC.

27 THE PRESIDENT: Is this the only disclosure in dispute? This is not the only disclosure you  
28 want, is it?

29 MR WOOLFE: In our notice of appeal we requested ----

30 THE PRESIDENT: In schedule D.

31 MR WOOLFE: Annex D, yes, we requested disclosure of the model and then, in terms, a broad  
32 request, "such other documents as are sufficient to disclose the proportion of common costs  
33 in the TI control which relates to local access only". In a sense, we do not know precisely

1 what falls within that category until we have seen the model, because then we will know  
2 whether there is anything left over and, if so, what it is.

3 We are not in a position to know what documents BT holds either. That is why we think it  
4 would be productive to have a discussion with BT.

5 THE PRESIDENT: I am just being a bit stupid here. Are you saying you do not need any of this  
6 to argue before the CC as to whether your grounds are correct?

7 MR WOOLFE: My understanding certainly is that we do not need it in order to argue about our  
8 grounds. It goes to the stage of remedy. It would be unfortunate if this whole discussion  
9 was taking place in, say, November when the CC has issued a provisional determination and  
10 something on remedies, and at that stage the whole proceeding gets held up. We are trying  
11 to do it now by way of good order.

12 THE PRESIDENT: You are saying that this can be dealt with, as it were, by us presumably,  
13 while the matter has gone to the CC - it sounds a little odd.

14 MR WOOLFE: I think it is also agreed between the parties now that the reference to the CC  
15 should only be made at the close of pleadings. We would hope we can agree the questions  
16 before that so that the reference can be made very quickly at the end of the pleadings. The  
17 pleadings are going to take a bit of time.

18 THE PRESIDENT: We will have to discuss that in a moment.

19 MR WOOLFE: It may be less time now that TalkTalk and Sky are no longer part of the party.

20 THE PRESIDENT: We do not want the pleadings to go on for ever because the points are pretty  
21 well ventilated.

22 MR WOOLFE: My point is that if we can have this done in 14 days or perhaps, if there is any  
23 argument, shortly thereafter, but that is going to be done and dusted.

24 THE PRESIDENT: So we can assume that the reference will go off in July. You seem to be  
25 envisaging that this argument about disclosure could bubble on through the summer?

26 MR WOOLFE: I would hope that it would be done before that point, but my understanding of  
27 how a reference from this Tribunal to the CC works, it does not stay the proceedings here.

28 THE PRESIDENT: I thought we would do it today. I thought that any objections would be taken  
29 today and we would just be getting on with it. Mr Beard seems to be agreeing with that.

30 MR BEARD: We had understood that they wanted the material in order to be able to argue their  
31 grounds, at which point we were concerned that there should be a stage built in where we  
32 could object to specific bits of the disclosure and then there would be an amended notice of  
33 appeal or confirmation that one was not going to be needed, so that everything was clarified  
34 and crystallised before things went off to the CC. Now the position appears to be different.

1 It does not matter for the grounds. It is only necessary for remedies, in which case our  
2 position is, you do not need disclosure now because there is a whole stage before the CC  
3 where a provisional determination is made and remedies are then dealt with subsequently.  
4 We may never need to give this sort of material. It is sensitive. We do not accept the  
5 taxonomy of the three levels, but you can immediately see that it is drilling down into BT's  
6 sensitive costs information quite a long way. If it is needed to be disclosed anywhere, rings  
7 or otherwise, we do not want it disclosed and it looks like it is not necessary.

8 THE PRESIDENT: That sounds right, does it not? Is this something that we can just leave over  
9 then. Under the CC procedure, will they want everything, the whole harvest in, including  
10 things they might need on remedy if they were to find that something had gone wrong, or  
11 will they deal with it, as it were, sequentially?

12 MR BEARD: Obviously, the Grim Reaper is sitting beside me in harvesting terms, but it is  
13 perhaps just helpful that there is CC Guidance, CC 13, that sets out two separate stages for  
14 provisional determination and remedy, but I will leave it to Mr West.

15 THE PRESIDENT: Mr West may be able to help us.

16 MR WEST: The position is that we do not need to harvest everything in any fashion, grim or  
17 otherwise, at the beginning. We can take it when it is necessary.

18 THE PRESIDENT: Once you are seized of the matter you will ask them for things that you think  
19 you need, and if they cannot agree, then we will be back here.

20 It sounds, Mr Woolfe, as though we are all ----

21 MR WOOLFE: I can see which way the Tribunal is going. Can I just say that it would be helpful  
22 if we could engage with understanding what material is held so that ----

23 THE PRESIDENT: That is a matter for you to deal with.

24 MR WOOLFE: Yes, but I just wanted to bring it to the Tribunal's attention. If we need to make  
25 a request in, say, October, November, we know what it is that we are making a request for,  
26 and BT will not say it is unparticularised, and so on. That would be unfortunate and it  
27 would hold matters up and we do not want unnecessary delay.

28 THE PRESIDENT: All right.

29 MR WOOLFE: As long as it is understood we can come back.

30 THE PRESIDENT: We are certainly not going to be arguing about hypothetical questions, so I  
31 think we will leave it like that, that you do not need it at the moment. I think you had better  
32 confirm that at some point, I think, a bit more formally, and maybe write to the parties or to  
33 us or everybody just saying that the disclosure in Annex D is not required at this stage.

1 MR WOOLFE: We will write to the Tribunal and the parties in due course. If, for some reason,  
2 we think we are terribly wrong and we need to reapply we will make an application at that  
3 stage.

4 MR SMITH: Just to be clear, you will confirm that this is going to remedy and not to grounds?

5 MR WOOLFE: Precisely.

6 THE PRESIDENT: The optimism was not totally unfounded in that case. What are we dealing  
7 with now?

8 MR WOOLFE: The confidentiality ring is the next item. There is some confidential information  
9 in a couple of our witness statements.

10 THE PRESIDENT: There is no issue about the ring?

11 MR WOOLFE: Except that BT in its letter last night wanted to add some drafting that gave any  
12 party a sort of unilateral right to object to certain material being shown to particular  
13 advisers, and so on. In a sense, if we are the only ones sharing information we are less  
14 concerned about it now. If this ring is going to apply in the information we may want this  
15 information that we are talking about. We think it would be more convenient if the  
16 confidentiality order is made in the form which is attached to our draft order that does not  
17 include that procedure, and then if anybody wants to object to particular information going  
18 to particular people at a certain stage, it is for them to make out the objection.

19 THE PRESIDENT: We had better hear it. The objection comes from Mr Beard, does it?

20 MR BEARD: Yes. It is not an objection this time, it is an addition. The addition is set out in our  
21 letter of 19<sup>th</sup> June. It is probably easiest if you could turn to that page. It is just  
22 clarificatory, that any party at any time in relation to material that is confidential to it can  
23 say, "We are not happy with this going into the ring or going to particular people in the  
24 ring". The reason that these issues arise in relation to particular categories of information is  
25 sometimes because people that are in confidentiality rings have been working on other  
26 matters or are currently working on other matters that, for instance, BT will know about and  
27 are not happy with that material going to them. Obviously we can make an application  
28 without this wording being in the order. There is no issue about that. We thought it was  
29 sensible to put it in. It has been recognised in previous cases in the WLR/LLU, so we are  
30 only lifting wording from another order and saying, "This is not in your standard version".  
31 We are just doing it for clarification.

32 THE PRESIDENT: Sometimes we have a dispute about a person being in the ring at all. This, as  
33 it were, avoids having a dispute about a person, as such.

1 MR BEARD: Yes, there is still scope for disputes about people, I imagine. That has obviously  
2 not been ruled out. This is more specific and it is saying, “You let the person in but there  
3 may be issues with particular pieces of information”. We are not assuming it is going to be  
4 a problem. It may never be operative.

5 THE PRESIDENT: Where is the wording?

6 MR BEARD: It is at the top of p.2 in italics.

7 THE PRESIDENT: (After a pause) Yes, I see.

8 MR BEARD: “Relevant advisers”, obviously the definition is standard in a confidentiality ring.

9 THE PRESIDENT: It is probably just stating what will happen in any case, is it not?

10 MR BEARD: That is what we see. We just thought it is sensible to put it in the order, it has been  
11 in other orders previously. That is it really, I do not have much else to say about it.

12 MR PIKE: Thank you, if I could just briefly address the point for Colt. We also do oppose the  
13 suggestion by Mr Beard for BT. We recognise that in a sense it does only recognise the  
14 position that would apply anyway, in that BT could apply to not have to disclose something  
15 to a particular person, but we do say that it is an unhelpful precedent to allow BT to just  
16 unilaterally refuse to disclose documents to particular people for no particular reason, and  
17 then put the emphasis on the other parties to apply for that disclosure, having already  
18 applied for disclosure generally ----

19 THE PRESIDENT: The only thing, I would say, Mr Pike, is without this what would happen is  
20 that there would be some correspondence. They would say: “We will disclose this into the  
21 ring but we do not want Mr X, who is the relevant adviser, to see it. Then someone would  
22 write back and say Mr X is the relevant adviser and he is entitled to see it. They would say:  
23 “On that basis we will not give it to you until we have gone to the Tribunal to vary the  
24 order.” That is what would happen, is it not, in practice, and I suppose the merit of this is  
25 that it just means that although the last thing we want to do is to encourage any applications  
26 and we very much hope that it would not if we put it in. What difference does it make other  
27 than to have a more orderly ----

28 MR PIKE: We would suggest, Sir, it does not make a more orderly process because it gives BT  
29 licence to withhold information presumptively.

30 THE PRESIDENT: But they could do that though, could they not?

31 MR PIKE: No, because otherwise they would have to make the application to you.

32 THE PRESIDENT: Urgently.

33 MR PIKE: Urgently, to justify why they do not have to give it to this particular person.

34 THE PRESIDENT: Is that a better alternative?

1 MR PIKE: Yes, we would say it is, especially in this situation where it is entirely hypothetical  
2 because, as I understand it, BT is not suggesting that anybody in the ring is in a position  
3 where they have worked on anything such that they would object to that person being  
4 included. They are not suggesting they do not trust the lawyers or economists who have  
5 been put forward. On the point that this has been used before we would note that this has  
6 only been used once before in all the cases that have ever been before the Tribunal, and in  
7 that one particular case the LLU/WLR appeal was quite a special case because of the  
8 situation where there were distinct grounds of appeal relating to very different matters and  
9 experts in relation to each of those different matters who did not need to see the information  
10 in relation to other matters.

11 MR FREEMAN: Mr Pike, in the BT letter we were referred to they say they reserve their position  
12 on external experts. Has that moved on?

13 MR PIKE: Yes, Sir, I believe it has. My understanding is that the agreed position now is that  
14 each of the parties, subject to your agreement, would be permitted to adduce the evidence of  
15 up to two economists and that, I believe, is now agreed.

16 MR BEARD: I think it is just a different point, Sir. As Mr Pike says the reservation in the  
17 position of external experts is our external experts, because, of course, we have not seen a  
18 chunk of the evidence in relation to these proceedings.

19 MR FREEMAN: It is not that you are reserving your position on whether other parties' external  
20 experts are the sort of people who should get your information?

21 MR BEARD: Not yet.

22 MR FREEMAN: But it may come.

23 MR BEARD: The names that we have seen so far we do not have any issue with, but  
24 Obviously ----

25 THE PRESIDENT: We have not made the order yet, there may be other names going in.

26 MR BEARD: No, we are just conscious that that happens in the course of dealing with  
27 confidentiality rings. But at the moment, no. The answer is we are not objecting to anyone  
28 that has been named thus far and we do not anticipate that we will need to trigger this  
29 mechanism, but we just thought it was sensible to build it in, it is as simple as that.

30 THE PRESIDENT: It is really just declaratory, is it not? Am I right, Mr Beard, that that is what  
31 would happen, that even if there was a confidentiality ring in place in the ordinary way you  
32 would just seek to, as it were, withhold information because you knew that Mr X was in the  
33 ring, if you thought that he did not need to see that, or should not see that?

1 MR BEARD: Yes, we would have to do it that way because that is the only way that it can work.  
2 You must always be able to object to the transmission of sensitive information, whether or  
3 not a confidentiality ring is in place or otherwise. In the course of that, to hold the position  
4 obviously the material does not go. The matter then has to be resolved by the Tribunal. It is  
5 not more sophisticated than that.

6 MR FREEMAN: Can I ask Mr Pike whether his clients would take advantage of this formula if it  
7 was included?

8 MR PIKE: I imagine it is theoretically possible, Sir, but again entirely hypothetical, we do not  
9 expect to do so.

10 THE PRESIDENT: We are rather attracted by the idea of having something in there that makes it  
11 appropriate. Now, whether it will get refined as time goes on, but I think for the purposes of  
12 the present case we are minded to put it in. It may be that one should put some time limits  
13 on things in due course. I am not going to start drafting it now but it may be the procedure  
14 would benefit from putting people on the spot so they cannot just do it to delay or drag  
15 things out. Mr Holmes, you did not leap to your feet on this -----

16 MR HOLMES: Not at all, Sir, no.

17 THE PRESIDENT: You are taking a lofty, neutral approach, are you?

18 MR HOLMES: We did not take any position on that. There is one connected point on the Colt  
19 confidentiality order which we could either take now or after the Colt disclosure application  
20 as the Tribunal sees fit.

21 THE PRESIDENT: Is it better to do it after that, I do not know.

22 MR HOLMES: It makes no difference to the point. It is simply that a variety of people's  
23 confidential information has been sought in the Colt proceedings, and Ofcom took the view  
24 that it was proper to raise with those people the fact that their information was being sought.

25 THE PRESIDENT: It may not mean parties.

26 MR HOLMES: It may not mean parties, indeed, Sir. Well, some of them are parties.

27 THE PRESIDENT: Some are not.

28 MR HOLMES: Some are not, indeed. We have heard that from some of them. One of them, O2  
29 has raised a specific concern that it wishes to be able to object to members of the  
30 confidentiality ring from being admitted and given access to its confidential information.  
31 So I think what O2 has in mind is that usually in the course of these appeals the  
32 confidentiality ring shifts over time, the membership changes, and this is a very small  
33 world. There are obviously a limited number of people, and there may be particular reasons  
34 why O2 might object to its confidential information going to certain specific individuals.

1 THE PRESIDENT: They should clearly be entitled to do that.

2 MR HOLMES: We thought that given are the only ones of the people in question who have  
3 raised this concern it could be dealt with simply by – does the Tribunal have the draft order  
4 in the Colt proceedings, the order establishing the confidentiality ring, not the general  
5 procedural order?

6 THE PRESIDENT: Yes, I have it somewhere.

7 MR HOLMES: At para. 6 you will see that there is provision for additional people to be added.  
8 We thought one could simply add the words after “to the Tribunal” “on notice to O2” so  
9 that any application would be made to O2 and their interests would be protected by knowing  
10 that ----

11 THE PRESIDENT: Which paragraph?

12 MR HOLMES: Paragraph 6 of the confidentiality ring order.

13 THE PRESIDENT: I have “Costs reserved” on that, I think it is the wrong confidentiality ring  
14 order.

15 MR HOLMES: There may have been developments. The latest version, I think, has at 6 a  
16 provision relating to addition of people. So, subject to any objections anyone might have we  
17 propose to simply add after the reference to applying to the Tribunal that the application  
18 should be “on notice to O2” so they shall apply to the Tribunal “on notice to O2”. It is a  
19 minor point but we feel that O2 having raised the point ----

20 THE PRESIDENT: Any comments on that? That seems a very ----

21 MR PIKE: No.

22 MR HOLMES: I am grateful for that.

23 THE PRESIDENT: Thank you for that, Mr Holmes. So we have to deal with disclosure then, do  
24 we, on Colt? Apart from the point that Mr Holmes has just dealt with, are there any  
25 objections?

26 MR PIKE: We understand there are not, Sir.

27 THE PRESIDENT: Which is the best order to be looking at from all your points of view? I think  
28 I might have more than one version. I have a Colt one.

29 MR PIKE: Yes, there should only be one for Colt, produced late last night.

30 THE PRESIDENT: Is it the one that ends up “7. There be liberty to apply”?

31 MR PIKE: Yes, that is correct. I am pleased to say that there is broad agreement on the terms of  
32 the order, just a few points that have been raised by the other parties which we have agreed  
33 as changes to this order.

34 THE PRESIDENT: Shall we go through those then?

1 MR PIKE: Yes, Sir. They actually all relate to paragraphs 5 and 6, on timing, we are moving on  
2 to another item on the agenda, but I believe everything else is agreed.

3 THE PRESIDENT: Right.

4 MR PIKE: So point 5(a) in our draft said Colt would indicate whether it intends to apply, by 5  
5 pm on 11<sup>th</sup> July. We have agreed, at Ofcom's request, and with BT's agreement, that it  
6 should say "By 5 pm on 11<sup>th</sup> July Colt to make any application to amend its notice of appeal  
7 consequent on receipt of the confidential disclosure."

8 THE PRESIDENT: I am not indicating necessarily our approval of the timings, but we will go  
9 through that in a moment. "To make any application to amend"?

10 MR PIKE: Yes, so if we receive the confidential disclosure and wish to add some points then we  
11 must make that application by then. On point 5(f) it has been agreed that the interveners  
12 should not have permission at this stage to file a reply or any supporting evidence. If the  
13 interveners wish to apply later for permission to make a reply and put in supporting  
14 evidence then they would have to make a separate application later, and that I believe is now  
15 agreed between all the parties.

16 THE PRESIDENT: So we can just delete that altogether, can we?

17 MR PIKE: Apart from the skeleton argument, Sir, so delete the words from ----

18 THE PRESIDENT: The balance of their skeleton argument.

19 MR PIKE: The final point is on para. 6 of the order, and as I have already alluded to, Sir ----

20 THE PRESIDENT: You are not seeking any – or are you? Two is it?

21 MR PIKE: Two, yes, we only need one, we have submitted the evidence of Dr. Lilico, but we  
22 understand that Ofcom and BT at this point want to reserve the right to potentially use up to  
23 two, and we have no objection to that.

24 THE PRESIDENT: I suppose as long as they are dealing with different things.

25 MR BEARD: From our point of view it is just that different people have been working on  
26 different aspects of what has been going on and therefore it would be sensible to be able to  
27 use them if it is appropriate.

28 THE PRESIDENT: The same applies presumably to you, they are dealing with different aspects,  
29 are they not?

30 MR HOLMES: Yes, Sir.

31 MALE SPEAKER (No microphone): Should one say to non-duplicative experts?

32 THE PRESIDENT: Yes, 'mutually exclusive'. (Laughter) "up to ...", there do not have to be  
33 two.

34 MR PIKE: No, no, absolutely, maximum of two.

1 THE PRESIDENT: Shall we add something like “whose evidence does not overlap” or  
2 something like that. We will think of something suitable.

3 MR BEARD: Non-duplication, yes, but I think “overlap” ....

4 THE PRESIDENT: Yes, right. I have not, I confess, read every bit of this, but would it be  
5 convenient to go through, bearing in mind you are telling us that this is now agreed as  
6 between the parties.

7 MR PIKE: Sir, yes.

8 THE PRESIDENT: We just need to look at the timings, do we not?

9 MR PIKE: Yes. On the timings we are told by Ofcom that their counsel team could not do a  
10 hearing in November, the earliest they could do is December, and that really conditions all  
11 the dates before that in the timetable.

12 THE PRESIDENT: Let us see where we get to, shall we, before we look at when the hearing  
13 should be. I know sometimes it is convenient to work back but it might be convenient to  
14 work forward to begin with. The defence, let us see, what do we have? This is all in 5 is it  
15 not? I am just looking for when the confidential disclosure is envisaged. Where is that in?

16 MR PIKE: That is in para.4, Sir. There is this process of giving third parties the right to object,  
17 and we envisaged that we need to allow about a week to ten days for that.

18 THE PRESIDENT: All right.

19 MR BEARD: If it assists, Sir, as Mr Pike has already indicated, some of the material at least may  
20 well be BT’s material. Whilst this is a sensible process by which we can get to see what of  
21 our material is being disclosed and can comment so that we do not have an objection to the  
22 order, we do still have concerns about what it is that is being suggested for disclosure and  
23 the way it may be disclosed. For instance, there is a proposal for anonymisation of material,  
24 but we are concerned that actually you will be able to work round that relatively easily if  
25 you are knowledgeable about the telecoms world.

26 THE PRESIDENT: There is going to be a letter by Ofcom on 24<sup>th</sup> June to all these people, but I  
27 gather from what you say that you have already done that.

28 MR HOLMES: Yes, Sir, there might need to be, in relation to at least one person, further  
29 correspondence because it was not clear exactly what material was being sought, and  
30 therefore the relevant paragraphs of the decision were not drawn to their attention when  
31 deciding whether they had any objection or not.

32 THE PRESIDENT: We will leave it at the 24<sup>th</sup>. I think that is not very long.

33 MR HOLMES: Certainly the seven day period might be truncated for others, but BT will have its  
34 own views.

1 MR BEARD: I do not think it is sensible to constrain it any further.

2 THE PRESIDENT: I am looking for when the disclosure takes place?

3 MR PIKE: That is in para.4(e), Sir, it says disclosure within three days.

4 THE PRESIDENT: I see, within three days of the seven day period.

5 MR PIKE: I believe it would be 4<sup>th</sup> July, Sir.

6 THE PRESIDENT: It would be about 4<sup>th</sup> July, would it not? Let me make a note of that. That  
7 gives you a week then, Mr Pike, to decide if you want to amend?

8 MR PIKE: Sir, yes.

9 THE PRESIDENT: That is probably reasonable. I just wonder why the interveners necessarily  
10 see it all before. They must know what they want to say in their statement of intervention,  
11 they have probably drafted it by now. It sets it back again, does it not? Is it going to make  
12 any difference? There may not be an amended notice of appeal. If there is, it is doubtful  
13 that it would make any difference to the kind of material that you want to put,  
14 Miss Berridge, is it not? Do you really need to have another week after that? Can you not  
15 serve it about the same time?

16 MISS BERRIDGE: I think it is very difficult without seeing what the amendments might be.

17 THE PRESIDENT: The stuff that you are going to put in is all about the fact that you are in a  
18 different market, all those things. It is not really ----

19 MISS BERRIDGE: We do have the duty not to duplicate anything that Colt has said, so there is  
20 that onus on us to have reviewed what they have written and indeed to co-ordinate among  
21 the five parties in preparing our submissions.

22 THE PRESIDENT: Miss Berridge, we think you should put your notice in by 11<sup>th</sup> July.  
23 Obviously, if there is an application to amend by the appellant then you can make your own  
24 application, if necessary. I think yours should be put in, bearing in mind what it is. I do not  
25 think you need to wait until you see whether they want to ----

26 MISS BERRIDGE: We have just heard from counsel for Colt that one of the aspects they may  
27 need to amend following confidential disclosure is about demand, which is where we feel  
28 the group may have important additional matters to bring to bear. We do think that some  
29 additional time would be appropriate.

30 THE PRESIDENT: I think you should just get on with it, bearing in mind what you are  
31 intervening on. It is perfectly feasible there will not be an application to amend. I think you  
32 should put it in, because it just strings everything out and extends the overall time limit. I  
33 think it is better if it is done.

1 MR BEARD: Sir, I do not want to anticipate where we are going in a moment, but there is a big  
2 problem with August. Part of the issue with the timing on the BT submission is that we will  
3 have real difficulties with availability and preparing our statement of intervention during the  
4 latter period of August - in fact, during all of August. In the circumstances, I am just  
5 concerned that actually that date of 5<sup>th</sup> September will need to be held. That is as soon as  
6 we think it is going to be feasible to do it, in which case pressure in the earlier dates may not  
7 actually be bringing things forward.

8 THE PRESIDENT: We may have to pressure your date, Mr Beard.

9 MR BEARD: That would be very cruel, Sir.

10 THE PRESIDENT: I am not sure it would be really. We have allowed your intervention for  
11 obvious reasons, but most of this material you will be extremely familiar with, more  
12 familiar probably than anyone else. Let us see where we get to. I am just very concerned  
13 that the CC are going to be - we hope they are going to be seized of this quite soon. They  
14 are going to do their work within a period.

15 MR BEARD: You are dealing with Colt at the moment, not Verizon.

16 THE PRESIDENT: I know that, but we have already agreed that these two appeals need to be  
17 disposed of at more or less the same time so that, as it were, the whole thing, depending on  
18 what the outcomes are, Ofcom are seized of everything they need to be seized of, rather  
19 than this being dragged out and then saying, "We cannot really deal with what has happened  
20 in the Verizon because we do not know what is going to happen in the Colt".

21 MR PIKE: Yes, Sir, if I could just address you on that point, I was not aware that was still a live  
22 issue ----

23 THE PRESIDENT: What?

24 MR PIKE: The extent of overlap and whether things need to move ----

25 THE PRESIDENT: It is not that there is an overlap, it is just that Ofcom have said, and it seems  
26 to be generally agreed, that if the Colt appeal succeeds it could well affect what they would  
27 do on a reconsideration of the price control, which might affect the price control, and  
28 therefore they need to know the result in Colt at the time that the Verizon result becomes  
29 available. So we have to keep the two appeals, although they are separate, not overlapping  
30 in terms of the grounds, *pari passu*.

31 MR PIKE: Sir, can I emphasise, that is not agreed.

32 THE PRESIDENT: It does not matter whether it is agreed. That is what we have formed a view  
33 about. It is clearly desirable that one of them should not be left behind the other

1 dramatically. That is just the view that we have formed, that that would be a good idea.

2 That is the basis on which we are working.

3 MR PIKE: It is actually one of our grounds of appeal, that it would have no impact on the price  
4 control for the ----

5 THE PRESIDENT: Ofcom do not accept that, and for the time being we think there is something  
6 in what they say.

7 MR PIKE: In any event, Sir, our appeal is going to be determined a long time before Vodafone's  
8 and Verizon's appeal if the CC's request for five months for the reference period is  
9 accepted. Even if it is referred in July, or even at the end of June, which is not very long at  
10 all now, that still takes you to December for the end of the reference and then it still has to  
11 come back to the Tribunal to consider whether or not to make an order.

12 THE PRESIDENT: I am getting worried about this idea that there cannot be a hearing in this  
13 before December. It will not take much to say, "Well, actually, we will not be able to do it  
14 by December, it may have to be January". I am concerned about the timing, frankly, of this,  
15 and you are all being quite relaxed about giving a week here and two weeks there on all  
16 these things, but I just want to test it.

17 We have got to 11<sup>th</sup> July at the moment, and we get a statement of intervention from the  
18 group and we get any application to amend from Colt.

19 What is the next thing? Ofcom's defence. There may have to be some slippage if there is a  
20 notice to amend?

21 MR HOLMES: Yes, Sir.

22 THE PRESIDENT: We might have to deal with that on the hoof, but let us assume there is not.  
23 How long do you need after 11<sup>th</sup> July, assuming you get everything from the other parties  
24 by then?

25 MR HOLMES: Sir, we are conscious of not setting a timetable which is so tight that slippage  
26 becomes a serious risk. Given the helpful truncation of the earlier dates, we think that 1<sup>st</sup> or  
27 2<sup>nd</sup> August would certainly be achievable by us, but we would be concerned about going  
28 very much before for two reasons: firstly, because of the evidence of demand which will  
29 accompany the group statement of intervention, evidence potentially from several different  
30 operators that will need to be considered and dealt with in the defence; and secondly, in  
31 case there were amendments, we would obviously like, if possible, to deal with them  
32 promptly without the need for the timetable to be revisited. The 1<sup>st</sup> or 2<sup>nd</sup> August, we feel  
33 comfortable with, as presently advised.

34 THE PRESIDENT: Can we go with the 1<sup>st</sup>?

1 MR HOLMES: Yes, Sir. I am so sorry, Sir, those instructing me have raised the fair point that  
2 there is an administrative task at the end of settling the notice of appeal which we need to  
3 take into account. The preference of those instructing me would be 2<sup>nd</sup> August, if that could  
4 be accommodated within the timetable.

5 THE PRESIDENT: All right, the 2<sup>nd</sup> then. Why do you need all that time, Mr Beard?

6 MR BEARD: Because people are away, Sir.

7 THE PRESIDENT: They must be able to do things during July, must they not?

8 MR BEARD: I am sure they will beaver away and we will do our utmost to pull things together  
9 during July, but we will not actually have seen Ofcom's submissions, and in those  
10 circumstances there are limits to what can practically be done. The truth is that a number of  
11 members of the team are not going to be around in the first three weeks of August.

12 THE PRESIDENT: I am sorry, no, I do not think we can say that because a number of members  
13 of the team are not around we can give you effectively five weeks. This is all stuff that your  
14 clients will be extremely familiar with. What we are working up to is trying to see whether  
15 we can accommodate a hearing before - you are stuck in November, is that what you are  
16 saying?

17 MR HOLMES: Yes, Sir, there is a difficulty in particular because Ofcom is going to be in  
18 another appeal which will run in the first part of October but then there are some follow on  
19 hearings scattered, I think. I am not sure if any present members of the Tribunal are  
20 involved in that case, but there are then two subsequent hearings of two days each, as I  
21 understand the position in mid-November, and then a week late in November, and I am  
22 instructed that that will create difficulties for those instructing me in relation to November.

23 THE PRESIDENT: October would be better then?

24 MR HOLMES: October would suit us better, yes

25 MR BEARD: I am sorry, Sir, I do not mean to be unhelpful, but it sounds, from what Mr Holmes  
26 is saying, is that there are actually periods in November that are feasible for Ofcom as well,  
27 when they are not in the Tribunal. It is not suggested that it is the same counsel team that is  
28 dealing with the hearings in November anyway. I quite understand that Ofcom's staff itself  
29 will be interested in both sets of proceedings, but to say that November is therefore off  
30 limits for the listing of this hearing does not seem quite right, with the greatest respect.

31 THE PRESIDENT: How long is Ethernet set down for? 28<sup>th</sup> October to ?

32 MR HOLMES: My understanding is there is one hearing between 28<sup>th</sup> October and 8<sup>th</sup>  
33 November. There is then a subsequent hearing between 14<sup>th</sup> and 15<sup>th</sup> November, and a third  
34 one from 20<sup>th</sup> to 22<sup>nd</sup> November, but there will, of course, be preparatory work to be done

1 between those hearings which will involve Ofcom's legal services. We do not pray this in  
2 aid but my learned friend, Mr Vinall, who is instructed on this appeal is going to be on  
3 parental leave during the month of November, so it would certainly be more convenient for  
4 us to have the full complement of team in October if a hearing could be arranged, but I did  
5 not raise that because, given that we are a counsel team of more than one member, it  
6 seemed like a less significant consideration.

7 THE PRESIDENT: I think the estimate for this is – have we got an estimate?

8 MR HOLMES: Our estimate is three to four days, I do not know whether that is agreed.

9 MR PIKE: Yes, it is.

10 THE PRESIDENT: Right. Let us just continue through the timetable then. Sorry, we are taking a  
11 bit of time up, we may have to have a break at some point, because we have to do Verizon's  
12 timetable too, have we not? Mr Beard, I am afraid you are going to have to do better than  
13 this on the statement of intervention. I think a lot of it you will be able to do probably  
14 without seeing the defence.

15 MR BEARD: As I say, undoubtedly we will be able to do work. It is striking that the reply,  
16 which is at the moment due on 3<sup>rd</sup> October, to a defence that was served almost two months  
17 ago on this timetable.

18 THE PRESIDENT: We have not agreed 3<sup>rd</sup> October.

19 MR BEARD: No, no, I understand that, but the point I am making is if that date were to be  
20 brought forward into September then it would still leave a substantial time for the other  
21 steps to be taken.

22 THE PRESIDENT: Well, we are on the statement of intervention at the moment. I think you  
23 should do it in a week really, after this. Most of the work will have been done and it is  
24 really just a question of seeing whether, as it were, there is a duplication or some point that  
25 is raised in the defence that changes something you want to do. I think we are going to put  
26 in 9<sup>th</sup> August for the statement of intervention, otherwise I am afraid November will be out  
27 and we will be lucky to hear it this year. By the same token 3<sup>rd</sup> October is far too late.

28 MR PIKE: Sir, yes, if the reply is due on 9<sup>th</sup> August we accept that. We do have the same issues  
29 as BT in terms of August availability both for the counsel that we plan to instruct and for  
30 experts and our client's internal staff. Also, we will need a certain amount of time to  
31 respond to whatever BT brings forward. They are anticipating, possibly, two expert reports  
32 as well as factual evidence. I must say, we struggle to see that this is going to make much  
33 difference to the trial timetable.

34 THE PRESIDENT: What I am trying to do is arrange it so we can have a hearing in October.

1 MR PIKE: My understanding is that the Ethernet appeal starts on 28<sup>th</sup> October.  
2 THE PRESIDENT: Yes, before that.  
3 MR PIKE: So it would have to be quite a long time before that with preparation for that  
4 presumably. It just feels like we are trying to really crush everything into a very, very tight  
5 period.  
6 THE PRESIDENT: That is what we have to do, because we cannot just string it out for ever. At  
7 the moment, as I say, on this timetable I think we will be very fortunate to have a hearing  
8 this year.  
9 MR PIKE: Nobody objects to a hearing at the end of November or in early December, and  
10 realistically if we cannot fit in a hearing then, then the hearing for the Verizon appeal for the  
11 potential judicial review on the Competition Commission's determination would not fit in  
12 either which we anticipate could not possibly be heard before, at least January if not  
13 February. I am just concerned that there are a lot of parties who are going to have real  
14 difficulties.  
15 THE PRESIDENT: Well, the parties brought the appeals.  
16 MR PIKE: This party did, yes, BT did not. (Laughter)  
17 THE PRESIDENT: Let us just see what it looks like. Let us say 12<sup>th</sup> September for all Colt's  
18 replies, and supporting evidence and anything of that kind.  
19 MR PIKE: Thank you.  
20 THE PRESIDENT: You will have quite a lot to look at. Then we are into skeletons now. (After  
21 a pause) What we are minded to do is to list this hearing for the week of 14<sup>th</sup> October, and  
22 then it is a question of working backwards to do the skeletons back from that. The first  
23 skeleton is down here as being the interveners. That is your skeleton, is it not, at that stage  
24 as well?  
25 MR PIKE: Sir, yes.  
26 THE PRESIDENT: You may just do one document, possibly?  
27 MR PIKE: We may. It may be two, but maybe one.  
28 THE PRESIDENT: So then interveners. (After a pause) We will say skeletons after 12<sup>th</sup>, 19<sup>th</sup>,  
29 26<sup>th</sup> and 3<sup>rd</sup> October, the latter being BT's, and 26<sup>th</sup> Ofcom's. Is there anything else on  
30 Colt?  
31 MR PIKE: Sir, no, I do not believe so.  
32 THE PRESIDENT: Thank you very much. Shall we turn to the Verizon one?  
33 MR WOOLFE: My understanding is that there are really only two dates to set, which is the date  
34 for Ofcom's defence, and the date for BT's statement of intervention. Now that disclosure

1 is out of the way and Sky/TalkTalk are no longer here, there should not be any problem  
2 with fitting it all in before any issues about August become a problem. I think Ofcom has  
3 indicated that it can meet the date of 5<sup>th</sup> August which is the default date under the rules.

4 THE PRESIDENT: I am just looking again for the best draft.

5 MR WOOLFE: Sorry, the draft I submitted yesterday with the note – I have spare copies of that.  
6 (Same handed)

7 THE PRESIDENT: Thank you.

8 MR WOOLFE: Perhaps if I just talk you through that swiftly. Item 1: Proceedings in England  
9 and Wales, that is fine. The question of orders as to the intervention of BT, 3 is standard  
10 form. In relation to disclosure I think simply there needs to be provision for the  
11 confidentiality ring and the provisions in Annex A, we will amend in the light of the  
12 Tribunal's indication that it wants BT's extra wording in. The order for (b) and (c) of  
13 para.4 can go for the moment.

14 Then there is a date for providing an agreed draft of questions. The questions are agreed as  
15 between us and Ofcom. BT might wish to comment. I think BT has said that it thinks we  
16 should not look at the questions until pleadings have closed.

17 THE PRESIDENT: We should finalise them.

18 MR WOOLFE: We agree the reference should not be made until that point, we do not see why  
19 we cannot agree the questions beforehand so that they can be made promptly on receipt of  
20 the final ----

21 THE PRESIDENT: I think at the moment, because there is a happy degree of agreement between  
22 you and Ofcom, and BT just want to keep an eye on it, I think on that score we do not need  
23 to do any more today, do we?

24 MR WOOLFE: You do not think there should be a date in this order for the agreed draft to be  
25 filed?

26 THE PRESIDENT: We need a date.

27 MR WOOLFE: We would think that by 5<sup>th</sup> July, which is the date we proposed for Ofcom's  
28 defence, would be ----

29 THE PRESIDENT: We need to see what is happening on the pleadings.

30 MR WOOLFE: All this was premised on the idea of Sky and TalkTalk's much more substantial  
31 intervention and application. There are no interveners in support of us so 6(a) just goes.  
32 6(b), Ofcom, as I say, have previously indicated that it can do the defence by 5<sup>th</sup> July.

33 THE PRESIDENT: I think we were happy with that. That is all right.

1 MR WOOLFE: Then on our draft we previously allowed one week for BT to do the statement of  
2 intervention in support of Ofcom, so you are looking at 12<sup>th</sup> July. In 6(c) we had allowed a  
3 gap of one week after Ofcom's defence for any interveners in support of Ofcom, which in  
4 this case is BT. So if Ofcom's defence is 5<sup>th</sup> July, then it would be interventions by 12<sup>th</sup>  
5 July. Then we would hope that the reference could be made immediately after that  
6 intervention being in.

7 THE PRESIDENT: 4(b), we do not need to worry about a date for that. Effectively 4(b) has  
8 gone, has it not?

9 MR WOOLFE: 4(b) has gone, and 4(c) has gone as well. All we are going to do, and I do not  
10 think it needs to be recorded in an order, is write to the Tribunal.

11 THE PRESIDENT: You are going to write us a letter. We just want a date for agreeing a date,  
12 when you are going to supply an agreed draft of the questions to be referred?

13 MR WOOLFE: We should align perhaps with the date for BT's statement of intervention. I do  
14 not see why we cannot agree it at that. Mr Beard is looking restless, he may object to some  
15 of these dates. Nonetheless, we do not see any reason to have the agreed ----

16 MR BEARD: It is not restless, restive.

17 MR WOOLFE: We do not see any reason to have the draft questions in any later than the  
18 statement of intervention. When BT is in the process of doing a statement of intervention it  
19 can ----

20 THE PRESIDENT: This must go off.

21 MR WOOLFE: We understand the CC thinks a five month reference is appropriate. The CC is in  
22 the best position to judge what it can do. So assuming it was somewhere around the 12<sup>th</sup> or  
23 19<sup>th</sup> July we are looking at the reference coming back in the middle of December.

24 MR HOLMES: Sir, we have no difficulty with any of that, save for the date in relation to the  
25 defence, and Mr Woolfe perfectly correctly says that in previous correspondence we had  
26 stated our belief at the time that we could do this within the ordinary period provided in the  
27 Rules - that is to say six weeks, which runs until 5<sup>th</sup> July.

28 Since then we have obviously been carefully considering the materials and the scale of the  
29 task that is going to confront us in both of the appeals and we think ----

30 THE PRESIDENT: It is not as bad as it could have been, is it not?

31 MR HOLMES: That is true, Sir, and for that we are extremely grateful.

32 THE PRESIDENT: Does that not enable you to keep to the 5<sup>th</sup>?

33 MR HOLMES: I can only tell you that we do have concerns. We will obviously do the best we  
34 can with whatever date the Tribunal feels it necessary to give us, but if we could contend for

1 a longer period, and we would propose that the deadline in the two appeals be aligned for  
2 2<sup>nd</sup> August, if that would be possible?

3 THE PRESIDENT: No. There is something to be said for saying, “Do we really need the  
4 pleadings before we send this off?” There might be something to be said for the defence  
5 being there, and I think there is. I would be very concerned about not being in a position to  
6 send it off more or less as we have the defence.

7 MR HOLMES: Sir, I understand that.

8 THE PRESIDENT: Therefore, that rather does mean that there is a bit of pressure on with the  
9 defence.

10 MR HOLMES: No, I understand completely. Is there some leeway to ----

11 THE PRESIDENT: Then we will have to give Mr Beard some leeway.

12 MR BEARD: Sir, yes, in relation to this, there is a particular problem. We do not have any of the  
13 evidence. There are two expert witness statements and two other witness statements. We  
14 do not have any of that stuff at the moment. We do not know what it is that we are going to  
15 need to engage with. Obviously once the confidentiality ring is set up and we have been  
16 able to get our experts looking at it then we may be in a better position. In these  
17 circumstances, the idea that we could produce a statement of intervention by 12<sup>th</sup> July is not  
18 feasible, and it is infeasible sensibly for us to prepare a statement of intervention by 12<sup>th</sup>  
19 July, only one week after Ofcom has produced its defence. It is just not going to be  
20 workable here, and that is with people being around. It is not the availability problem in the  
21 same during July . It is the logistics of dealing with this material that we have not yet seen.

22 THE PRESIDENT: I can see that we need to make sure there is a dispute - one can see that to  
23 make sure there is a joinder of parties, it is sensible to have a defence in before the thing is  
24 sent off. I am not sure that is necessary because all these submissions are going to be made  
25 again to the CC, we are not going to be dealing with that.

26 MR HOLMES: There is an argument to be made which I think found favour with the Tribunal in  
27 - I am afraid, Sir, these price control cases all blend into one - one of the previous price  
28 control appeals which Mr Smith was Chairman of, that the issues are crystallised in ----

29 THE PRESIDENT: In the defence?

30 MR HOLMES: Even before that stage. It is the notice of appeal which determines the scope of  
31 the appeal, so one might say that one does not - which I understood to be the point that you  
32 were making, Sir -----

33 THE PRESIDENT: It was, yes, but then my second thought was should you actually see what  
34 Ofcom says in its defence before you send it off, because there may be concessions. They

1 may refine something of what is in the notices of appeal. Therefore, is it sensible at least to  
2 see the defence?

3 MR HOLMES: I see that point, but then I suppose the contrary view would be that in so far as  
4 concessions are made then that will simply make the Commission's job that much easier. In  
5 relation to any matter that is not in issue between the parties ----

6 THE PRESIDENT: It might affect the questions conceivably?

7 MR HOLMES: It might render some of the questions otiose, or parts of the questions otiose, in  
8 so far as particular points are not defended. I should say, although we are still in the  
9 foothills, we are not, I think at this stage, anticipating that any of the issues will fall away in  
10 that way. That may be an academic ----

11 THE PRESIDENT: Are you not rather encouraging us not to worry about the pleadings?

12 MR HOLMES: Certainly we do not see it as essential if it is going to create a stumbling block for  
13 giving time to ensure that the issues are properly distilled in the pleadings.

14 MR WOOLFE: Sir, might I raise one point which is the CC Guidance, CC 13, which I think  
15 Mr Beard took you to earlier, normally in a six month reference the CC expects to receive  
16 core submissions two to four weeks into the reference process.

17 THE PRESIDENT: Expects to receive?

18 MR WOOLFE: Core submissions, essentially the parties' written submissions on the issues.  
19 Obviously we need to make sure that all the pleadings are in in sufficient time. Even if the  
20 reference questions go off and the reference starts before pleadings close, we need to make  
21 sure that all the pleadings are in in sufficient time so that those core submissions can be  
22 drafted with sight of everybody's position.

23 THE PRESIDENT: It sounds sensible. I think we are minded to squeeze you a bit to try and see  
24 if you can keep to 5<sup>th</sup> July on the defence, but if you have to apply for a few more days you  
25 can always try that in correspondence.

26 MR HOLMES: I understand, Sir. At the risk of trying your patience with one final plea, this is  
27 the type of case in which every day may make a difference, so perhaps if the Tribunal could  
28 even manage a week, I think that would be a consideration that would count in our favour.

29 THE PRESIDENT: We will say the defence on the 12<sup>th</sup>. Mr Beard, I see your predicament, but I  
30 think we can perhaps help because I am not sure that that need slow up the reference.

31 MR BEARD: If the Tribunal is minded to order that the reference question goes off, we will  
32 obviously be able to discuss the reference once the defence is finalised whilst we are  
33 working on finalising this statement of intervention. We would then perhaps submit,  
34 assuming we are talking about the 12<sup>th</sup>, there will be discussions on the reference question,

1 if we can have until 2<sup>nd</sup> August to lodge our statement of intervention we will get that over  
2 to the Competition Commission then.

3 THE PRESIDENT: We will say 2<sup>nd</sup> August for your statement of intervention. In the meantime,  
4 is there any reason why we cannot have an agreed draft, or whatever, rival drafts, by either  
5 the day of the defence or very soon after?

6 MR BEARD: I would have thought you want to build in a week after the defence to get a final  
7 draft of questions, but I will leave that to Ofcom. We can certainly participate in that  
8 process and we have had sight of the defence we can pass on our comments.

9 THE PRESIDENT: That sounds sensible, a week after the defence we will have an agreed draft  
10 with a view to sending it off more or less straight away.

11 MR WOOLFE: That sounds fine from our point of view, as long as it understood that the  
12 statement of intervention coming in after the reference is made does not unduly squeeze the  
13 parties in making their core submissions.

14 THE PRESIDENT: The trouble is, it is going to get pushed back if we do that, is it not?  
15 Mr West, you have been very patient in all of this?

16 MR WEST: Thank you, Sir. The timetable that I had set out in my note was predicated on us  
17 effectively starting work after the close of pleadings including submissions of intervention  
18 that would come in by 17<sup>th</sup> July. The five months we say we need is actually taking account  
19 of August. We can obviously start work as soon as we get the questions and as soon as we  
20 get the defence, but the amount of time we get for the period overall obviously depends  
21 upon what date we get the statements of intervention and how substantial they are.

22 THE PRESIDENT: We are minded to send the reference before the statement of intervention, but  
23 it probably would not be very long, and obviously your five months which you have asked  
24 for and, I think, subject to anything that anybody else wants to say, nobody objects to that.  
25 That sounds a reasonable time.

26 MR WEST: That would be perfectly acceptable.

27 THE PRESIDENT: As Mr Smith is saying, if we get the draft questions agreed by the 19<sup>th</sup> July,  
28 that is a week after the defence, we obviously need some leeway so we would send it off to  
29 you by the 22<sup>nd</sup>. That leaves time for anyone to tweak it or argue about it ----

30 MR FREEMAN: That sounds a very nice Christmas present!

31 MR WEST: That was our thinking. There is a point when you get into December where it makes  
32 almost no difference, getting it done before the end of the year and giving people time to  
33 have it on their desks before they go off for Christmas ----

1 THE PRESIDENT: I think the best thing is, could I ask the parties in both appeals then, because I  
2 think we have covered almost everything – I hope it is everything now – to let us have an  
3 agreed draft. I know you still have to talk about the confidentiality side of it a bit.  
4 MR WOOLFE: I think it is probably just a matter of settling it on the basis of the Tribunal’s  
5 indication.  
6 THE PRESIDENT: And also could we have draft orders of directions that we have covered now?  
7 MR WOOLFE: Yes, I do not think there is anything else that you need to cover for our appeal.  
8 THE PRESIDENT: Is there anything that anyone can think of that we have not dealt with?  
9 MR BEARD: As a matter of formality BT would ask for permission to intervene in both appeals.  
10 THE PRESIDENT: Yes, I think we sort of dealt with that. (Laughter) We would have kept you  
11 very quiet, Mr Beard. If we had been minded to refuse ----  
12 MR BEARD: I assumed so.  
13 THE PRESIDENT: Thank you all very much indeed.  
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