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

Case Nos. 1260/3/3/16  
1261/3/3/16

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

23 January 2017

Before:

**THE HON. MR. JUSTICE SNOWDEN**  
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- AND -

**CITYFIBRE**

Appellant

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- with -

**VIRGIN MEDIA  
GAMMA TELECOM  
CP GROUP**

Interveners

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**CASE MANAGEMENT CONFERENCE**

## **A P P E A R A N C E S**

Mr. Daniel Beard QC, and Ms. Ligia Osepciu (instructed by Openreach) appeared on behalf of the Appellant British Telecom.

Ms. Julianne Morrison (instructed by Preiskel & Co LLP) appeared on behalf of the Appellant CityFibre.

Mr. Josh Holmes, Mr. Tristan Jones and Mr. Daniel Cashman (instructed by Ofcom) appeared on behalf of the Respondent.

Mr. Duncan Liddell (Partner, of Ashurst) appeared on behalf of the Intervener Virgin Media.

Mr. Stefan Kuppen (instructed by Towerhouse LLP) appeared on behalf of the Intervener CP Group.

Mr. Tim Johnston (instructed by Charles Russell Speechlys) appeared on behalf of the Intervener Gamma Telecom.

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1 MR. BEARD: Sir, good morning. I appear today with Ms. Osepciu for BT. On my far right is  
2 Ms. Morrison for CityFibre. Just working to my left, Mr. Johnston, who is for Gamma,  
3 Mr. Kuppen for CP Group, and Mr. Holmes and Mr. Jones and Mr. Cashman for Ofcom.  
4 Behind me is Mr. Liddell for Virgin.

5 THE CHAIRMAN: Right.

6 MR. BEARD: Sir, you have, I hope, a bundle of materials and submissions for each party and the  
7 interveners in relation to the agenda points from the Tribunal, for which many thanks. You  
8 should have received on Friday evening our attempt to distil out where we are. Thankfully,  
9 I think, there is a very large degree of concurrence on key matters.

10 Rather than working through the agenda point by point, and given the experience of the last  
11 CMC, I wondered whether it was sensible to skip first to issue 8 which is the timing and the  
12 start of the trial. We are conscious of what happened last time. We are aware of the letter  
13 sent in December from the Tribunal Registry talking about when we might be able to start,  
14 and them not being entirely sure at that stage. We, in our submissions, which are set out at  
15 tab 2, have proposed a start date for the hearing right at the start of the window that was  
16 marked down at the last CMC. Obviously we have done that - and I will not repeat the  
17 submissions I made last time - but given that we lodged this appeal back in June of last year  
18 and we have got a remedy that is supposed to be coming into place on the basis of a  
19 decision in October of this year, we want to get on with this as soon as possible. That is all  
20 well and good so long as the Tribunal can sit at that time, and we can perhaps have a  
21 discussion about it. I thought it was most sensible to perhaps ask that before I went any  
22 further.

23 THE CHAIRMAN: That is very sensible. The position as far as I am aware and I have been  
24 informed is this: as yet, the two other members of the Tribunal have not yet been  
25 appointed, and indeed have probably not yet been found, in the sense that, as you are  
26 probably all aware, there has been a recruitment exercise which is still ongoing, but which  
27 I am reliably informed has produced a large number of very highly qualified applicants who  
28 are at the final stage of interview. Certainly the hope and expectation is that we will have  
29 two people who will be available to start in the window that we discussed.  
30 The difficulties though are these: the closer that we put the start date to the front of the  
31 window and the less accommodation we make for Easter, the more likely it is that those  
32 members will already have their diaries full or have holidays pre-booked, and the like. To  
33 put it a different way, the chance of getting the other two members of the Panel are  
34 improved if we do not try and cram it in right at the very start of the window, possibly in the

1 way I think you were suggesting, or run without a break over Easter, because that may  
2 reduce our options in terms of who is selected.

3 So certainly provisionally, and I am very happy to hear other people on it, I was not minded  
4 to impose a pre-reading week before the start of the window. In essence, I think your  
5 proposal, or certainly somebody's proposal----

6 MR. BEARD: It would be ours suggesting reading beforehand.

7 THE CHAIRMAN: If you do not ask you do not get. You were suggesting, I think, that the  
8 Panel should pre-read in the week of 27<sup>th</sup> March, which I think may be adventurous. My  
9 provisional suggestion was going to be that the Panel would pre-read during the week of the  
10 3<sup>rd</sup> April, and that openings would commence on 10<sup>th</sup> April, allowing us either three or four  
11 days to open, if that is what the parties----

12 MR. BEARD: We thought we would be opening through to Good Friday.

13 THE CHAIRMAN: It depends what the parties want for opening. There are potentially four  
14 days. I am not necessarily encouraging you to take all four days, but if, independently, you  
15 think four days is appropriate for openings that would be when we do it. That has the twin  
16 advantages, if we then have the Easter break, and I was again provisionally proposing that  
17 there should be a break in the week following Easter, not only to potentially maximise or  
18 not interfering with Panel members' pre-booked holidays, because I suspect that is when  
19 they are most likely to have pre-booked, but also it would mean that if your openings have  
20 really helped us we may have some time to do some further and more targeted reading  
21 before the evidence starts during that week.

22 That also has one advantage, which is that I understand it would not cause a problem with  
23 counsel availability of at least one party during the week of the 3<sup>rd</sup>.

24 MR. BEARD: It may be that Ofcom's counsel has a difficulty in the week of the 3<sup>rd</sup>, and no  
25 doubt would welcome this.

26 From BT's point of view there is no point in me making further protestations about timing.  
27 We are dealing with the realities of the situation, and I think if this maximises the chance  
28 that we are actually going to start on the 10<sup>th</sup> and finish as soon as is sensible, given what  
29 we actually have to get through, and we can discuss that, BT are going to be content with  
30 that.

31 Equally, whilst the selflessness of those behind me knows no bounds, I am sure they will  
32 not object to the idea of having an Easter break if that is going to increase the chances of  
33 this going ahead on the 10<sup>th</sup> and rolling through. Again, BT has to deal with the situation as  
34 it is.

1 THE CHAIRMAN: It is pure guesswork from my point of view in the sense that I do not know  
2 the holiday arrangements of each and every one of the short list of applicants.

3 MR. BEARD: I am sure that everyone here understands that you are not ensuring that there will  
4 be necessarily the two alongside you, but I think, pragmatically, if that maximises the  
5 chances, then that is the timetable we should sensibly work to. I do not believe that that  
6 means that there will really be any objection because it was us that wanted things earlier.  
7 There was one other party who was suggesting that we should start rather later. I think that  
8 was concerned in part with counsel availability, which I understand may not be the problem  
9 that was anticipated. Therefore, I think, on that basis, you are unlikely to find any dissent in  
10 relation to marking down the week of the 3<sup>rd</sup> as being reading, and the 10<sup>th</sup> being openings.  
11 I think, provisionally, we should stick with four days for those openings, because we think  
12 for our part, particularly in the light of your suggestion, Sir, that it may give an opportunity  
13 for those away on holiday to enjoy some targeted reading whilst they are there. Slightly  
14 fuller openings is a useful exercise in the context of this case, and we would envisage that  
15 we would probably be a good day and a half in opening. That means that four days ends up  
16 being a sensible timetable.

17 That means, when it comes to dealing with other matters and the timetabling of other  
18 matters, to work off the date of 10<sup>th</sup> April is the sensible course for these purposes.

19 THE CHAIRMAN: Having, as it were, provisionally pencilled those dates in, now let us work  
20 our way backwards.

21 MR. BEARD: Backwards and forwards.

22 MR. HOLMES: Sir, we fully agree that this is a sensible way forward. It will require, I think, a  
23 modest extension of the trial at the other end.

24 MR. BEARD: We have to live with that as well. There are those on our side that were trying to  
25 sort things out just beyond the window and they may need to make some other  
26 arrangements.

27 THE CHAIRMAN: What I do not have at the moment is a detailed trial timetable. In fact there  
28 are a number of things I do not have, and it is probably as well that I mention them to you  
29 now. One of the things that I do not have is your depth of knowledge of the case. That  
30 should not come as any great surprise to you in the sense that you are busy working on it,  
31 hour by hour, minute by minute, and some may think every waking hour and minute.  
32 Surprisingly, I have a judicial life outside this room - I do not have a life any more, but a  
33 judicial life outside this room - and that means some of the more detailed points, and it is a  
34 substantive point, levity aside, which we are going to come on to are ones which I think

1 I am not necessarily going to be in a position to resolve today, but we will need to get a  
2 process in place for any critical issues about evidence or the scope of the issues to be  
3 resolved before any substantial work is done in any particular direction.

4 MR. BEARD: I think both points are well taken. In the light of that, I will work through the  
5 timetable for trial and the preparation timings, and highlight where there may or may not be  
6 points of discussion. That timetable does involve producing an issues paper, and indeed at a  
7 time when that can then shape the skeletons. Just to anticipate, in relation to what has been  
8 referred to by Ofcom as ‘superfluous evidence’, there is an argument about it. As you will  
9 have seen from our submissions, we do not accept the suggestion that certain of our  
10 evidence is superfluous. Ofcom, very sensibly, is saying, “Let us continue a discussion  
11 through correspondence rather than trying to ask the court to resolve these things at this  
12 stage”. I think that is going to be the pragmatic course that we need to follow.

13 THE CHAIRMAN: The reason that I mention it at this stage is that I was also going to say that  
14 I do not have, obviously at the moment, any visibility as to how long the cross-examination  
15 of particular witnesses or groups of witnesses will take. Therefore, trying to predict how  
16 much, or by how much the window may need to be extended at the other end is something  
17 that I am really in your hands about at the moment.

18 MR. HOLMES: Sir, there is a fair degree of consensus between the parties, although it is a little  
19 difficult to arrive at firm predictions for us as well at this stage. In terms of provisional  
20 listing, it ought to be possible to reach some provisional conclusions at this stage, given the  
21 shared view of BT and Ofcom about the length of time required for oral examination of  
22 witnesses.

23 MR. BEARD: At the moment Ofcom have pencilled in four weeks. We have said something like  
24 15 to 16 days. There is not a vast difference at the moment, but obviously that is----

25 MR. HOLMES: That is 15 days each for the oral examination of witnesses.

26 MR. BEARD: At the moment you have got it listed in your timetable for rather longer, I think.

27 THE CHAIRMAN: We will get to it.

28 MR. BEARD: It matters not a great deal. What we have done, and it may only be of limited  
29 assistance to the Tribunal, is compile a complete list of all the witnesses and witness  
30 statements, just so that you have it for reference. This does not answer your question, Sir,  
31 as to how long cross-examination will be required in relation to them, but it does give you  
32 an indication of what it is that we are grappling with. I think the truth is that on both sides a  
33 view has not yet been taken as to how long in cross-examination of these different people  
34 we will need.

1 THE CHAIRMAN: The parties are going to have to sit down, probably best at a meeting, and  
2 resolve in the usual way running order and timing. There is also this interesting question  
3 about how you split the... Anyway, never mind, we will come on to that.

4 MR. BEARD: I think the answer to your question, Sir, about how this is going to be dealt with is,  
5 yes, it will have to be dealt with, at least initially, through a discussion. We anticipate,  
6 given that there is a reasonable degree of consistency in the overall view on timing, in those  
7 circumstances we should be able to come up with sensible running orders and sensible  
8 timings for the witnesses concerned. We are happy to put forward a proposal on this.  
9 I would suggest that we do not want to do this immediately because we do want to digest  
10 what we have got to do. The danger is that if you do it too early, people adopt a  
11 precautionary principle, and you end up with timetables that are not actually helpful.

12 THE CHAIRMAN: You are quite right, it is not yet that you need to finalise this list or even  
13 begin to start putting numbers to the witnesses. At least at this stage, if your solicitors have  
14 not already done so, they ought to be very clear as to any days on which certain witnesses  
15 are not available, because the thing that certainly disrupts trials, and I am aware this  
16 happens with monotonous regularity, is the witness who suddenly discovers that they have a  
17 pre-booked arrangement that they cannot break on a certain and therefore the whole  
18 timetable has to be readjusted. Obviously things may come up, medical issues may come  
19 up, which you cannot avoid, but certainly at this stage people ought to be very clear with  
20 their own witnesses as to whether they have got dates to avoid that they just cannot break.

21 MR. BEARD: Certainly on our side, that is well in mind and we do have that sort of information.  
22 I have no doubt that is also true for Ofcom. I have not canvassed that yet.

23 THE CHAIRMAN: I only say that because you would be surprised how often, even with very  
24 sophisticated litigants, this does come up.

25 MR. BEARD: The note of caution is heard and I am sure those on all sides will bear it in mind.  
26 I think, with that in mind, we have set out a schedule for----

27 MR. HOLMES: I do hesitate to interrupt Mr. Beard, but for the sake of diaries, and accepting that  
28 will only be provisional, do we not need a provisional window at this stage so that all of the  
29 parties can keep their diaries clear?

30 THE CHAIRMAN: I think the way I am going to do this is this: having provisionally discussed  
31 the start date and the problems that are not caused within this room, we will at least  
32 provisionally operate, unless anybody is going to stand up now and say they do have a  
33 vehement objection to 3<sup>rd</sup> April being the reading week and the 10<sup>th</sup> being the opening  
34 week, and the 17<sup>th</sup> being a holiday week, and then starting the evidence on the 24<sup>th</sup> - unless

1 anybody is going to jump up and tell me now that that is really not a runner from their point  
2 of view and say why, then we will provisionally work with that timetable and we will come  
3 back to finalise it and extend the window when we have looked at all these other bits and  
4 pieces.

5 MR. BEARD: That was precisely what I was going to suggest.

6 MS. MORRISON: I was just going to confirm that CityFibre are happy with that provisional  
7 timetable.

8 THE CHAIRMAN: Thank you. I will take silence as joining the general affirmation that that, at  
9 least provisionally, is where we are going to be.

10 Can we then go to the agenda items

11 MR. BEARD: I was just looking at it in our submissions at tab 9, p.2. Obviously we need to  
12 displace those dates and introduce the Easter break.

13 THE CHAIRMAN: As I said, we will come back to that at the end and agree it. Let us look at  
14 the substance of the other questions which are out there.

15 MR. BEARD: We have got start date. In terms of evidence, as I say, for the moment we are  
16 going to work on the basis of a 15 day period, so that is three solid weeks of evidence for  
17 these purposes, and I hear Mr. Holmes on that.

18 I think the only debate that then arises in terms of the overall structure of the hearing as  
19 between Ofcom and BT, assume that we are going to have the four day openings as I have  
20 just discussed, is just in relation to closings. In the Ofcom timetable, Ofcom have suggested  
21 that there should be a whole week off for writing closings, and then a two to three day oral  
22 closing. We think that is the wrong way round. Having a couple of days and a weekend to  
23 work on written closings is a sensible course, but we think that closings in this case are  
24 going to be fairly substantial, and the idea that you can deal with them in two to three days  
25 is, to say the least, a little ambitious. What we are concerned about is that this turns into a  
26 period of oral cross-referencing rather than proper submission.

27 THE CHAIRMAN: But if the overall time for production of written closings and oral debate  
28 about the written closings is generally agreed, at this stage I do not think I need to nail my  
29 colours to the mast to say what will best suit me and my two Tribunal members as to  
30 whether they would prefer more in writing and more orally. That may well be something  
31 that we literally sort out during the trial. I think that I and the other members of the  
32 Tribunal will have a much better idea at that time about what we will benefit from, whether  
33 it is lengthy written submissions with a very short series of oral submissions, or whether we  
34 want the reverse, but I do not think trying to resolve that at this stage is appropriate.

1 Provided everybody agrees there should be a period which we can then carve up in the light  
2 of experience, I do not think that particularly matters.

3 MR. BEARD: I do not think there is going to end up being a great deal of difference. I think the  
4 window for this runs to the middle of the week commencing 22<sup>nd</sup> May, so, effectively, for  
5 Mr. Holmes' purposes in setting a window, I think the final day would probably be 24<sup>th</sup>  
6 May, which is a Wednesday.

7 THE CHAIRMAN: I think in terms of the window, unless people are really, really radically  
8 inclined to work until they drop, they would be well advised, I would have thought, to  
9 reserve the window until the end of the week, which is 26<sup>th</sup> May, with the added pleasure of  
10 knowing that there is a Bank Holiday on the Monday.

11 MR. BEARD: I think that makes perfect sense.

12 THE CHAIRMAN: I am certainly not going to be crashing into the Chancery Clerk of the Lists  
13 to tell him I absolutely have to be given something on the 25<sup>th</sup> or 26<sup>th</sup>.

14 MR. BEARD: You have a terrible dilemma in those circumstances!

15 THE CHAIRMAN: Absolutely! I would have thought sensibly, having pushed the date to there,  
16 that any other modifications, barring some unforeseen illness or the like, would have to be  
17 aimed at condensing the debate within that window and not at a further extension.

18 MR. BEARD: Yes, and as I say, we think it is entirely sensible to set the window to the end of  
19 the week, but at the moment the sort of timetabling that we have got would actually finish  
20 the trial in the middle of the week, and we note that.

21 THE CHAIRMAN: It is always useful to have a couple of days in case of, for example, illness or  
22 whatever difficulties might arise. I note that you aim to finish on 24<sup>th</sup> May.

23 MR. BEARD: That I think then sorts out the timetable of the trial, at least in the sense of setting  
24 out a window. It is then worth perhaps taking a step back and picking up a number of  
25 points that are timetabled to that trial. Again, I am not sure that there is a vast amount of  
26 dispute about many of the issues here. It might just be useful in this regard to turn back to  
27 p.7 of our submissions. What we have done is set out more detailed dates that would run up  
28 to a trial commencement in addition to issues such as skeletons and a pre-trial review.

29 THE CHAIRMAN: I think my point is, before we start discussing any of these more detailed  
30 dates, that there are a number of points of substance which I need to understand as to where  
31 people are in terms of what is going to be produced and the like, which we ought to look at  
32 before we start going down---

1 MR. BEARD: I was going to work through list of issues, joint expert statements and the expert  
2 interactions, the skeleton arguments, and the evidence maps before I got on to pre-trial  
3 review and authorities.

4 THE CHAIRMAN: That is fine. I cannot remember who it was who produced it, but somebody  
5 produced a useful table on Friday of issues and where the parties are.

6 MR. BEARD: That was us, Sir. I am happy to do that. The only reason I was not going to take it  
7 in that order is because it starts off to do with issues to do with Virgin's evidence, which  
8 perhaps we should come back to.

9 THE CHAIRMAN: All right, if you want to go out of sequence. In relation to the 'teach-in' and  
10 'primer', again I would like to come back to that, if I may. You take your own course.

11 MR. BEARD: It is no criticism of the agenda, but if we put in place the framework of the key  
12 steps in relation to issues, expert statements, skeletons, and so on, I think then we can also  
13 see how we can fit in issues to do with primer, teach-in, and so on. Indeed, in relation to  
14 teach-in, if and in so far as we are going to be able to sort that out, I think we are going to  
15 have to be relatively flexible and think about that quite late on in the process, if we are not  
16 going to have a Tribunal empanelled already for this. Again, it may be that there is a degree  
17 of flexibility that needs to be built in to that.

18 If I may, just picking up on the list of issues, which I think is going to be important, we  
19 have suggested that, and I do not think there is any real dispute about it, it would be sensible  
20 to have a list of issues, and the list of issues we say should be produced on an agreed basis  
21 by 17<sup>th</sup> February. We have actually suggested a timetable running up to that for us to  
22 circulate a draft list of issues, enable Ofcom to comment, and so on.

23 THE CHAIRMAN: When you talk about a list of issues, is that the same in content as the issues  
24 map, as referred to by Ofcom?

25 MR. BEARD: Yes, it is.

26 THE CHAIRMAN: In other words, it is not just the bald, these are the issues; it is, these are the  
27 issues, this is where they are in the pleadings, this is where they are critically in the factual  
28 evidence, and this is where critically they are in the expert evidence?

29 MR. BEARD: Yes.

30 THE CHAIRMAN: It is a table which can flow, which can change, it is a moving document, but  
31 it is that document?

32 MR. BEARD: It is that document. There was a debate in correspondence about the extent of the  
33 detailed description of evidence that Ofcom were intending to have in this document. They  
34 clarified that they just wanted the cross-references to the relevant bits of evidence. On that

1 basis, we think that is a perfectly sensible way of doing things. So we need to delineate the  
2 issues and then each party is going to need to provide their cross-references to factual and  
3 expert evidence. So, yes, I refer to it as a list of issues, Ofcom have referred to it as an  
4 issues map. So that document that provides a useful framework we say should be produced.  
5 I think Ofcom were talking about that being produced by 24<sup>th</sup> February. The only reason  
6 we have said the 17<sup>th</sup> is because, given the nature of that document, given the importance of  
7 a structured list of issues when it comes to writing skeletons, we thought slightly sooner  
8 rather than later was a good idea in that regard. On any of the different versions some  
9 skeletons will be provided on 10<sup>th</sup> March. We say that all first skeletons should be on  
10 10<sup>th</sup> March. Ofcom says, "We want to do it serially", but any which way, we think leaving  
11 the list of issues to something like 24<sup>th</sup> February might not be wise in these circumstances.

12 THE CHAIRMAN: I think, again, my provisional view would be informed by this: this is a  
13 working document for the Tribunal to assist the Tribunal to understand what they have got  
14 to decide, and where they can find, most conveniently, the key materials to help them  
15 decide it. It is a document that may change during the run-up to and indeed during the  
16 hearing, in the sense that issues may become better clarified, refined, eliminated, hopefully.

17 MR. BEARD: We live in hope!

18 THE CHAIRMAN: We live in hope! Because it is a working document and nobody is pinning  
19 their colours to the mast by having to give a final sign-off, it is not a pleading. I do not see  
20 any reason, if your suggestion is that it should be done by the 17<sup>th</sup>, and you are taking - is  
21 this right - the lead in producing it?

22 MR. BEARD: Yes, our proposal is that we will circulate a first draft.

23 THE CHAIRMAN: I do not see any reason to say, "Please will you provide one by the 17<sup>th</sup>". If  
24 people say, "We have not quite signed off it", and it is provided on the basis that there is no  
25 'sign-off', it does not matter, you will not be held to it. It is a working document.

26 MR. HOLMES: Sir, if it simplifies, with that proviso, we are fine with 17<sup>th</sup> February.

27 MR. BEARD: It really is just to make sure that we are working on a broadly common basis for  
28 the preparation of skeletons.

29 THE CHAIRMAN: Obviously I am hoping it is more than a 'broadly common basis', but it will  
30 become a working tool, and so it should not be regarded as something to be fought over,  
31 pickled in aspic and put to one side. That is not the purpose of the document.

32 MR. BEARD: No, quite understood. I think on that basis, when drawing up the order, we can put  
33 a qualification, "with best endeavours by the 17<sup>th</sup>", or something of that sort for the  
34 direction.

1 THE CHAIRMAN: Or just say provide the current draft of the issues map on the 17<sup>th</sup>.

2 MR. BEARD: I am entirely content with that.

3 The next issue I was going to pick up was actually joint expert statements.

4 MR. HOLMES: Working from the table, there is the issue of the evidence maps as well.

5 MR. BEARD: I was going to come back to the evidence maps. Can I just work through the  
6 expert statements and skeletons, because in relation to the expert statements, again what we  
7 need is a process that ensures that the joint expert statement is produced in advance of the  
8 skeleton arguments, it seemed to us.

9 THE CHAIRMAN: As I understand the evidence maps - are you talking about----

10 MR. BEARD: I was talking about the process of engagement between the experts where the  
11 Tribunal has suggested or asked whether or not there was a desire to have what is  
12 euphemistically referred to as a 'hot tub' process for the experts.

13 THE CHAIRMAN: There is a resounding no from everybody.

14 MR. BEARD: There is not an enormous amount of enthusiasm. So we are in the more orthodox  
15 world of ensuring that the experts do engage with one another and produce a joint  
16 statement. Again, that process is going to be important, because identifying what is the  
17 nature of the issues between the experts so far as they are concerned is again something  
18 important to build into the process of preparation of skeletons. There we have included a  
19 timetable which would mean that a joint expert exchange with a provision of a joint experts'  
20 statement during the course of February - we have it down for 24<sup>th</sup> February. Again, Ofcom  
21 are suggesting this should be 3<sup>rd</sup> March, but if we are going to be looking at skeletons on  
22 10<sup>th</sup> March, we do think it is sensible that the experts have crystallised points of agreement  
23 and disagreement a good couple of weeks in advance of that, and it is for that reason----

24 MR. HOLMES: Sir, again, just to cut through matters, our concern was that we just did not want  
25 to over-freight February, because there are a lot of documents that will be useful, we hope,  
26 to the Tribunal in making this case tractable, one of which is the issues map, another is the  
27 evidence maps, which apparently we are coming back to, and the third of which is the joint  
28 statement by the experts, which will help to see what is agreed and what is disagreed  
29 between them. Sir, our only concern with the timetable was just to sequence this. Now that  
30 we are on 17<sup>th</sup> February for the issues map, we are perfectly happy to live with  
31 24<sup>th</sup> February for the experts' statement, if that is the date that Mr. Beard would prefer.

32 MR. BEARD: I am grateful to Mr. Holmes, that is very helpful.

33 THE CHAIRMAN: This will include Mr. Osborne at this stage, will it not?

34 MR. BEARD: Yes.

1 THE CHAIRMAN: Again, I cannot form a view at the moment as to whether Mr. Osborne's  
2 evidence is useful, not useful, or what. Surely the appropriate thing to do is to allow  
3 Mr. Osborne to participate as an expert. If, in fact, he agrees and does not disagree with  
4 anybody, then in a sense the question solves itself, or at least we can then see the extent to  
5 which Mr. Osborne stands differently from other experts, and we can take a view in the  
6 slightly more conventional way about what weight and what relevance his evidence, rather  
7 than get side-tracked into a debate at the moment.

8 MR. BEARD: I think, having spoken to Mr. Holmes and indeed Mr. Liddell before the hearing,  
9 I do not imagine there will be any disagreement. I think, although this is not directly a  
10 matter for BT, we are concerned that trying to resolve this now would be too difficult, and  
11 really the question is whether or not there is duplication, whether or not Mr. Holmes will  
12 need to cross-examine, or to what extent he will need to cross-examine Mr. Osborne in due  
13 course, and I imagine that this process will ensure that that is well identified.

14 MR. HOLMES: Sir, we raised the concerns in relation to Mr. Osborne, but we apprehended that  
15 it was going to be very difficult for the Tribunal at this early stage to pick through the fish  
16 and debone it. It is just not very practical. Sir, what you say seems perfectly sensible to us.  
17 The two concerns, just to highlight them, are, first, it appears to us that there is an element  
18 of duplication. The approach that we propose to take to cross-examination is that where  
19 BT's experts deal with a point, the Tribunal is not going to be assisted by having the same  
20 point explored in cross-examination with another expert. So where there is an alignment  
21 between their views on the written evidence, we think we can cut through a lot at the  
22 hearing by taking that approach and focusing really on the cross-examination of the  
23 principal, the lead expert, chosen by the appellants to the proceedings. We think that will  
24 resolve the problem of duplication in terms of avoiding the trial running out of control.  
25 Then, in so far as there are novel points, that will emerge and be much clearer and easier to  
26 deal with in the light of the issues map and the evidence map.

27 MR. LIDDELL: I think, from our perspective on behalf of Virgin Media, we are obviously very  
28 happy with the proposal that Mr. Osborne's evidence stays in. I think, in terms of  
29 duplication, that is going to be an issue for identifying what is and is not duplicative. I think  
30 at this stage our position is that there is not any duplication in Mr. Osborne's report, and in  
31 that regard, to the extent that he needs to be cross-examined, he should be cross-examined  
32 on his own report rather than by reference to cross-examination of BT's experts.

33 THE CHAIRMAN: If, by definition, there is no duplication, he could hardly be cross-examined  
34 on BT's report. In a sense, we just have to suck this one and see.

1 I can either formally give him permission to have his evidence in on the basis that we have  
2 discussed or, alternatively, he simply participates and we park the question. Technically,  
3 you have got to ask for permission to adduce his evidence, have you not?

4 MR. LIDDELL: Sir, I think we have asked for permission. I think the position is currently that  
5 no party now, following correspondence last week, objects to that evidence being admitted.  
6 I think, just to avoid this coming up again in the future, it might be sensible for it to be  
7 admitted after today's proceedings.

8 THE CHAIRMAN: The idea would therefore be that I make an order formally allowing his  
9 evidence to be adduced as expert evidence subject to the caveats which have been identified  
10 about duplicating the expert evidence or the identification of who is most appropriately  
11 cross-examined. In a sense, I think we understand each other. I am not going to sit and  
12 listen to two different experts being cross-examined about the same question. I think you  
13 can take that as read, if they both agree on the point.

14 MR. LIDDELL: Yes, I think that is sensible.

15 THE CHAIRMAN: If they disagree then obviously they have to be.

16 MR. HOLMES: We are very happy to have the evidence admitted now, Sir. The only other  
17 caveat we would add is this: if it emerges from the issues statement and from the evidence  
18 maps that there are points which really do not attach to any of the grounds of appeal set out  
19 in the notice of appeal, which defines the Tribunal's jurisdiction, then it may be necessary  
20 to revisit the scope of his evidence in advance of trial, but we do not propose to do that here  
21 today.

22 THE CHAIRMAN: We are going to come on to that type of area in a few minutes. So as far as  
23 the expert is concerned----

24 MR. LIDDELL: Just as a final point on that, I think we are perfectly content with that approach.  
25 All I would say is I do not think Mr. Osborne should be treated as being a special case in  
26 terms of these caveats. I think he ought to be treated as being an expert in the same fashion  
27 as everybody else.

28 THE CHAIRMAN: He is entitled to be treated, *prima facie*, as much of an expert as anybody  
29 else's expert. The same caveat applies to all experts.

30 MR. LIDDELL: Thank you very much, Sir.

31 THE CHAIRMAN: The joint statement you think should be produced by 24<sup>th</sup> February. The  
32 experts are going to be what, left to themselves?

33 MR. BEARD: No, that is always dangerous, Sir, we think.

34 THE CHAIRMAN: Do you mean experts cannot be expert without the assistance of lawyers?

1 MR. BEARD: That is certainly true, Sir, but we take that as a matter of judicial notice! It was  
2 more on timing. We have actually built in a suggestion as to the timing of a meeting  
3 between the experts ten days or so beforehand in order to ensure that this process works. It  
4 does not need a direction, I do not think.

5 THE CHAIRMAN: It should not need a direction. What I actually meant about leaving the  
6 experts to themselves, and I was just teasing, is that obviously they are busy professionals  
7 and they will have their own diaries. We should not start trying to micromanage their  
8 diaries. If we tell the experts that they are to produce a joint statement by 24<sup>th</sup> February,  
9 they will have a clear view of what they need to do and how they go about doing it. It  
10 should be a matter for them. I am assuming that your experts are all, as it were, committed  
11 to the cause and are not going to suddenly find themselves unavailable at awkward times.

12 MR. BEARD: No. The reason we indicated the 13<sup>th</sup> is because one of our experts is not available  
13 for discussions shortly prior to 13<sup>th</sup> February. In any event, those are matters which I think  
14 the experts can all deal with, so long as that target has been set down.

15 THE CHAIRMAN: That is really quite tight, is it not, if your expert cannot engage until ten days  
16 before the joint expert report needs to be finalised?

17 MR. BEARD: We recognise that, but that is part of the reason why we put in an indication that  
18 the experts should be engaging to ensure that they met that week because of that sort of  
19 availability issue. We can take that away and see whether or not there are other ways in  
20 which these matters can be dealt with, and we are content to work without a direction.

21 THE CHAIRMAN: You are suggesting the 24<sup>th</sup> in the sense that you think you can deliver?

22 MR. BEARD: Yes, we do.

23 THE CHAIRMAN: All right.

24 MR. BEARD: That is that issue. Then we come to----

25 THE CHAIRMAN: I was just checking, on the list of witnesses that you gave me I am just  
26 looking at the numbers of experts that we have got.

27 MR. BEARD: There are three for BT. There is one for CityFibre. Then Ofcom indicates that it  
28 has three. There is also Mr. Osborne.

29 THE CHAIRMAN: But the experts will be meeting, as it were, with their counterparts on the  
30 areas of expertise not----

31 MR. BEARD: No, it does not need to be a great group gathering.

32 THE CHAIRMAN: How many joint expert reports are you envisaging being produced  
33 ultimately?

1 MR. BEARD: I think we think it is going to be two, but to some extent we are willing to ensure  
2 that the experts engage. I think it is sensible for us to take that away. I do not think any of  
3 the parties have discussed in more detail whether it should be two or three joint expert  
4 reports. I think our thinking was that it should be two.

5 THE CHAIRMAN: All right. I am just highlighting an issue that needs to be resolved, and if  
6 there is any substantial disagreement on that that needs resolution that can be dealt with on  
7 paper, I would have thought, but hopefully not.

8 MR. BEARD: I am grateful. I think, in general, with all of these issues - we will come back to it  
9 - we were hoping that, subject of course to us putting in a pre-trial date which we all think is  
10 sensible, any issues that arise in relation to the modalities of these particular processes  
11 where we need, Sir, you to effectively adjudicate on them, we can deal with them in writing  
12 unless there is some other burning reason.

13 THE CHAIRMAN: Yes.

14 MR. BEARD: That then takes us to Mr. Holmes' evidence maps. I think the position is that, as  
15 far as we are aware, there is no objection to them. We are certainly happy to produce them  
16 in relation to our witnesses. Mr. Holmes has proposed it in relation to his witnesses. I do  
17 not hear any objection from anybody else. We can see value in relation to these documents.  
18 Obviously, the modalities of production, I think Mr. Holmes has said there should be  
19 summaries of one or two pages. I think it would not be sensible to try and lay down the  
20 format at this stage, because we could see, for example, that a tabular summary might well  
21 be useful, and then it might be slightly longer than one or two pages. Nonetheless, it should  
22 indicate in relation to the issues particularly, what the summary of the evidence was and the  
23 cross-references seems an entirely sensible course of action to us, and then there are just one  
24 or two issues on timing.

25 MR. HOLMES: We are very happy with that. The one or two pages may not be achievable. The  
26 intention is to have a cover sheet, if you like, that can be put in front of the witness  
27 statement as a crib sheet for the Tribunal and the parties to recall what is essential. Some of  
28 that material will already be in the issues map, but having it there by the witness statement  
29 will be useful, together with just a summary that will identify what is key. We are grateful  
30 to Mr. Beard for his indication that that is not opposed.

31 THE CHAIRMAN: Again, as a sort of executive summary or strap lines at the top, I am more  
32 than happy to take that. I am generally motivated to try and reduce the amount of paper, not  
33 increase it, but if the parties are willing to produce that then that is fine.

1 MR. BEARD: Since I think Mr. Holmes has very sensibly not suggested that people should go  
2 round trying to agree these things, it makes it feasible to undertake this exercise. What we  
3 are always concerned about is that the generation of this further paper does not end up  
4 detracting from or distracting from the effort on some of the key documents, such as  
5 skeletons.

6 THE CHAIRMAN: I can certainly deal with that quite easily in saying this: there is no doubt  
7 that the evidence is the full document. That is the evidence and that is what somebody  
8 would be cross-examined on, not on some lawyer's summary of their evidence. I am  
9 perfectly happy to say that each side, if they think it is appropriate, can provide the evidence  
10 summaries to the Tribunal in relation to their own witnesses. If the parties do not feel the  
11 need, or they are too busy on other things, so be it. It just means that I will not have a  
12 convenient, pithy summary of the evidence, and I will have to dig into the large bundle.  
13 You can take a view as to how helpful or otherwise you want to be. There you go.

14 MR. BEARD: I think that is very helpful, and if that is the direction I think there is no other  
15 issue----

16 THE CHAIRMAN: The parties should be at liberty to provide a summary or evidence maps in  
17 relation to their own witnesses.

18 MR. BEARD: Yes. I think that deals with the matter. I think the only concern was the idea of  
19 having to produce them simultaneously with skeletons whilst people are running around----

20 THE CHAIRMAN: This is something that is nice to have, but do not let it get in the way of the  
21 documents that we need to have.

22 MR. BEARD: We are entirely content to deal with it on that basis. I think that deals with the  
23 evidence maps.

24 Then I think probably the next stage is skeletons themselves. Here there is a difference  
25 between the position of BT and Ofcom. Ofcom say that BT should submit its skeleton on  
26 10<sup>th</sup> March, and then Ofcom should put its skeleton forward on 24<sup>th</sup> March. There are two  
27 issues that arise there. The second of them is the proximity of Ofcom's skeleton to the trial.  
28 Obviously if we are not going to start until 10<sup>th</sup> April, that it is mitigated to some extent, but  
29 it really takes us back to the first issue with this.

30 THE CHAIRMAN: The 3<sup>rd</sup> April in the sense that, actually, the first thing the Tribunal is  
31 probably going to read is the skeleton argument.

32 MR. BEARD: Yes, and it would not give BT very much time to digest that, albeit recognising  
33 that the primary purpose of the skeletons is for the Tribunal. The concern here is that what  
34 we have had, following on from the previous directions and in perfectly proper cause, is the

1 appeal; we have then had the defence and the evidence; and we have recently submitted a  
2 fairly substantial reply with reply evidence. We do not have anything from Ofcom in  
3 relation to that reply or reply evidence. What is of concern to us is that the first time, on  
4 Ofcom's timetable, we will hear what Ofcom has to say about any of this is on 24<sup>th</sup> March,  
5 and that is----

6 THE CHAIRMAN: I am sorry, I do not understand, the first time that you will hear what Ofcom  
7 has to say about any of this?

8 MR. BEARD: No, the reply material, I am sorry. Obviously not in relation to the main appeal,  
9 obviously one can see a great deal of what Ofcom is saying from their defence and  
10 evidence. What concerns us is that we have set out a response to Ofcom's position in our  
11 reply. We are then being asked to produce a skeleton argument. Now, of course our  
12 skeleton will consolidate----

13 THE CHAIRMAN: I am sorry, I am trying to get a grip on this. If we go back, Ofcom issues a  
14 report. It is a big chunky document.

15 MR. BEARD: Yes.

16 THE CHAIRMAN: You appeal against it and you put in your notice of appeal. If you put in  
17 your pleading and Ofcom puts in its defence, you put in your reply. We have already had  
18 four rounds, if you like, if you count the report in as well. Why, with a view to refining the  
19 issues, should I not simply take the view that this is a case, like some of the others, in which  
20 you are the ones that are shooting at a target, you should go first with your skeleton, then  
21 Ofcom, and if you want to put in some short supplemental submissions you can. It should  
22 not be simultaneous exchange, it should be sequential. Yes, all right, there may be some  
23 points which you have not seen in their rejoinder to your reply, but, frankly, if we are  
24 fighting down in that territory we are rather missing the bigger picture, are we not? I am  
25 slightly more motivated to try and ensure that we focus on the bigger points, which  
26 I assume, unless there is something very odd going on, are canvassed in the main  
27 documents.

28 MR. BEARD: Absolutely. It is not suggested that the matters are not canvassed in the main  
29 pleadings, not at all. The material that has been put in in reply does provide relevant  
30 evidence, which is joining issue with the way that Ofcom has set out its case in its defence.

31 THE CHAIRMAN: You know what that is. It is your evidence.

32 MR. BEARD: We know what it is that they have said differently. Whether or not they have got  
33 further points that they want to raise in relation to our reply material - if, Sir, you are  
34 thinking that we changed the date such that we would go first with our skeleton argument,

1 crystallise our story overall, Ofcom reply and there is time, prior to pre-reading, for us to  
2 put in a short supplemental skeleton, that may well deal with these concerns. Then it just  
3 becomes a matter of timing.

4 THE CHAIRMAN: Frankly, if it is genuinely supplemental and short, if it does not even arrive  
5 before the middle of the week of the 3<sup>rd</sup>, it may not much matter. You can certainly give it  
6 to us by the 3<sup>rd</sup>.

7 What is the problem with you leading off? The dates that I have got in front of me, the  
8 suggested dates are 10<sup>th</sup> March.

9 MR. BEARD: Yes, 10<sup>th</sup> March is what Ofcom have suggested for us.

10 THE CHAIRMAN: 17<sup>th</sup> March for Ofcom - is that right?

11 MR. BEARD: No, what Ofcom have suggested is that there be another week with interveners'  
12 skeletons in support of our position; then we would have the Ofcom skeleton; then we  
13 would have skeletons in support of Ofcom. It is partly because of this: for instance,  
14 Gamma end up putting in potentially two skeletons in different places, and it was partly for  
15 that reason we thought it would be a lot easier if we just had simultaneous exchange of  
16 skeletons and then if people do want to pick up supplemental points that have been raised,  
17 that could be done in an orderly fashion on 24<sup>th</sup> March. I think that is why we were----

18 THE CHAIRMAN: The alternative is that we take the view that the main battle is between the  
19 appellants and Ofcom----

20 MR. BEARD: Yes, which is obviously true.

21 THE CHAIRMAN: -- and the interveners are there to support one or other, or in Gamma's case  
22 both sides, and the actual order of events ought to be that you and CityFibre put your  
23 skeletons in first, Ofcom puts its skeleton in second, and all interveners, to the extent that  
24 they have anything to add, because that is really what they are supposed to be doing, put  
25 theirs in in a third wave. Then, if you have a supplemental, so be it. As a sequence, what is  
26 wrong with that?

27 MR. BEARD: I could see that that could work, and that would then alleviate the concern that----

28 THE CHAIRMAN: You think it may work.

29 MR. JOHNSTON: Sir, if it assists, being part of the potential third wave and supporting both  
30 sides, Gamma would be very supportive of that approach and would be keen not to put in  
31 two separate skeletons - that just seems to be inefficient - and also to go after the main  
32 skeletons have been filed. That would be very much supported.

33 MR. HOLMES: Sir, we hear what has been said. We see the sense of what you are suggesting.  
34 We are happy to have three rounds - BT, Ofcom, interveners, with a possible reply.

1 THE CHAIRMAN: If BT and CityFibre feel the need for something which is genuinely  
2 supplemental but short - you will have to take the chance that if you make it too long and  
3 tedious, by that time the Tribunal's patience will have been exhausted with you; but if it is  
4 short and snappy, you might just get under the wire.

5 MR. BEARD: And on timing, it would be probably be sensible on that basis to do 10<sup>th</sup>, 17<sup>th</sup> and  
6 24<sup>th</sup> for the three ways.

7 THE CHAIRMAN: On that, I am slightly more interested in making sure that Ofcom have a  
8 proper time to put in a properly responsive skeleton. What I am not going to be thrilled  
9 about is if I have said it ought to be sequential then I get something which is not actually  
10 responsive from Ofcom. Nobody is kidding anybody, the Ofcom skeleton argument is not  
11 going to be written in a week.

12 MR. BEARD: No.

13 THE CHAIRMAN: Obviously there is going to have to be some stuff put together, but I do want  
14 your skeleton moulded to be a genuinely helpful and responsive document. The question is  
15 how long do you need, genuinely, to do that?

16 MR. HOLMES: That is what we want to do as well, because it will be most effective in  
17 presenting our case. We think one week is not enough , because we are going to be meeting  
18 two skeleton arguments, including one prepared by new counsel in the CityFibre case. We,  
19 therefore, think two weeks to 24<sup>th</sup> March. That will still give ten days for any supplemental  
20 skeleton argument to be prepared, which, based on your indication, will only be a short  
21 document that makes a few points, if needed. Certainly the focus of our skeleton argument  
22 will not be addressing BT's points in reply.

23 MR. BEARD: We understand that week would be tight.

24 THE CHAIRMAN: All right, so we are looking at yours on the 10<sup>th</sup>, Ofcom's on 24<sup>th</sup>, interveners  
25 on 31<sup>st</sup> because they should genuinely have much less to say. If anybody wants to try and  
26 get a supplemental in under the wire that really should be by the 3<sup>rd</sup>, when the Tribunal starts  
27 reading.

28 MR. BEARD: I am most grateful. From our point of view, that delays the concern that sat on our  
29 side.

30 Ofcom very sensibly have said 50 pages should generally be the target for these sorts of  
31 skeletons. I think at one point they suggested that there should be an absolute limit. I do  
32 not believe that is their position now.

33 MR. HOLMES: Yes, Sir, it still is just to avoid - it is still our position that there should be ---

1 THE CHAIRMAN: Here is where the worm turns, as it were. Having had to produce skeleton  
2 arguments in my time and being forced to do so for the Court of Appeal and having realised  
3 that, although it took longer, the shorter document was actually a better document. I am  
4 quite concerned that I should indicate to the parties that I do want shorter, harder limited  
5 skeleton arguments, otherwise they just become a repackaging of other documents. We  
6 have got enough material to read here. I really do think that there should be some hard limit  
7 and an effort to condense this case into something which is a useful skeleton, as its name  
8 suggests, and you are going to have oral openings.

9 My other suggestions, which I will put out there and you can then have a pop at, are these:  
10 if BT and CityFibre are going to be dividing issues between them - primarily dividing the  
11 issues between them, which I think is very sensible, their collective page usage should be,  
12 give or take, what Ofcom will have to have to respond to it. I appreciate that there may be a  
13 little bit of overlap, you may get a little bit more in terms of paging, but let us say, just for  
14 the sake of argument, that if I was to say 40 pages for each of BT and CityFibre, Ofcom  
15 would be up at the 75 limit. I am not going to suggest those numbers because I think they  
16 are too big. Is not the point of principle that if you are, in reality, principally aiming your  
17 tag for BT at one set of issues and CityFibre is essentially aiming its submissions at  
18 different issues, so you are not aiming just to duplicate and overlap, collectively Ofcom  
19 have to deal with the two of you and they are going to have a little bit more to do to deal  
20 with it.

21 MR. BEARD: You are quite right, Sir, what we have suggested is that there should be a division  
22 of issues, albeit the division of issues is that BT deals with everything in its appeal and  
23 CityFibre deals with the stuff that is additional to BT's appeal. I am not quite sure that  
24 necessarily captures it in the sense that CityFibre will be taking some of the heavy lifting off  
25 BT, because that is not going to be happening.

26 THE CHAIRMAN: Alternatively, what I can say is that between BT and CityFibre, you together  
27 can sort it out between yourselves, but you have X pages and Ofcom has exactly the same.

28 MR. BEARD: Sir, we recognise the benefit of shorter documents. In the old Blaise Pascal  
29 formulation, if it we had had more time it would have been shorter, it is obviously the rubric  
30 which applies to most lawyers' documents. We are, therefore, concerned to focus our  
31 submissions and as far as humanly possible, when some of the matters are quite technical,  
32 not to bore the Tribunal in relation to our skeleton.

33 THE CHAIRMAN: Bore or confuse.

34 MR. BEARD: Certainly not the latter, but, yes----

1 THE CHAIRMAN: I am perfectly serious. There is a substantial risk that, if people do not really  
2 apply their minds to how the issues can be condensed and explained, you introduce an air of  
3 diffuseness, confusion, into the process.

4 MR. BEARD: We have all dealt with skeleton arguments that have become very baggy and the  
5 consistency checking across the length of the document becomes an exercise in and of  
6 itself. So all of those points are well taken.

7 In terms of page limits, what Ofcom was suggesting, I was simply going to say that, as a  
8 target and essentially you get marked down for going longer, we completely understand  
9 that. What we did not particularly want was a strict direction because if there were a  
10 circumstance where, for instance, we thought we can put the main part of our argument into  
11 40 pages but there is an annex or a table that we want to attach and that could take us over a  
12 50 page limit, we did not want to have to come back to the Tribunal to be making an  
13 application in that regard. We are happy to live with it as a target, so I am not sure there is a  
14 vast amount between us.

15 THE CHAIRMAN: Okay, there probably is not, but again there are a few ground rules: you do  
16 not do what has been done - and I have had all these tricks played, so there is nothing new  
17 under the sun - you do not get away with saying, okay, a 50 page limit for the skeleton, for  
18 example, but then you suddenly find that there is another 50 pages of annexes.

19 MR. BEARD: Yes, that is what we appreciate.

20 THE CHAIRMAN: It is 12 point font, because I have got eyesight still and I would like to keep  
21 it, no silly condensed fonts, please, which is another wheeze that people use. Also, could  
22 we please have at least 1.5 line spacing?

23 MR. BEARD: Yes, and no comedy margins, I imagine.

24 THE CHAIRMAN: Yes, and no comedy margins. Can we just please have a readable, useful  
25 document?

26 MR. BEARD: It is well understood. In fact, the European Court specifies in a practice direction  
27 what font, scale, size and line spacing you can have, because they have strict page limits on  
28 documentation.

29 THE CHAIRMAN: Yes, and the courts in Hong Kong did exactly the same a few years ago.  
30 They missed the condensed fonts wheeze, so we managed it!

31 MR. HOLMES: Are you going with targets? Surely if you go with targets people will not respect  
32 them, and it would be unfair to those that do.

33 THE CHAIRMAN: I think there should be a limit, I am afraid, on pages. The only thing  
34 I suppose I might say that I would allow to be put into an appendix is a table or a diagram,

1 or something of that ilk. I have said what I have said, and you are taking a high risk  
2 strategy if you are going to take me on in terms of irritation by producing a skeleton which  
3 goes over that. That is the beauty of sitting here as opposed to standing where you are, so  
4 I can now say so.

5 I think I would say there should be a hard page limit. The question is how should it be set,  
6 how should it be divided up. These are only openings, for goodness sake, do not forget you  
7 are going to have a chance to produce a written closing. Mind you, I am going to be saying  
8 something similar in relation to that, and you might want to bear in mind that one of the  
9 things that I think would be useful, and I have found useful, is that the closings should, as it  
10 were, build on the opening. I would imagine your closing will at least have the same  
11 framework, unless something radical has happened, as opening. The closing will be a  
12 stand-alone document but may well find it develops from the skeleton at the start. People  
13 should not get desperate. A skeleton is a skeleton. The case is going to last four weeks, it is  
14 going to develop. We will be going away and reading the closing submissions. It is not  
15 critical that you squeeze every last detail into your skeleton argument, that is not the point  
16 of it. The point is to try and help me and the two Tribunal members get through a heavy  
17 reading week and the openings with a sense of what it is actually all about and where we are  
18 going. So less is possibly more.

19 Against that background and having taken the pressure off you and in front of your clients  
20 so that they do not think that this be and end all document - admittedly, it is one that should  
21 give us a clear steer as to what the case is - how many pages do people think sensibly you  
22 can inflict on us?

23 MR. BEARD: I think in those circumstances we should be working on a maximum of 50 pages,  
24 as Ofcom have suggested. We had that in mind, as I said, as a target in any event.

25 THE CHAIRMAN: Is that a split - is that 50 pages to be split between you?

26 MR. BEARD: No, that would not be a split. We would rather keep a target for ourselves, and a  
27 target be separately set for CityFibre. We can understand, and we will leave it to  
28 Ms. Morrison, that CityFibre may want to say, for instance, a little bit more than it is  
29 perhaps covering in relation to just the particular issues in relation to it. We are concerned  
30 that---

31 THE CHAIRMAN: The deal is that you serve your skeletons first, and Ofcom gets the same  
32 number of pages as collectively the two of you have used?

33 MR. BEARD: Yes.

1 THE CHAIRMAN: If you want to cramp their style, you keep yours shorter. If you want to give  
2 them a longer opportunity to retaliate then you just use up extra pages. And you?

3 MR. BEARD: We would say 50 pages. We understand that you think----

4 THE CHAIRMAN: So that potentially means that Ofcom are going to get a 100 page response?

5 MR. BEARD: If CityFibre were then to seek to have 50 pages that would be true. I cannot  
6 believe that CityFibre would wish to do that, but I can leave that to Ms. Morrison, given the  
7 allocation of issues. I am just concerned that we have to deal with the whole of the BT  
8 appeal.

9 MS. MORRISON: Sir, I am at a slight disadvantage from everyone else in that I am desperately  
10 catching up with everything that is in the bundles.

11 THE CHAIRMAN: I think you have probably got an advantage over me at the moment.

12 MS. MORRISON: It is certainly only slight, if there is any advantage. Obviously at this point in  
13 time we have yet to instruct senior counsel, and just to be clear there have been some issues  
14 in who was proposed to take over, which was Mr. O'Donoghue, so currently we do not have  
15 anybody.

16 I appreciate the concerns that the Tribunal has expressed, and we will obviously be looking  
17 to keep our skeleton as short as possible. I would ask for the 50 page limit now, simply  
18 because I do not want to tie the hands of my future master, whoever that happens to be, but  
19 I would----

20 THE CHAIRMAN: Or mistress.

21 MS. MORRISON: Or mistress - but at this current stage there is no final division of labour  
22 between the parties, because that is subject to discussions with that counsel, and I am in  
23 difficulties in really predicting to you today, Sir, where it would end up. Sir, I think we  
24 would be saying to the Tribunal that the comfort would be that CityFibre would not be  
25 looking to be anywhere near the 50 page limit but we would like it just now.

26 THE CHAIRMAN: It makes some sense as well that you should obviously at least ask to see, or  
27 get some idea of what BT is saying if BT is taking the lead, simply because then you can  
28 tailor your submissions accordingly.

29 MR. BEARD: We can assure the Tribunal that we will try and ensure that.

30 THE CHAIRMAN: Does Ofcom have any views on that?

31 MR. HOLMES: Sir, of course counsel is always going to bid high at this stage, but we are  
32 mindful of what the Tribunal will be faced with in terms of the paper it already has to  
33 digest, and the paper it will need to consider just in terms of the skeletons.

1 We were attracted by the suggestion of 70 pages for Ofcom with 35 pages for each of  
2 appellants. If one appellant wishes to donate pages to the other, that would be a matter for  
3 them, and it may well be, given the division that is proposed between BT and CityFibre,  
4 that CityFibre will be in a position to do so. I hear that Ms. Morrison is hopeful of getting  
5 well under the 50 page cap.

6 THE CHAIRMAN: Okay, but I am not sure that you should be arguing too hard against this.

7 They both get up to 50 pages. Neither of them goes over 50 pages. If it turns out that they  
8 collectively can do it in less, then great. Whatever they collectively do it in, you get that  
9 number of pages.

10 MR. HOLMES: I think that a lengthy document has diminishing returns in terms of its impact.

11 THE CHAIRMAN: True, but I have made that point, I think with as much good humour as I can  
12 muster. People who produce longer documents do, I am afraid, risk, unless they are just  
13 fabulous, all the problems that I have identified.

14 MR. HOLMES: We will produce a fabulous short document.

15 THE CHAIRMAN: A fabulous short document is the key.

16 MR. HOLMES: For the interveners we propose 20 pages, Sir.

17 THE CHAIRMAN: Right, what about the interveners? Any ideas what sort of number you are  
18 likely to want. You have not seen what is going to come.

19 MR. JOHNSTON: No, indeed, but for our part, we are content with 20 pages.

20 MR. LIDDELL: It sounds like a small point, but if we could beg for 25 that would be very much  
21 appreciated. We feel that we have got a number of issues to deal with and I think we would  
22 appreciate an extra five pages.

23 THE CHAIRMAN: Enough on this. Up to 50 pages for each of BT and CityFibre, Ofcom to  
24 have the same number of pages as collectively BT and CityFibre take between them. The  
25 interveners should have 25 pages.

26 I have already indicated a few basic ground rules about the structure of the document. I do  
27 not count a cover sheet, if you want to put a cover sheet on as a page, and I do not mind  
28 people putting pithy tables or diagrams, if that is what you want to do, into an appendix,  
29 which also does not count towards your page number, but I do not expect to have, as it  
30 were, substantive submissions made in appendices.

31 At the end of the day, if anybody, on reflection, cannot live within those guidelines then  
32 you are going to have to explain why. As I say, the aim is to make sure that we get  
33 skeletons which are responsive and follow the others, and certainly my anticipation will be  
34 that I will read them in sequence.

1 MR. BEARD: I am grateful. I think that probably deals with all matters to do with skeletons, and  
2 probably now has dealt with many of the issues in the agenda overall.

3 We have got a pre-trial review that all agreed would be a good idea. At the moment it has  
4 been pencilled in for the week commencing 13<sup>th</sup> March.

5 THE CHAIRMAN: I am sorry, before we get to that, I was a little more substantively concerned  
6 about the potential problem that exists in relation to either identification of superfluous  
7 evidence, or, rather more importantly, the suggestion that there are parts in CP's statement  
8 of intervention that fall outside the scope of the appeal. The question I have got there is: on  
9 the evidence and the question of superfluous evidence, I am pretty much relaxed, because if  
10 you are producing both a list of issues that identifies the critical evidence and evidence  
11 maps, in a sense, anything else which is not mentioned will be read but probably not  
12 regarded as important. Therefore, if it is a bit superfluous there is no necessity at this stage  
13 to start going through it.

14 What I am more concerned about is if there was any objection on the basis of actual  
15 admissibility of evidence, which is unlikely to be the position in this case, or if there is an  
16 issue which somebody is saying should not actually be on the agenda at all, how do we  
17 resolve that?

18 MR. BEARD: I will deal with the superfluity issue in relation to BT on our side of the appeal.

19 As I indicated earlier, the issue is not one, Ofcom have made clear, of trying to exclude any  
20 of our evidence. I think we took the view that a combination of issues list, map, evidence  
21 maps and skeleton arguments, quite frankly, would ensure that it became clear what were  
22 key parts and we did not need to have a fight. I think, having spoken to Mr. Holmes, there  
23 is no dispute about that in relation to these matters.

24 The position in relation to CP Group I will leave to Mr. Kuppen and Mr. Holmes, but from  
25 a conversation just prior to the hearing, I think again a sensible and co-operative approach  
26 has been adopted, but I will hand over, if I may.

27 MR. HOLMES: Our concern is simply that we need to know whether we put in evidence to deal  
28 with particular points, because we have not done so yet. Sir, with that in mind, we do think  
29 this might need to be addressed sooner rather than later, but we are conscious that there are  
30 a lot of counsel here today, and Mr. Kuppen and I struck on a proposal if it meets with your  
31 approval, Sir, which would be that the parties continue to liaise to see whether any  
32 agreement can be reached about what is and is not outside scope. Then, if need be, should  
33 we have to trouble the Tribunal with it, we could make short written submissions and the  
34 point could be determined on the papers.

1 THE CHAIRMAN: Fine. That corresponds with where I hoped we would end up, and I will tell  
2 you when I have got availability, such as it is, in a short while. In fact, we may get to it now  
3 in relation to the question of a PTR.

4 MR. BEARD: Yes. Sir, I did not mean to skip over the superfluity issue, I was aware that we  
5 had the modality---

6 THE CHAIRMAN: I saw that as a possible pre-PTR point that needs to be done sooner, because  
7 otherwise it----

8 MR. BEARD: It will not feed into the skeletons. We are entirely with you, Sir. As you probably  
9 anticipated, the thrust of our submissions is having stuff earlier so that we can feed it into  
10 the skeletons, and making sure that those documents are properly focused is important for  
11 us. I think that is true for all parties.

12 THE CHAIRMAN: So pre-trial review?

13 MR. BEARD: At the moment, I think the broad agreement was the idea of having one in the  
14 week commencing 13<sup>th</sup> March. There are obviously two issues. I think Ofcom may even  
15 have said 6<sup>th</sup> March. There are obviously two issues: one is your availability, Sir; and the  
16 second is just a question in relation to this. Obviously, by 13<sup>th</sup> March you will have had one  
17 skeleton argument. On 6<sup>th</sup> March, if we were to have it in that week, you would not have  
18 had any skeleton arguments.

19 THE CHAIRMAN: I can tell you that you are not going to have it in the week of 6<sup>th</sup> March, so  
20 you can eliminate that.

21 MR. BEARD: There is obviously always a bit of a dilemma with PTRs in the sense that you want  
22 them far enough through the process that you have got stuff to review, but far enough in  
23 advance of the hearing that you can actually do something about problems that have arisen.  
24 We are in your hands. To some extent, your convenience after 13<sup>th</sup> March, we would say,  
25 however, there might be a benefit in having it slightly later.

26 THE CHAIRMAN: We have also got to factor in now the unknown of when Tribunal members  
27 come on-stream, and the question of arranging the teach-in. My diary is such that at the  
28 moment I am away in the week of 6<sup>th</sup> March. In the week of 13<sup>th</sup> March I am the  
29 Applications Judge in the Chancery Division. Then, as far as I am aware at the moment,  
30 I am here in the weeks of the 20<sup>th</sup> and 27<sup>th</sup>. I cannot promise to be able to get out of the  
31 Applications List, but it is at least possible if it needed to be during the week of the 13<sup>th</sup>.  
32 I suppose it is at least possible I can ask for one of my colleagues to be assigned to sit in and  
33 do the applications in place of me for a day if it was necessary. Otherwise we have got the

1 week of the 20<sup>th</sup>. I am afraid the week of the 6<sup>th</sup> is not possible, but the week of the 13<sup>th</sup>  
2 may be, and the weeks of the 20<sup>th</sup> and 27<sup>th</sup> seem to be, but they are quite close to the start.

3 MR. BEARD: Yes, they are close to the start of the trial, but---

4 THE CHAIRMAN: When were you thinking about the teach-in, and how close do you think the  
5 teach-in should be to starting?

6 MR. BEARD: I think it needs to be fairly close to starting, because if it is not then the benefits of  
7 it are likely to diminish, because you want it relatively close to the reading in process. We  
8 would have thought the teach-in would probably be in something like the week of  
9 27<sup>th</sup> March. I only say that because I am conscious that Ofcom will be providing their  
10 skeleton on the 24<sup>th</sup>, and presumably having a teach-in during that week whilst they are  
11 finalising preparation is not something that they are going to necessarily relish.

12 THE CHAIRMAN: No, and it would probably be sensible, although at that stage we may not  
13 have had much chance to read it, at least the parties will have understood by at least having  
14 the two main skeletons in play which elements of the teach-in are more significant than  
15 others. So if we do the teach-in in the week of the 27<sup>th</sup>, the question is how much before  
16 that do you think it would be sensible to have a PTR?

17 MR. HOLMES: I wondered if we could combine the two and kill two birds with one stone in the  
18 week of the 27<sup>th</sup>, or do you think that is too late in the process?

19 MR. BEARD: No, I do not necessarily think so. They are going to be different sessions because  
20 there are going to be different people involved. Having them both in that week, I think we  
21 would be relatively agnostic. We can see the benefit of having had your skeleton before we  
22 do a PTR. I do not think, from our point of view, there would be a problem with putting a  
23 PTR into the week of the 27<sup>th</sup> shortly in advance of the reading week.

24 The only issue then is we are very close to the start of the hearing, so if something has gone  
25 wrong the PTR is a bit late to fix it. On the other hand, and in reality, if things are going  
26 wrong they will either have been detected well in advance of that, at which point we can  
27 raise them with you, Sir; or we will not have realised it until we see your skeleton, so  
28 having a PTR beforehand is not of any benefit. I think we can see the benefit of the PTR  
29 that week as well.

30 THE CHAIRMAN: The PTR is there to, one would hope, confirm that we are on course, to nail  
31 down the timetable for witnesses. By that stage, if there were any unresolved problems  
32 about admissibility of evidence or expert evidence or anything like that, you would have  
33 hoped they would have been identified and, as you say, capable of being raised at an earlier  
34 stage, at least on paper, for some sort of decision.

1 The other thing is, it probably assists in at least making it possible that one of the other  
2 Tribunal members might be around, even for the PTR. I know that is unusual, but in a  
3 sense, if they are getting involved----

4 MR. BEARD: If that would be useful for the Tribunal members we quite understand. I think for  
5 the purposes of the PTR, unless real problems have arisen, we do anticipate it will be  
6 sorting out the final timetable for the trial. That is why I say the week of the 27<sup>th</sup> may be  
7 better, because until we have seen the Ofcom skeleton there may be issues about the extent  
8 to which witnesses need to be cross-examined, and we will not necessarily be in a position  
9 to deal with those matters.

10 THE CHAIRMAN: I can see at the moment - it is unusual because normally my instinct would  
11 be to have the PTR in the week of the 20<sup>th</sup>, but I can see the undoubted benefits of having it  
12 after the skeletons have at least been produced. I am frankly going to be saying that, as far  
13 as I am concerned, I am going to be trying to keep myself as free as possible during that  
14 week anyway for this, but I just do not know, and I cannot commit. Would you want to put  
15 a date in towards the end of the week for the teach-in, and towards the beginning/middle of  
16 the week for a PTR? Does that make sense?

17 MR. BEARD: I think that would be sensible if that were feasible for you, Sir.

18 THE CHAIRMAN: As I say, at the moment my diary for that week is clear as far as I am aware.  
19 Do people want to pitch for a day?

20 MR. BEARD: It sounds like Wednesday and Friday is the sensible course, because then we will  
21 have had a couple of days to digest the skeleton, and possibly actually resolve the trial  
22 timetable. If that is the one issue that is outstanding for the PTR - I do not want to assume  
23 that we actually need to come back before the court and go through it in any detail. It may  
24 be the sort of matter that can be agreed.

25 MR. HOLMES: We could perhaps say a PTR if so advised on the Tuesday or the Wednesday.

26 MR. BEARD: I just think, if Ofcom are serving their skeleton on the Friday, the possibility of  
27 having a proper exchange and resolving matters before the Tuesday is just a little remote.

28 THE CHAIRMAN: We should get the date in everybody's diary. Have any of the other counsel  
29 got any problems? I would imagine that you will all be working madly on this at this stage.  
30 The interveners have to put their skeletons in by 31<sup>st</sup> March, I think. To what extent are the  
31 interveners going to be happy to participate in either a PTR in the middle of the week or  
32 even a teach-in.

1 MR. LIDDELL: Sir, I think, pragmatically, we recognise that it is getting congested at that point,  
2 but it does seem to us that that period is the right period of time in which to have both the  
3 PTR and possibly the teach-in, so we are not going to stand in the way of that.

4 THE CHAIRMAN: Within the week, do you have a particular view as to how it might pan out  
5 for you?

6 MR. LIDDELL: I do not. I think the way in which we, on behalf of Virgin Media, might see it  
7 being structured is that our counsel, who as yet has to be determined, will be working on the  
8 skeletons and if there is to be a PTR and teach-in we, at Ashurst, will try and deal with that.  
9 We will take your view as to the most appropriate time for that.

10 MR. KUPPEN: It might perhaps be preferable not to have the teach-in on the same day as the  
11 skeletons are due, so not on the Friday of that week.

12 THE CHAIRMAN: Yes, I can see that. You might want to participate in both.

13 MR. KUPPEN: We might want to observe at least, if that is possible.

14 THE CHAIRMAN: So you would want the teach-in before the Friday, or you think you might  
15 just get your skeleton in a day earlier and have the teach-in on the Friday?

16 MR. KUPPEN: Ideally, we would probably like to keep the skeleton deadline on the Friday and  
17 not have the teach-in that day, if that can be arranged. We do not know quite know how it  
18 is going to pan out in terms of personnel.

19 THE CHAIRMAN: Does anybody else have any views?

20 MR. JOHNSTON: Nothing substantive to add. Similarly, if it could be done on a day other than  
21 the Friday, I think that would assist realistically. If it cannot, then it cannot.

22 THE CHAIRMAN: Is there any reason why we cannot say the Wednesday and the Thursday, on  
23 the basis that if we reserve Wednesday, 29<sup>th</sup>, and Thursday, 30<sup>th</sup>, for a PTR and a teach-in,  
24 I do not suppose it actually matters which sequence they go in, although provisionally  
25 I would have thought the PTR first and the teach-in second.

26 MR. BEARD: I think that is----

27 THE CHAIRMAN: We have not discussed the----

28 MR. BEARD: I was going to come on to the technical primer and the teach-in now, but I think  
29 pencilling it in is sensible.

30 THE CHAIRMAN: As a provisional working presumption until we nail this down, PTR on the  
31 29<sup>th</sup>, and if there is nothing to resolve and everybody is happy, and we are going to be  
32 seeing each other for a teach-in anyway on the 30<sup>th</sup>, if people say, “We do not need a formal  
33 set PTR, everything is going to plan, here is the timetable we have all agreed, we will see  
34 each other at the teach-in”, then we can vacate the PTR on the Wednesday.

1 MR. BEARD: That is why I think it is better to have it on Wednesday rather than Tuesday,  
2 because I think there is more chance of that happening. I am not suggesting it will, but...  
3 That really then takes us to the technical primer and teach-in. Obviously on the agenda,  
4 what the Tribunal had envisaged was the idea of having an independent external person----

5 THE CHAIRMAN: Which everyone disagrees with.

6 MR. BEARD: I think everyone struggles with identifying someone that is independent and  
7 sufficiently expert in relation to these matters. We think there is just a grave danger that we  
8 are going to end up with long arguments about who it should be, whether they can be  
9 available and useful, and then how it is going to be run.

10 THE CHAIRMAN: Just to put it from the other point of view, what the teach-in is not is an  
11 opportunity for the parties, as it were, through the teach-in mechanism, to have a pre-  
12 emptive strike at the arguments.

13 MR. BEARD: That is also what we were slightly concerned about. There are two issues. One  
14 was, obviously, there is a suggestion about having a technical primer, so a document that  
15 provided relevant technical background. Again, we have no issue with that. It is something  
16 that needs to be prepared by the parties if we have not got an independent expert. Ofcom's  
17 suggestion seemed to be that primarily it could simply be by reference to their witness  
18 statements, or at least one of them. We do not accept that that is a sensible way of dealing  
19 with these matters. We do think it needs to be a neutral document. It may be that material  
20 from witness statements, whether from Ofcom or BT, can be agreed and consolidated in that  
21 document, but we think that that is the right way of producing the technical primer.  
22 When it comes to the teach-in itself, we have proposed a list of issues which we attached to  
23 our letter of 18<sup>th</sup> January, which is at tab 23 of the bundle. I am not sure that Ofcom  
24 necessarily disagree with these as being the relevant issues for a teach-in. Ofcom have  
25 suggested that the issues should be rather like the issues that were raised in the CMA  
26 proceedings in the CMA teach-in. We do not agree that that is right, because there are  
27 different issues arising in this case as compared to the CMA case, not least of which is the  
28 characterisation of the market and the products involved in the market, which was not at  
29 issue in the price control matters.

30 THE CHAIRMAN: Just remind me, just mentioning the CMA, can you remind me of the date  
31 that the CMA is due to produce their----

32 MR. BEARD: The end of February.

33 THE CHAIRMAN: Thank you. I suddenly had a thought in relation to the timetable, but that is  
34 fine, that will be----

1 MR. BEARD: The provisional findings, third week in February, I think is the indication.

2 THE CHAIRMAN: All of the timings that we have been discussing fit. That is fine.

3 MR. BEARD: Given where we were at the previous CMC, the CMA got on with matters as  
4 envisaged by the Tribunal last time. So we are anticipating provisional findings by the third  
5 week in February, so well in advance of the hearing. I think probably the final outturn of  
6 the CMA will be before the trial starts. It is 31<sup>st</sup> March.

7 THE CHAIRMAN: Yes, 31<sup>st</sup> March is the date I had in my head.

8 MR. BEARD: So the provisional findings are probably as important as anything else so far as  
9 general preparation is concerned, but you will also have the final decision by the time we  
10 start trial in April.

11 THE CHAIRMAN: Thank you. That was a complete aside.

12 MR. BEARD: No, I am sorry, I should have picked it up, I had some notes on it.

13 The very broad point here is, in relation to the teach-in we are not content with Ofcom's  
14 approach. In particular, Ofcom have suggested that they should broadly take the lead and  
15 then we should chip in in relation to the technicalities of our system. We say that is not the  
16 way that this should work. As we say, we do not see this as an opportunity for one person  
17 to come along, one of the parties, and tell you what they say is the relevant story. We are  
18 not trying to sort out today how this works. We obviously recognise this is not an  
19 opportunity for submissions, we obviously recognise that some of the material that Ofcom  
20 has put in is relevant and can be drawn upon for the technical primer, and equally, in terms  
21 of presentation at the teach-in, Ofcom will rightly want to do some of that presentation.  
22 We think, beyond that, trying to ascertain precisely what the issues should be and who takes  
23 on which role at the teach-in is probably not a sensible discussion, and we have not got into  
24 a particularly detailed discussion.

25 Unless, Sir, you want me to, I will not go through in detail why we say that Ofcom's  
26 approach, which is essentially adopting the issues that were raised before the CMA, is not a  
27 sensible one for the moment.

28 MR. HOLMES: Sir, it certainly has not been Ofcom's intention to suggest that it would take the  
29 lead at the presentation, or that this would not be something for all of the parties to  
30 participate in. We just thought, in the spirit of trying to be helpful, we would note that there  
31 has been a teach-in already for the CMA, these were the topics covered, and that might form  
32 the basis for discussions between the parties about what might be covered before you. It is  
33 not really something that could be the subject of directions today, what is covered at the  
34 teach-in.

1 I am slightly alarmed at the bellicose tone in which the point has been put, because it does  
2 not suggest that it will be necessarily be straightforward to reach agreement. I think the  
3 parties should go away and discuss it and come back with, hopefully, an agreed position.

4 THE CHAIRMAN: I have to say, by definition, if I knew what I was doing on the technical side  
5 to resolve the dispute, I would not need the teach-in. I think it is right, the purpose of the  
6 teach-in is for everybody who is going to be participating to agree amongst themselves and  
7 have the opportunity to ensure as best they can that the members of the Tribunal understand  
8 the technical background to the issues that are going to be put.

9 MR. BEARD: Absolutely.

10 THE CHAIRMAN: I would want, in a sense, there to be an agreed and ideally single document  
11 as a technical primer which we should endeavour to have had and read before the teach-in.  
12 That is one of the obvious points. It should, as it were to avoid offending people's  
13 sensibilities, be a neutral document. If you are going to put logos on it, then put  
14 everybody's logos on it.

15 MR. BEARD: No, no logos.

16 THE CHAIRMAN: Preferably do not put anybody's logos on it. If Ofcom have material that  
17 they think could usefully go into it, stripped of the Ofcom logo, and BT, stripped of the BT  
18 logo, etc, have stuff to go in it, it should not be beyond the wit of your teams to produce a  
19 technical primer. How long do you think a technical primer will take to produce, or how  
20 much in advance of the teach-in on, say, that Thursday can we have it?

21 MR. BEARD: Our broad indication was that we would try and liaise in the second half of  
22 February on getting this technical primer together. We were hoping to get it to the Tribunal  
23 before the end of February. That is less critical if the teach-in is not going to be until the  
24 end of March.

25 THE CHAIRMAN: Possibly.

26 MR. BEARD: That is what we have in mind. We are happy to stick with that. The intention  
27 was, Sir, as you indicate, we produce a neutral document . We are not reinventing the  
28 wheel, we will take stuff from the evidence----

29 THE CHAIRMAN: Ideally, I would quite like the technical primer to be with me by the time  
30 I have finished my applications in the Chancery Division on the basis that then I have a  
31 week, and certainly by the week of the 20<sup>th</sup>.

32 MR. BEARD: Of March or February?

33 THE CHAIRMAN: You are saying you are going to have it?

34 MR. BEARD: Yes, I was talking about the end of February, Sir.

1 THE CHAIRMAN: Okay, fine, in which case it is a long time ahead, in which case ideal.

2 MR. BEARD: If there is a bit of slippage, it sounds like that would not trouble the Tribunal  
3 unduly.

4 THE CHAIRMAN: As it happens, I have got a Financial List case starting next week for three  
5 weeks, so there is no rush to get it to me before Friday, 17<sup>th</sup> February.

6 MR. BEARD: I do not think we were envisaging that. We were envisaging the end of February.

7 THE CHAIRMAN: I will be writing judgments, but there is that little slot at the end of February,  
8 which would be quite useful, because if I do have time I am obviously going to be starting  
9 to think about this.

10 MR. BEARD: We have put down in our suggestion 24<sup>th</sup> February. We will do our best to get that  
11 to you by then. If it ends up being the end of February then perhaps that does not trouble  
12 you unduly, Sir, but we will do our best to get that done.

13 THE CHAIRMAN: Discuss the technical primer, try and get the document by the 24<sup>th</sup> or end of  
14 February, that is fine.

15 MR. BEARD: We will also discuss the modalities of the teach-in and how it could sensibly be  
16 run as we are in the process of producing the technical primer, but again I am not sure that  
17 trying to sort that out now is necessarily, as Mr. Holmes rightly says, the sort of thing that  
18 we can sensibly engage in. Having the date there at the back end of March is useful.

19 THE CHAIRMAN: Right.

20 MR. BEARD: I think those constitute the main issues. I will go back through the agenda so that  
21 we can tick things off. I think we have all agreed, unless the Tribunal thinks otherwise, that  
22 we would try and get the authorities bundle on 31<sup>st</sup> March. It may be, in the light of the fact  
23 that the interveners' skeletons are not going to be in until 31<sup>st</sup> March, that either we serve an  
24 authorities bundle which is a main parties' authorities bundle, and then we slot in  
25 supplementals thereafter, or we have to postpone it. I would prefer the former, because it is  
26 better, I think, to have the core of the authorities, and if the interveners have more than so  
27 be it. We will canvass it with them beforehand, and if there are particular ones that they  
28 know they are going to want in we can slot them in along the way. I would prefer to keep  
29 31<sup>st</sup> March as the authorities bundle deadline, if that is acceptable to the Tribunal.

30 THE CHAIRMAN: Yes, that is fine.

31 MR. BEARD: We have dealt with pre-trial review. In terms of practical arrangements for the  
32 trial, we are going to be liaising about transcription issues. I think, as is often the case, it  
33 may come down more to----

1 THE CHAIRMAN: The actual trial bundles themselves: have the parties been discussing the  
2 format that they will take, or are we just going to be working on the basis of the bundles in  
3 the form that they currently do take? What I am really aiming towards, I suppose, is  
4 questions such as, is there going to be a core bundle, is there going to be a cross-  
5 examination bundle? Are there ways of distilling key documents from the large number of  
6 files that exist?

7 MR. BEARD: We have not specifically discussed the core bundle, but the core bundle obviously  
8 is feasible. The only issue is that, in some cases, the core becomes an enormous thing. We  
9 can try and discuss it and sort that out. We have all agreed that it would be a good idea to  
10 have an electronic hearing bundle. In relation to cross-examination bundles, I think it is  
11 something that is worth liaising further about. The only reason I say that is because you  
12 have in the bundles before you material that is confidential to certain parties, and we will  
13 need to liaise to make sure that relevant witnesses are cross-examined on material that is  
14 confidential to them but not confidential to others, for example, and that they should not  
15 have seen. I think these are modalities that probably we need to engage with, but at the  
16 moment that is not sorted out, I think is the answer. It is one of the points that has been  
17 highlighted in issue 9. You will see in our summary table that what all of the parties  
18 currently think is that each party should produce its own cross-examination bundles,  
19 containing its own confidential information and redacting that of others, so that the  
20 responsibility lies with the people who are particularly cognisant of the confidential  
21 material. They will produce a non-confidential version that can then be used for cross-  
22 examination of other witnesses.

23 Let me just give you an example: if you have got a BT witness in the box, Mr. Holmes may  
24 want to be cross-examining them. He can plainly cross-examine in relation to BT  
25 confidential material. Therefore, they need a set of bundles that includes all that  
26 confidential material. On the other hand, if it is another party's witness, they cannot have  
27 those same bundles which contain BT confidential materials. So we just need to make sure  
28 that there is a relevant set of bundles available for each piece of cross-examination. The  
29 best way of doing that is for each party to go away and identify its confidential material and  
30 produce a non-confidential set.

31 THE CHAIRMAN: How do you envisage the hearing taking place with cross-examination about  
32 confidential material?

33 MR. BEARD: In the past what has happened is that those that are carrying out the cross-  
34 examination try to structure their cross-examination so that they are not traversing

1 confidential material so far as they can at any point, and if there is material that they need to  
2 cross-examine on that is confidential, then it has to be a limited and closed hearing for those  
3 that are subject to the confidentiality arrangements. There are sometimes witnesses where  
4 almost all of the cross-examination pertains to confidential matters, in which case it is just  
5 not an open part of the hearing.

6 THE CHAIRMAN: It is only this: when people are looking at the trial timetable and how much  
7 time they think they need for particular witnesses, when we get much closer to it that is an  
8 additional factor that will have to be dealt with.

9 MR. BEARD: That is absolutely right, and it needs to be considered. It is just the logistics of  
10 people coming in and out can slow things up, and we are conscious of that. I think all of  
11 those involved in this case have been involved in previous hearings where this course has  
12 been followed and are cognisant of that.

13 THE CHAIRMAN: It happens from time to time. It is just that I can see that there is a greater  
14 potential for it happening in this case than in some others.

15 MR. BEARD: It is a problem, and occasionally we encounter the problem that a question is asked  
16 by a cross-examiner who thinks that the answer is likely to be in open and the witness  
17 actually wants to give an answer that is confidential, or indeed sometimes gives an answer  
18 that discloses confidential information and then we have to go through the process of having  
19 that redacted from the transcript, and so on. We recognise that there is no perfect way of  
20 doing this, but we are also conscious that this Tribunal wants to have its proceedings in  
21 open as much as possible.

22 THE CHAIRMAN: Yes.

23 MR. BEARD: In terms of practical arrangements, we do have some consideration but not final  
24 agreement in relation to the cross-examination bundles. We do have broad agreement in  
25 relation to electronic hearing bundles. We are discussing transcription issues, whether or  
26 not there will be live transcription or end of the day transcription, and so on.

27 We will also add to that list for consideration the production of a core bundle for the  
28 Tribunal.

29 THE CHAIRMAN: Yes, and I do mean core.

30 MR. BEARD: We understand.

31 THE CHAIRMAN: A core bundle is something that you put into your briefcase overnight if you  
32 want to, which you carry around with you. Something which goes beyond a relatively  
33 modest file is not a core bundle.

34 MR. BEARD: We understand.

1 THE CHAIRMAN: If you do not think that that can be produced usefully then we would have to  
2 make do without it, but it is usually possible to produce a really slim bundle.

3 MR. BEARD: We will see what we can do. I am conscious of the volume of the pleadings, and  
4 so on, it is difficult.

5 THE CHAIRMAN: It is not like it is a contractual dispute where you have the contract and---

6 MR. BEARD: That is the only caveat I place on it.

7 MR. HOLMES: We will do our best, Sir, in relation to a core bundle.

8 There is just one point to flag, which is that some of the BT bundles have been served in  
9 electronic copy but not in hard copy on both the Tribunal, I think, and the parties. From our  
10 perspective, we certainly do not propose that they should all be produced in hard copy and  
11 provided to the Tribunal. There may be bits and pieces that do need to be sifted out and  
12 provided to the Tribunal as supplemental materials, but we can liaise about that as well.

13 THE CHAIRMAN: When you are talking about an electronic hearing bundle, are you talking  
14 about an electronic bundle which will be on a bespoke system, or are you talking about an  
15 electronic bundle that essentially is on a USB stick or is loadable on to an iPad, or  
16 something like that?

17 MR. HOLMES: The point I was making was not in relation to the hearing bundle, but in relation  
18 to the appeal bundles served by BT, of which there were ten volumes that were served in  
19 hard copy, but a number of additional volumes that were provided only in soft copy. So  
20 there are documents in support of the appeal, broadly speaking, but none of us have them at  
21 present in hard copy. It is simply to make the point that we may need to supplement the  
22 hard copy appeal bundles in preparing the hearing bundles with some of that material in so  
23 far as it is relevant and necessary - for example, the cross-examination of witnesses at the  
24 hearing.

25 THE CHAIRMAN: Why the bifurcated---

26 MR. BEARD: The volume of paper was simply it. I think it was accepted by the Tribunal that it  
27 could be served electronically. We are happy to produce it all in paper or selectively.

28 THE CHAIRMAN: Is it the case that, as it were, the main documents have been produced in hard  
29 copy and it is just lots and lots of other stuff that is electronic, or is it completely random?

30 MR. BEARD: No, it is not random. Fun though that would be as an adventure through an index,  
31 it is far from random. The key documents are all in paper, and then it is material that is  
32 referred to and is supporting, for instance, assertions in witness statements. All of that has  
33 been produced in paper.

1 THE CHAIRMAN: So what you are saying is that it may be that some of the documents referred  
2 to do need to be printed?

3 MR. HOLMES: Yes.

4 MR. BEARD: Yes, and we have no objection at all. If we were told by Ofcom, “Actually, we  
5 need all of it in paper form”, then we recognise that it has got to be produced. I do not hear  
6 Mr. Holmes saying that. We are very happy to produce whatever is required from that  
7 electronic material in paper form.

8 THE CHAIRMAN: If you produce the electronic hearing on a USB stick or indeed in a form that  
9 could be read on an iPad, it is presumably not searchable, but at least you can go through it?

10 MR. BEARD: I think it is probably PDF searchable. I think these are PDF documents, but it is  
11 not the sort of bespoke intranet system that sometimes is created by way of an electronic  
12 bundle. That is not what we have at the moment. The parties can discuss that, but at the  
13 moment what we have are essentially collections of headed PDF documents which are the  
14 relevant pleadings, or witness statements with attachments.

15 THE CHAIRMAN: It may be - I do not know and I cannot speak for people I have not got here -  
16 that the necessity for a ‘core bundle’ if one does not immediately spring out of the  
17 documents at you is somewhat reduced if you do provide us with an electronic bundle,  
18 because then, in a sense, if it can all fit, say, on an iPad, or something like, that is the thing  
19 that you would take with you if you wanted to do some weekend reading.

20 MR. BEARD: Sir, you are asking about the navigability of that. I will talk to those behind me.

21 THE CHAIRMAN: In the old days, and indeed in the new days, the great thing about a core  
22 bundle is that they were the documents that you referred to most often, you could annotate  
23 them. It is your safety blanket to carry around and it travels with you so that you can  
24 pretend you are working, even when you are not. It is that sort of thing, but if you have an  
25 iPad then maybe you can think of some way to do it.

26 MR. BEARD: I think, to be clear, the USB material we are talking about is not in a format as per  
27 one of the document systems that you are contemplating where you can do annotation, and  
28 so on.

29 THE CHAIRMAN: You can nevertheless pull up the document if you want it?

30 MR. BEARD: Yes, absolutely.

31 THE CHAIRMAN: It may be that that will be satisfactory.

32 MR. BEARD: We will discuss it further, but I think that is where we are with these matters.  
33 The other points that were picked up on the agenda - legibility, we do not believe there are  
34 any.

1 I think there is one other application that Virgin has that we can come back to, but before  
2 we deal with that, is it worth just zipping through the agenda as it was and making sure that  
3 we have covered all of the issues?

4 THE CHAIRMAN: Yes.

5 MR. BEARD: So, starting with 1, reliance on the expert evidence of Mr. Osborne: I think we  
6 have dealt with those matters.

7 THE CHAIRMAN: There will be an order that Mr. Osborne's evidence is admitted on the same  
8 terms that apply to all the experts, with the caveats we mentioned earlier in relation to  
9 overlap or ultimate cross-examination.

10 MR. BEARD: They are matters for another day.

11 THE CHAIRMAN: Yes. Technical primer: I have got end of February in my diary.

12 MR. BEARD: It is probably sensible to say best endeavours by the end of February, but I do not  
13 envisage there is going to be a problem with it.

14 THE CHAIRMAN: Sure.

15 MR. BEARD: Then the teach-in: in principle, I think we all agree that is a good idea, and we  
16 have listed the time for it, and the issues to be covered and the formalities of it to be  
17 discussed.

18 THE CHAIRMAN: Thursday, 30<sup>th</sup> March, I think, is the date.

19 MR. BEARD: That was the day we discussed. Review of factual witness statements, superfluous  
20 material, critical passages: I think that is now taken up. Superfluous material, we are  
21 somewhat leaving to one side, and it is probably now taken up with the evidence maps.

22 THE CHAIRMAN: It is a combination of the issues map and the evidence map, but primarily the  
23 issues map will identify the critical pieces of evidence that the parties are relying on.

24 MR. BEARD: Then we have got directions in relation to parties' expert evidence, and we are just  
25 putting in place the direction the parties' experts----

26 THE CHAIRMAN: 24<sup>th</sup>, joint statements.

27 MR. BEARD: -- provide a joint statement on 24<sup>th</sup>.

28 THE CHAIRMAN: Yes, 24<sup>th</sup> February. Then 4(b) is no. That is subject always, obviously, to if  
29 it appears for some reason that there would be merit in hot-tubbing them on a particular  
30 issue that arises, then the Tribunal can always decide to do it, but provisionally at the  
31 moment it will be done a more conventional basis.

32 MR. BEARD: Yes, that is the basis we are going to proceed on. The Tribunal can revisit these  
33 matters, and obviously everyone has got liberty to apply to the Tribunal in any event, but we  
34 will proceed on that basis.

1 THE CHAIRMAN: You have divided up between you, or at least between you and CityFibre,  
2 what you plan to do.

3 MR. BEARD: Yes. Ms. Morrison has placed the caveat that she has not had an opportunity to  
4 discuss it with whoever is going to be leading her in relation to these matters, but at the  
5 moment we are working on the basis that we will need to deal with all of the issues that  
6 appear in our appeal; and CityFibre will be dealing with the matters that are additional in  
7 relation to their appeal. We have indicated that. Ms. Morrison is not dissenting, but she is  
8 quite properly placing a caveat at this stage.

9 THE CHAIRMAN: Fine. Technical primer, we have said end February.

10 MR. BEARD: Yes, and meetings of experts, we are not putting in place a direction, we have got  
11 the joint statement date.

12 Filing and service of skeletons: it is BT on the 10<sup>th</sup>, Ofcom on the 24<sup>th</sup>, interveners on the  
13 31<sup>st</sup>. Any supplemental skeleton from BT by the 3<sup>rd</sup>. We do need to include here some  
14 wording to cover, Sir, the provisions in relation to page limits.

15 THE CHAIRMAN: Yes, if you just simply say up to 50 per for each of BT and CityFibre, and  
16 Ofcom to have the same number of pages as their total. I hope the order does not need to go  
17 into all the other points.

18 MR. BEARD: That is all understood.

19 THE CHAIRMAN: I will be the butt of many jokes if I make an order like that, but I think I have  
20 made it clear what I am expecting to find.

21 MR. BEARD: Absolutely. We will not include that in the order. I think that covers all matters in  
22 relation to skeletons.

23 Then joint authorities bundle: we will serve an agreed authorities bundle on the 31<sup>st</sup>, with  
24 the caveat, and we do not need to put it in the order, that it may need to be added to.

25 THE CHAIRMAN: Yes, the PTR is 29<sup>th</sup> March, and the teach-in is on the 30<sup>th</sup>.

26 MR. BEARD: Yes.

27 THE CHAIRMAN: Sequence of cross-examination, factual, this is all going to have to be looked  
28 at.

29 MR. BEARD: Subject to discussion.

30 THE CHAIRMAN: Dates of the Easter break, we are going to say that we will take the week of  
31 the 17<sup>th</sup> to 21<sup>st</sup> as a Easter break.

32 MR. BEARD: Yes. I think at this point in the order it will be sensible to put in reading week, 3<sup>rd</sup>  
33 April, openings 10<sup>th</sup> to 13<sup>th</sup>, and then indicate the Easter break, and then indicate the period

1 of weeks during which there is going to be cross-examination of witnesses, and then  
2 indicate the allotted period for preparation of and closings, so that we have got the----

3 THE CHAIRMAN: Just remind me, we did not actually look at that detail. I said we would  
4 come back to that detail. The timetable that you propose for the closings?

5 MR. BEARD: Yes, we had said a couple of days for preparation and then we thought a total of  
6 up to six days of oral closings. It is effectively eight days. I think the Ofcom proposal was  
7 almost the other way round, saying five days of written preparation and then three days or  
8 oral closings. It comes to the same amount. Sir, it may not be necessary to include that  
9 here.

10 THE CHAIRMAN: I think at this stage let us leave it out, simply because, as I indicated, we will  
11 know much closer to the time what it is that is going to benefit us all. Provided we have  
12 warned people about the end date then, in a sense, how we use the time amongst ourselves  
13 is up for grabs. So the end date?

14 MR. BEARD: That then is the important date.

15 THE CHAIRMAN: The one thing I said is that this hearing must finish----

16 MR. BEARD: Yes, by the 26<sup>th</sup>.

17 THE CHAIRMAN: I said it is a----

18 MR. BEARD: The window was through to 26<sup>th</sup> May, I think.

19 THE CHAIRMAN: It is 'aimed to finish' on 26<sup>th</sup> May.

20 MR. BEARD: I do not think we said 'aiming to finish'.

21 THE CHAIRMAN: It must finish on 26<sup>th</sup> May.

22 MR. BEARD: Yes, I think it is a 'must finish', I think the 'aim to finish' is on the Wednesday on  
23 both of these timetablings.

24 THE CHAIRMAN: Yes, it is two weeks further than the previous window. That is important  
25 again for talking to the potential Panel members about availability. They need to know that  
26 that is their commitment.

27 MR. BEARD: I think it may be all sorts of reasons. Given that a window has been allocated to  
28 the 12<sup>th</sup>, people are going to have to do a little bit of moving around.

29 THE CHAIRMAN: Do I take it from the silence that there is nobody who actually knows that  
30 they are unavailable in that additional two week window?

31 MR. BEARD: I may have difficulties on the 25<sup>th</sup> and 26<sup>th</sup>, but I will try and rearrange what I am  
32 doing then.

33 THE CHAIRMAN: Yes. You have got an incentive to finish on the 24<sup>th</sup>?

34 MR. BEARD: I do, yes, very much so.

1 Given that we are working our through and talking about directions, it seemed sensible to  
2 put those in there.

3 Consider arrangements for the hearing: transcription for the hearing, still under discussion.  
4 I am not sure a direction is required at this stage.

5 Electronic hearing bundle: yes, we are all agreed that there should be one. We can have  
6 another think about formatting, and the logistics of having it more interactive, but  
7 otherwise, yes, one will be produced.

8 Bundles for use during cross-examination: at this stage I do not think any direction is  
9 needed, but we broadly have consensus in relation to those matters.

10 That then takes us through to the agenda so far as we are concerned.

11 THE CHAIRMAN: Then my list says that Virgin has got one additional application.

12 MR. BEARD: Yes, and I think also Gamma may have one. Unless I can assist you further, Sir,  
13 those are my submissions.

14 THE CHAIRMAN: Who wants to go first?

15 MR. KUPPEN: Just one very short point on the timetabling of the hearing itself: the practical  
16 concern that is foremost in our mind is to keep the time window to block out in the diary of  
17 four factual witnesses as tight as possible. We understand that at the moment the timetable  
18 implies that we start on the 24<sup>th</sup> with the evidence, and the evidence will run for  
19 approximately three weeks. I understand that it is too early at the moment, of course, to  
20 commit about which witnesses are likely to be cross-examined. If we could, we would like  
21 to encourage the parties to resolve this matter sooner rather than later, or, at the very least,  
22 narrow down the time window to say, for instance, that factual witnesses are being dealt  
23 with first, at the beginning of this 15 day window, with experts to be heard after that.

24 THE CHAIRMAN: Bearing in mind there is also a Bank Holiday in the middle of that. The  
25 Monday, 1<sup>st</sup> May, is a Bank Holiday. In a sense, as soon as parties can negotiate and try  
26 and agree----

27 MR. BEARD: I wonder whether, even if we cannot finalise it, in relation particularly to the  
28 interveners where they may only have one or two witnesses, what we might be able to do is  
29 discuss which days they might sensibly block out and try and limit the amount they need to  
30 block out within that period. I think trying to do that now may be rather difficult. We take  
31 the point.

32 THE CHAIRMAN: Can I just canvass one thing which is raised and is in Ofcom's letter, I think,  
33 which is this: what Ofcom mentioned was whether the sequence of giving evidence should  
34 be different in the sense that it should be done broadly by issue - i.e. market definition first -

1 and then other evidence in relation to remedies being done second, as opposed to doing it,  
2 as it were, witness by witness. Has there been any discussion or movement on that?

3 MR. BEARD: I do not think there has been discussion on it. We can understand why issue by  
4 issue can be useful for a Tribunal working through. The difficulty comes where one witness  
5 deals with matters that cross over, and then it ends up becoming somewhat cumbersome.  
6 Sir, we have not reached a view about it. We are happy to discuss it further, but it ends up  
7 being a logistical issue as much as anything else, it is not some massive issue of principle.

8 THE CHAIRMAN: The answer may suggest itself rather more clearly when you have actually  
9 gone through the exercise of producing the issues map, the evidence map, etc. It will  
10 simplify that, but that does dovetail with the point about trying to get an early sight on not  
11 only witness sequencing but also how the witnesses should group their evidence or  
12 otherwise, because that will enable particular people to be accommodated.

13 MR. BEARD: We quite understand, Sir, from the interveners' point of view that they do not  
14 necessarily want to have to be in attendance or put their witnesses on notice for very  
15 substantial periods. We are sympathetic to that, but I think we are just not in a position to  
16 be able to assist at this moment.

17 THE CHAIRMAN: All right.

18 MR. JOHNSTON: Sir, can I just reiterate that point, *a fortiori*, for my client. Currently we are in  
19 a position where we have liberty to apply to appear before the Tribunal, but at the moment,  
20 without meaning any disrespect to the Tribunal, we are hoping not to do so. The reason we  
21 would, of course, would be if Mr. Farmer was being called as a witness. We are in a  
22 difficult position. We have six weeks blocked in counsel's diaries but we do not yet know  
23 whether it is going to be needed, and that obviously gives rise to practical difficulties, but  
24 also costs consequences. I was going to rise and ask, at least in respect of Mr. Farmer,  
25 whether we could have a hard edged deadline when the parties are going to indicate whether  
26 or not they propose to cross-examine him. We suggested the 20<sup>th</sup>, which is a month from  
27 today, in correspondence. Ofcom have said some time in early March. The other parties  
28 have reserved their position.

29 I fully understand that they may not have a clear and definitive position now, but, if I can  
30 put it this way: Gamma is the little fish at the party, and we would really appreciate the  
31 clarity that that would bring.

32 THE CHAIRMAN: Mr. Farmer goes to, according to this list, geographic market definition.

33 Mr. JOHNSTON: And also the appropriateness or otherwise of the remedy. Gamma is in the odd  
34 position of being both for in some respects and against Ofcom in other respects. I have not

1 comprehensively digested the witness evidence recently received, but my impression at  
2 least from having looked at it is that he is not facing a wholesale assault, if I can put it that  
3 way, in the other parties' evidence.

4 I am conscious that parties do not know at this point, but from our perspective it really is  
5 important to have a date when we could---

6 THE CHAIRMAN: Your appearance, is it solely dependent upon whether Mr. Farmer is going to  
7 be cross-examined?

8 MR. JOHNSTON: Sir, our position at the moment is that we are not proposing to apply to  
9 address the court orally unless Mr. Farmer is going to be called, in which case of course we  
10 will have to. Our position at the moment is, as confirmed at the previous CMC, permission,  
11 but in writing, with liberty to apply. We are proposing to make our submissions by way of  
12 the skeleton argument and in writing, and not to appear otherwise.

13 THE CHAIRMAN: If you did appear, you are saying, in essence, it would only be whilst he was  
14 giving evidence?

15 MR. JOHNSTON: I think we would want, realistically, to be here for openings, and we may  
16 want to make a short opening and possibly by way of closings, and when he is being cross-  
17 examined, and we would have to obviously review the transcript slightly more thoroughly  
18 for the rest of the period in order to know what might or might not be coming his way.  
19 I appreciate that we might get to a position where we could identify the day or two days that  
20 he might be called on, but I think the ramifications are slightly wider than that.  
21 Whilst conscious this might not be possible in respect of all of the witnesses, given the  
22 particular position that Gamma is in, that is our request, that there is a hard deadline on it.  
23 We are content for it to be 20<sup>th</sup> February or shortly thereafter, but we really do hope that the  
24 parties could decide, not merely on behalf of my clerks, but genuinely on behalf of my  
25 clients.

26 THE CHAIRMAN: I am just trying to think what other dates would fit---

27 MR. JOHNSTON: Would fit within the time.

28 THE CHAIRMAN: -- in the sense of what is happening which would affect the decision of the  
29 parties as to whether they want to cross-examine Mr. Farmer, whose evidence I am afraid  
30 I cannot claim to have read.

31 MR. JOHNSTON: Sir, I take no insult in that respect. Let us put it this way: one would assume  
32 - BT's skeleton argument is due when?

33 MR. BEARD: 10<sup>th</sup> March.

1 MR. JOHNSTON: If, in the course of preparing that, and we would really prefer before 10<sup>th</sup>  
2 March, that would be a long-stop for us really, BT is going to be applying its mind in some  
3 detail to the issues in this case. I am conscious that Ofcom might want to cross-examine  
4 Mr. Farmer, but I think it is fair to say that the scope of the issues is slightly narrower in that  
5 respect.

6 THE CHAIRMAN: The experts are due to produce their joint report - I am just thinking  
7 sequentially what is going to happen - the first thing around about that sort of time is the  
8 experts' joint report. Is what Mr. Farmer says likely to be affected in any way by that?

9 MR. JOHNSTON: No, Sir, I do not think it is. I think his evidence is factual exclusively. He is a  
10 senior member of Gamma in-house, and has given fact evidence. I do not think it needs to  
11 be tied to that. I think our position would be----

12 THE CHAIRMAN: I was going to say, you are looking to have an indication by the end of  
13 February/beginning of March as to whether the parties are going to want to cross-examine  
14 Mr. Farmer. Is it beyond the wit of your parties to take a view on that particular issue by  
15 the time?

16 MR. BEARD: We can do our best to do that. I think the other thing we will do is try and identify  
17 which days it would be that Mr. Farmer should make himself available for sooner than that,  
18 because that would----

19 THE CHAIRMAN: It would alleviate the problem, even if you could not say yes or no.

20 MR. BEARD: Could not say finally.

21 THE CHAIRMAN: You could figure out a way of fitting him into the timescale so he can reduce  
22 the block in his diary?

23 MR. BEARD: Exactly. I do not want to minimise Mr. Johnston's difficulties in this regard, but  
24 given that he has got permission to intervene in writing, it is obviously going to be the case  
25 that if his witness does come under cross-examination by either BT or Ofcom he may want  
26 to say more, but it is not clear that that necessarily means a vastly different extent of  
27 attendance on his client's part. Obviously it is a matter for his client. We will try and do  
28 our best----

29 THE CHAIRMAN: It sounds as if actually what would really assist is that, even if you could not  
30 give the hard yes/no answer that we do not need him - I encourage you to do it if you can -  
31 but if you could not----

32 MR. BEARD: Yes, of course, we have that well in mind.

33 THE CHAIRMAN: -- I think what sounds as if it would substantially alleviate the logistic  
34 problem would be if you at least identified for Mr. Farmer when he would be cross-

1 examined, if that was the case. You could agree, whatever else happens, this would be the  
2 date. You are going to say, "I want the same for my witnesses", are you not?

3 MR. BEARD: We do not have an objection for Mr. Kuppen. Obviously we need to liaise with  
4 Ofcom, it is not just a BT question.

5 MR. KUPPEN: It would certainly assist greatly to have the sequencing of the witnesses sooner  
6 rather than later to be able to narrow down the timeframe, if not to a day then to a number  
7 of days.

8 THE CHAIRMAN: The difficulty I have got is obviously, at this stage, without having read and  
9 considered the detail of the evidence, I cannot sensibly make a decision on this in the sense  
10 I cannot say, yes, you must be able to tell me by this date, or you must take these witnesses  
11 before those witnesses. What we probably could say is that the parties ought to endeavour  
12 to agree a provisional running list and timetable for the witnesses by a certain date. A few  
13 issues might remain to be resolved, but if no progress had been made by a particular date,  
14 and it was obviously causing an enormous problem, then there would be a date beyond  
15 which the parties could then come back in writing, or ask for a hearing, and say, "We have  
16 reached a road-block on this".

17 MR. BEARD: Yes, that point is entirely taken, Sir. The reason why we did not suggest a specific  
18 date is because we envisaged that if you are going to put down a specific date, it is going to  
19 at least need to be after the BT and CityFibre skeletons. The problem with that is we are  
20 then looking at around 15<sup>th</sup> March, and I anticipate the interveners would prefer to have less  
21 specificity earlier than more specificity later, and that was the reason I was not---

22 THE CHAIRMAN: I think the point that is being made is that I should put a long-stop date by  
23 which an agreement in principle should have been arrived at, or at least beyond which  
24 parties would be at liberty to apply for a harder timetable to be set.

25 MR. BEARD: Then I think we are looking at something like 17<sup>th</sup> March, because that is the week  
26 after the BT skeleton.

27 THE CHAIRMAN: On the expectation that an effort will be made to actually put some people in  
28 by a much earlier date?

29 MR. BEARD: Yes, pencilling----

30 THE CHAIRMAN: This is really a date by which----

31 MR. JOHNSTON: We would really like to know whether we are being called by that point, if  
32 possible, rather than the date at that stage.

33 MR. BEARD: Yes, I think that would be the intention.

1 MR. JOHNSTON: But if we could have a provisional date at some time before then, and a final  
2 decision by that point, it is later than we would have certainly looked for, but we are content  
3 to live with that if we can block out a small number of days in Mr. Farmer's diary and in  
4 counsel's diary a little way before then.

5 THE CHAIRMAN: There is going to be liberty to apply, so that if things do not go the way we  
6 all hope, people can apply. Who is going to be the person who is most likely to want to  
7 cross-examine Mr. Farmer - Ofcom, in fact?

8 MR. JOHNSTON: The best way to answer that question is to say that both Ofcom and BT would  
9 have, if any, really a rather small number of questions, would be my expectation, perhaps  
10 less on the Ofcom side, but I would not wish to pre-judge that.

11 THE CHAIRMAN: Is there any reason why I should not say that we will assume all witnesses  
12 are required to be cross-examined unless parties confirm that they are not going to cross-  
13 examine by a date which is around or just after the service of the BT and CityFibre  
14 skeletons, but with the expectation that the----

15 MR. JOHNSTON: I am getting an indication from Ofcom that they think they might be able to  
16 decide earlier, Sir.

17 MR. HOLMES: Sir, we are all beginning to see the shape of the case now. I am not sure that the  
18 detailed preparation involved in the skeleton arguments will be needed in order to take a  
19 view on whether there are witnesses that do not require to be cross-examined. We were  
20 going to support the end of February, which was the date by which Mr. Johnston was  
21 originally requesting clarification.

22 MR. JOHNSTON: Sir, if the circumstances change and the parties were to decide that it is critical  
23 for Mr. Farmer to be cross-examined, then we recognise we have asked for them to expedite  
24 their decision making, and may have to live with that. There is a month between now and  
25 the end of February and Mr. Farmer's witness evidence is targeted and not terribly lengthy.

26 THE CHAIRMAN: Is there any other potential witness who is in the same sort of position, who  
27 is a candidate for a no cross-examination? Can anybody identify whether there is any  
28 similar witness, or is everybody else----

29 MR. JOHNSTON: Mr. Farmer is the only witness for Gamma. If there was, for example, a  
30 witness for BT that would not be cross-examined, that would not have the knock-on  
31 consequences.

32 THE CHAIRMAN: Ofcom do not seem to want to see your skeleton to make their decision. You  
33 presumably do not need to see your own skeleton to make your decision, you can do it.

1 MR. BEARD: It is a matter of the practicalities of it. The danger is that the earlier you set the  
2 deadline the more likely it is that out of an abundance of caution it will be said, yes, we do  
3 want to cross-examine him.

4 THE CHAIRMAN: All right, but if I was to say the end of February----

5 MR. BEARD: I am sure we will.

6 THE CHAIRMAN: -- it is ten days before your skeleton. If you have not formed that view by  
7 then you will be struggling with your skeleton, I suspect.

8 MR. BEARD: If that is what, Sir, you want to do, I am sure we can deal with these matters that  
9 way. I am slightly concerned because I do not want to be put in a position - understanding  
10 Mr. Johnston's particular situation and giving an indication earlier in relation to him, what  
11 I am more concerned about is that as we are going through preparation for skeletons we are  
12 also having to make sure that we are covering off a complete list of who we are going to be  
13 cross-examining, on what, and then providing a list by the end of February. In relation to  
14 Mr. Johnston, that is one thing, but I think the expectation that we should have to produce  
15 negative indications at that time is another thing. It may well be that as we think about  
16 these things more, we think, actually, there is a greater deal of duplication than we had  
17 initially envisaged, and therefore X does not need cross-examining at all, and so on.

18 THE CHAIRMAN: All right. Everybody is obviously encouraging an early view being taken,  
19 but it is only in relation to Mr. Farmer's evidence that there is a specific request for a  
20 specific reason.

21 MR. BEARD: We can deal with that.

22 MR. JOHNSTON: We are grateful.

23 THE CHAIRMAN: You should, by 28<sup>th</sup> February, indicate whether you wish to cross-examine  
24 Mr. Farmer. The same goes for other parties. If, in the meantime, you can give some  
25 firmer dates for individual witnesses - which are your witnesses that you need to deal with?

26 MR. KUPPEN: It is on the helpful list that BT produced. It is on the second page, the second  
27 group from the bottom is CP Group.

28 THE CHAIRMAN: Are there any of those who you think are candidates for non-cross-  
29 examination, being realistic?

30 MR. KUPPEN: I would not be able to speak for any other parties in that respect as an obvious  
31 candidate.

32 THE CHAIRMAN: Your main concern is that you just want them to have some defined dates?

33 MR. KUPPEN: Our main concern would be, instead of having 15 days, to narrow it down to, let  
34 us say, three or four days, or whatever it may be in practical terms.

1 THE CHAIRMAN: Is this a sensible thing for me to say: that by the end of February I expect the  
2 parties to have indicated whether there are any of the witnesses of these other parties that  
3 they definitely do not want to cross-examine, and to have at least produced a draft trial  
4 timetable for the giving of evidence, which they should have exchanged so that if any  
5 particular witness has a difficulty which has not been resolved by the end of February, they  
6 can be the subject of some application on paper to me to fix a date for their cross-  
7 examination? That way everybody has got a date to work towards and a date beyond which  
8 they can make an application to have a date fixed on paper if they have got a very good  
9 reason to need the date fixed. I will simply say that parties should indicate by 28<sup>th</sup> February  
10 if they do not wish to cross-examine any witnesses of the other parties, and should  
11 endeavour to agree a draft trial timetable for the giving of evidence by that same date. Any  
12 applications in relation to unresolved matters can be made to me on paper after  
13 28<sup>th</sup> February.

14 MR. BEARD: Phrased in that way, if it later turns that there are other witnesses that it is not  
15 going to be necessary to cross-examine that will be dealt with in due course.

16 THE CHAIRMAN: Yes. That accommodates your two concerns. The other concern is Mr. Orr  
17 and Mr. Higgins?

18 MR. LIDDELL: Yes, that is right, Mr. Orr and Mr. Higgins on behalf of Virgin Media. I think at  
19 the first case management conference in September we indicated that we would like to have  
20 liberty to apply to submit further evidence in response to Ofcom's defence because of a  
21 slight rescheduling; or at least on the basis of the scheduling of pleadings that was agreed at  
22 that CMC, you indicated that we should have liberty to apply. We applied for permission to  
23 submit two short extra witness statements, one on behalf of Mr. Orr and one on behalf of  
24 Mr. Higgins, dealing with very specific points raised in Ofcom's defence.

25 THE CHAIRMAN: Does anybody at this stage have any objection to that?

26 MR. HOLMES: No objection, Sir.

27 THE CHAIRMAN: Right, permission to adduce those two supplemental or two second witness  
28 statements of Mr. Orr and Mr. Higgins.

29 MR. LIDDELL: Many thanks.

30 THE CHAIRMAN: Have we managed to, almost bang on time, fight our way through the  
31 agenda?

32 MR. BEARD: We have, and we are grateful to the Tribunal for the agenda. It has helped the  
33 parties in terms of working through these issues.

1 Just in terms of the modalities of production of the order, does the Tribunal want a draft to  
2 be produced by us or is it going to be a matter that the Référéndaire may be producing a  
3 draft for comment by the parties, as often happens in the Tribunal?

4 THE CHAIRMAN: I think the view is, could you, between yourselves, produce a draft order and  
5 then submit it to me through the Référéndaire.

6 MR. BEARD: We are very happy to do that, Sir.

7 THE CHAIRMAN: Obviously as soon as the identity of any Panel members is known they will  
8 be made known to the parties. That is the only thing to say. Obviously, there should be in  
9 the order a general liberty to apply on paper in the first instance. If there is a problem, and  
10 I am very hopeful that there will not be, as soon as we know we will let you know.  
11 I have indicated when, realistically, you cannot get hold of me. It is only really the week of  
12 the 6<sup>th</sup> when I am actually away that you are going to struggle to get me. Otherwise I am  
13 just doing other things, other trials, so I can deal with things. Actual court availability to  
14 have an oral hearing on any matters, obviously I can give my dates.

15 MR. BEARD: At the moment, I do not think anybody is envisaging a need for that, but unless  
16 other parties want to go through that exercise at this stage I think it is probably not  
17 productive, and we will hope that that will not be necessary. I think that is probably the best  
18 way to deal with it.

19 THE CHAIRMAN: Yes. Has anybody got anything else? No. Good. Thank you all very much.  
20