IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1205-1207/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22nd November 2013

Before:
THE HON. MR. JUSTICE ROTH
(Chairman)
STEPHEN HARRISON
PROFESSOR COLIN MAYER

(Sitting as a Tribunal in England and Wales)

B E T W E E N:

BRITISH TELECOMMUNICATIONS PLC Appellant

- and -

OFFICE OF COMMUNICATIONS Respondent

AND B E T W E E N:

(1) CABLE & WIRELESS WORLDWIDE PLC
(2) VIRGIN MEDIA LIMITED
(3) VERIZON UK LIMITED Appellants

- and -

OFFICE OF COMMUNICATIONS Respondent

AND B E T W E E N:

(1) BRITISH SKY BROADCASTING LIMITED
(2) TALKTALK TELECOMMUNICATIONS GROUP PLC Appellants

- and -

OFFICE OF COMMUNICATIONS Respondent

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H E A R I N G D A Y THIRTEEN

A P P E A R AN C E S

Mr. Rhodri Thompson QC, Mr. Graham Read QC, Ms. Sarah Lee, Mr. Ben Lynch and Ms. Georgina Hirsch (instructed by BT Legal) appeared on behalf of the Appellant, British Telecommunications PLC.

Mr. Meredith Pickford and Mr. Julian Gregory (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Appellants (1) British Sky Broadcasting Limited and (2) TalkTalk Telecommunications Group PLC.

Ms. Dinah Rose QC and Mr. Tristan Jones (instructed by Olswang LLP) appeared on behalf of the Appellants (1) Cable & Wireless Worldwide plc, (2) Virgin Media Limited and (3) Verizon UK Limited.

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

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THE PRESIDENT: Mr. Read, just before you begin, there is one matter which I think, as I understand it, would fall more in Mr. Thompson's territory, but he is not here I see this morning. Is he joining us in due course?

MR. READ: He should be due here shortly, for reasons I will explain. Perhaps if there is a particular issue - which Ground is it, Sir.

THE PRESIDENT: It is in your closing, I will explain but I do not think it really matters which Ground it is in, but at the moment it is put under Ground 5, it is para. 440 to 443. But, as I understands the submission, if correct it goes to every Ground.

MR. READ: It certainly applies to every Ground. If we are successful on Ground 5 then it applies to all the others.

THE PRESIDENT: No, if this argument that is there advanced is correct, it means, as I understand it, Ofcom had no jurisdiction to determine the dispute at all.

MR. READ: Exactly, that was my point.

THE PRESIDENT: In which case the Determination is set aside, we do not have to worry about repayments, connections, rentals, transmission costs, etc. So it is a very fundamental point.

MR. READ: Sir, I think it is one that Mr. Thompson should address you on rather than me.

THE PRESIDENT: Yes.

MR. READ: I hope he will be here before I finish in the hour. I have an hour so obviously I will try to finish before ----

THE PRESIDENT: We will give you an extra 10 minutes.

MR. READ: Because of that I am going to go at a fair pace through the material and I am not necessarily going to take you to all the points and documents that have been involved.

I do want to make one initial point which is this, having had a further chance to analyse what Sky and TalkTalk have put in their closing submissions, BT does have very serious concerns about the way that the case that they are putting forward seems not only to have changed from their original pleaded case but also that a substantive amount of it with material was never put to any of BT's witnesses, and only in the end appears to have been put to Mr. Myers in cross-examination. One only has to look at the additional documents bundle to see where the additional documents have actually gone in right at the end to demonstrate that these were matters that were not previously put.

We are particularly concerned because obviously the PPC case in particular, as I know from my own experience, had an awful lot of material contained within it, and we have made those points at paras. 567 to 570 of our closing submissions, but we are very concerned, Sir, that this Tribunal has to decide the case by reference to the grounds of appeal, that is

s.195(2), and that the Tribunal Rules require that, as far as practicable, a copy of every document upon which the appellant relies is served with the notice of appeal and that is Rule 8.6(b) of the Tribunal Rules.

What I had hoped would be here by now but will certainly arrive during the course of the morning is that we want to put in a document that demonstrates - rather as Ofcom indicated that they would do - where we say that the materials now relied upon by Sky and TalkTalk have departed from their original pleaded case, and I want to put that marker down very firmly because we do say that this is an area that is very unsatisfactory in the way that it has effectively arisen in the course of closing submissions.

Having said that, can I now turn ----

THE PRESIDENT: That document will be with us before - because obviously Mr. Pickford should have a chance to ----

MR. READ: It should be here in the course of the morning, Mr. Pickford should have the course of the short adjournment to at least have perused it before he gets to his feet.

Sir, the order I am going to deal with matters is I am going to take Ground 4, then interest, and then make three short points on Ground 3.

I want to start with Ground 4 because I need to say something about an appeal on the merits, which is relevant generally but it is particularly relevant to two issues within Ground 4.

First, Ofcom appear to be suggesting that because this Tribunal is not a second tier regulator somehow matters that were never raised at the administrative stage with Ofcom must be rejected.

Secondly, we say Ofcom keeps hiding behind the fig leaf that because this is all a matter of judgment and that BT had not put any reason why Ofcom erred in the exercise of their judgment, then that is something that, at the end of the day the Tribunal should just effectively reject the adjustments put forward. We say that that does not bear scrutiny when you properly analyse the case law.

The case that Ofcom rely upon is the 08 Numbers case in the Court of Appeal. I will not go through that at length, but what I can say, and it is reflected in the Judgment is that the issue of what constituted an appeal on the merits was not put forward in any of the skeleton arguments and it was raised quite late in the course of argument and was not specifically addressed. Lord Justice Lloyd acknowledges that in his Judgment at para. 90, where he says that this was not the occasion on which to review the true nature of the relationship between Ofcom and the Tribunal in an appeal of this kind.

"Nothing turns on it and we did not hear argument on this other than the points made in

passing to which I have referred to above."

THE PRESIDENT: Can you just help me, that Judgment is not in our bundle.

MR. READ: That Judgment is in your bundle, it is at tab 10. I was not going to take you to it.

THE PRESIDENT: No, but for my note. I am thinking of another Judgment, that is the 0800 Judgment, this is the 08X Judgment.

MR. READ: This is the 08X Judgment. That followed on following the 0800 Numbers case, which was the only case where the whole issue of what constituted an appeal on the merits was actually to the Court of Appeal. That is what I do want to take you to, it is in authorities bundle 3, tab 46. It was a case that Ms. Rose and I had the opportunity to argue in the Court of Appeal, she was appearing for Ofcom.

THE PRESIDENT: Yes, this was specifically about new evidence, was it not?

MR. READ: This was about new evidence. The way it came about was that Ofcom said: oh, BT has introduced new evidence that was not before us at the administrative stage, and it is wrong that in an appeal on the merits that material should be before the Tribunal, because it cannot affect the judgment of the Tribunal precisely because, Ofcom was contending, an appeal on the merits did not entail an overall review. It is reflected in para.6 which sets out the sources of principle that Ofcom were relying upon which were effectively that (1) on a proper interpretation of the 2003 Act it precluded new material being admitted. (2) There was a *Ladd v. Marshall* principle that was applied.

If one goes to para.58, sir, one sees the essential building blocks of Ofcom's case. They list out there the reliance that Ofcom is the primary decision maker (58(1)). One also sees that in 58(3) they were suggesting the limited role that the Tribunal actually had. If one looks in para.58(7) it said in terms:

> "If it is permissible for a disputing party to put fresh evidence before the CAT, not only will the CAT's judgment be made without the benefit of the material having been considered by Ofcom, but the principle of swift adjudication would be undermined and the period of financial uncertainty for the parties would be extended …"

So the issue of what was before Ofcom as to whether or not it was a factor against the admission of new evidence on an appeal on the merits was firmly before the Court of Appeal. You can see at para.59 they were not persuaded by any of those arguments.

THE PRESIDENT: Paragraph 60 is important.

MR. READ: Paragraph 60 is particularly important, we say, because it makes it absolutely clear that the appeal body is given responsibility for considering the merits of the case and, more

to the point, that that is not synonymous with the merits of the decision taken by the national regulatory authority. In other words, we say, the case is quite clear that the Tribunal is taking its own independent view about the merits of the case; it is not putting itself back into the position that Ofcom was.

THE PRESIDENT: Of course, the last sentence of para.60 is important

MR. READ: Absolutely, sir. I am sorry, I am taking this quickly.

THE PRESIDENT: No, I am familiar with the judgment.

MR. READ: I would also draw your attention to para.62 where the Tribunal specifically replied on the point that the CAT rules came into force at more or less exactly the same time as the Act was passed, because that is quite important when I come on to the question of interest. Finally, sir, may I ask you to note para.64 where the dicta of Jacob LJ which features in Ofcom's defence was put into context. BT was arguing in that case that it did not actually mean that there was some implicit restriction on what a full merits investigation actually involved, or an appeal on the merits actually involved. Then it deals at paras.65 to 67 with the issue about allowing the appeal body to raise fresh evidence. Core in this is what we say is that you can see at para.66 where it is said in terms:

> "I can see ample scope for procedural arguments over whether additional evidence is admissible under the rubric of seeking to show that Ofcom has in some respect misapprehended the effect of the material before it."

That is rejected, and one sees that that is dealt with further in the context of the argument on *Ladd v. Marshall* that if one looks at para.72 it is said in terms:

> "The court was asked by Ofcom to give clear guidance to the CAT about the exercise of its power to admit fresh evidence. Before the CAT there was argument whether it was for the party seeking to adduce fresh evidence to show why it should be given permission to do so, or was for the opposing party to show why permission should not be granted."

We say that is a key point because Ofcom were dealing with this matter in the right way, which is to have actually taken the objection to the evidence and dealt with it at that stage. Then one can see that they say in terms that it would be right for the Court of Appeal to tell the Tribunal how it is done, and indeed they make clear in 73: "This court should be wary of trying to tell the CAT how it should do so." In effect it said it was quintessentially a matter for the Tribunal.

THE PRESIDENT: Yes.

MR. READ: We say that there are some clear principles that can be derived from this. First,

when engaged in an appeal the Tribunal is taking a fresh decision, and that is not confined to taking the decision that Ofcom itself took. Second, we say that the Tribunal is most definitely not excluded from looking at the merits of the appeal on all the material before it including new evidence where that was before it. Third, it is up to the Tribunal to control what evidence is placed before it. We say that those points are crucial here because Ofcom keep, in the course of this hearing, raising the point that BT should have raised all of this at the administrative stage. On ground 4 they say: these are mistakes that were not pointed out by BT at the administrative stage. One sees that in respect of excess construction costs and in respect of transmission equipment costs. Both of those points are made in Ofcom's closing at paras.70 and 82.

We say that if that was a point that Ofcom wanted to raise, then the correct way for Ofcom to have dealt with it was to have objected to the material that BT adduced with its Notice of Appeal and said in terms (along the lines that they said in the 0800 case): this material should not be relied upon because BT have effectively delayed in putting it before us and it is too late for BT to rely upon it. That is precisely what they did in the 0800 preliminary issues case.

However, in this case they did not, even in their defence, suggest that the Tribunal should refuse to consider the new evidence. They did not say in their defence: we think this is all too late; we want it excluded. In respect of excess construction costs they actually said at para.217 in the Defence:

> "On the basis of the information in Mr Coulson's report now served with the NoA, it appears that the appropriate adjustment to make would have been to remove £11.7 million from the BES and WES rentals rather than £15 million."

THE PRESIDENT: Sorry, the reference is?

MR. READ: Paragraph 217 of the Defence at CBA tab 4 p.93. In transmission equipment costs and provisioning costs they simply said: had the material been presented during the administrative phase Ofcom would have considered it, and Ofcom would of course be willing, if it would assist the Tribunal, to provide its view in relation to the impact which the new evidence would have had on Ofcom's Determination. That is set out at paras.225 and 226 with cross references to the earlier parts of the defence as well at p.95 CBA/4.

THE PRESIDENT: I alluded to this right at the beginning, you may remember, by reference to this case.

MR. READ: Yes, sir.

THE PRESIDENT: Although, as you put it, the CAT controls what evidence is before it, we

control it by deciding; we do not normally exclude it of our own motion when parties are represented. You make the point they did not object to it. So it has all been admitted and it is all in evidence. However, it seems to me there is a separate point, a related point, which flows out of what the Court of Appeal said in these paragraphs you have taken us to. Namely, when considering that evidence and argument as to whether any argument that could have been taken at the administrative stage of the dispute resolution and was not should, nonetheless – whether that is a relevant factor in deciding whether to disturb the Determination, even if the argument might seem well founded.

MR. READ: Sir, there is no doubt that in the course of this case what the Court of Appeal was addressing was whether that evidence should be admitted because it had not been previously adduced and therefore it was at that stage and that stage alone that the comments that the Court of Appeal made concerning whether or not there might be problems in the parties not adducing evidence and that there should be an encouragement for the parties to adduce evidence, it was at that stage that the question needs to be dealt with. We say that is very clear from the way that the Court of Appeal --

THE PRESIDENT: They did not consider the other issue, and sometimes it is only when you have really analysed the evidence, and indeed there still is a live issue in this case I think on transmission costs– and you and Ofcom interpret the contemporary documents differently – whether it is a point that was being fairly taken, or could have been taken at the time or not. We have to reach a view on that. It may be it could not have been, in which case you do not have a problem.

MR. READ: So I am clear about the submission I am making, we say that is precisely the point that needs to be taken at the initial stage.

THE PRESIDENT: Yes, I understand that.

MR. READ: And if it is not taken at the initial stage it is too late for Ofcom to urge on the Tribunal that it should effectively ignore the material before it because to do so would allow matters that were not properly put at the initial stage to have been introduced. We say that that is the effect of what that 0800 preliminary issue case deals with.

THE PRESIDENT: I understand your point.

MR. READ: Therefore we say that you do not in fact need to investigate it, although, as I will deal with in due course, we say it is not anywhere near as clear cut as Ofcom accept. One of the slightly bizarre things about this is that if there is an error, as there is for example with excess constructions costs because that is precisely what Ofcom have admitted, we do find it rather surprising in light of what Ofcom has previously said that it should in fact not

simply say that is an error and it needs to be corrected. We make that point very forcefully at para.304 where we refer to the *Verizon and Vodafone* case and para.9 of the judgment which records Ofcom in terms saying that in normal circumstances it would be appropriate to correct an error. If there is an error we say it ought to be corrected.

May I just deal with excess construction costs while I am there. Sir, this is not a case where BT was not saying that actually there is an error in Ofcom's calculations. It is quite clear from the 3rd September letter that we actually put to them and we were saying there is a £3.3 million error involved.

What Ofcom seem to be complaining about is we did not make clear that that was our mistake rather than some form of mistake in the calculations. The reference to the letter, sir, is at -- It can be identified.

THE PRESIDENT: It would be helpful. I think it is in your closing, is it not?

MR. READ: It should be in our closing, but in any event it certainly is set out in our Notice of Appeal because it is quoted in terms.

THE PRESIDENT: Yes.

MR. READ: It is at para.3.1.1 of our closing and the document is at BT8 tab 13.

Sir, the point we make about this is it is really unfortunate in a case like this that it should turn upon whether BT did not properly identify the precise cause of the error, because they were flagging the error up.

THE PRESIDENT: Yes, just a moment. You need not labour the point about ECC on that particular one.

MR. READ: Can I then turn to transmission costs, because it is suggested that in fact this is something of regulatory judgment that is going on by Ofcom and it is suggested that in fact BT failed to demonstrate at the administrative stage what it was actually suggesting was the error with Ofcom's change. What we say about that, Sir, is that the key issue that is involved with transmission costs is whether the process that Ofcom adopted was the correct one for the ends that it wanted to achieve. That is the issue for the Tribunal and the issue is ventilated in the evidence. In other words, it was whether or not the method Ofcom adopted achieved comparing a single year's transmission cost against a single year's revenues from those cost elements. Because effectively it was the timing mismatch that was the problem. Having removed the cost figures, because they wanted to achieve that end, what Ofcom was trying to do was to put back into the figures a proper estimate. Whether what Ofcom did was correct in the circumstances, given what it intended, we say is a straightforward issue of fact that this Tribunal, particularly with the accounting expertise it has, is perfectly able to

judge. The Tribunal has the evidence of Mr. Coulson that Ofcom's process was wrong because effectively it used rental costs to weight the actual allocations between the WES and the BES services. You will recall that there was a two-stage process, (1) splitting the cost between WES and BES; (2) the proportioning them out between the various bandwidths. Ofcom used the connections for the second stage of the process but used a methodology, or a process, that actually led to the use of historic rental costs being applied rather than something that we say was more appropriate to focusing on a single year's costs. It may be, as with any ----

THE PRESIDENT: The position on this is rather different as to what happened from ECC. ECC was an error, or so you pointed out anyway. Here, according to the Determination, what Ofcom did and how the need to make an adjustment was made clear in the provisional Determination. Everyone agrees you need to make an adjustment. The adjustment they proposed to make was set out in the provisional Determination and BT did not comment on that. I am looking at 13.1.30 in the Determination

MR. READ: That is a slightly different point, Sir, because that is whether BT should have flagged up the concern beforehand. The point I am making at the moment is that, whilst there might be a difference of views, as with any factual accounting issue, as to what is the best method for achieving it, ultimately we say that the question is one for the Tribunal to decide because, when they have heard the actual evidence in the case they can form a view, as with any factual accounting issue, as to what actually is the most appropriate given what Ofcom was intending to achieve.

THE PRESIDENT: Yes, I am going back to the point I made to you.

MR. READ: That is essentially ----

THE PRESIDENT: I appreciate you say it is a bad point and you say, no, the only way of dealing with that is object to the evidence or, I suppose, apply to strike out that part of the appeal as inadmissible and that was not done and you say that is the end of it. If it is not done you then go straight to look at the issue on the evidence in the usual way. If you were wrong on that and we did not find that acceptable, and we thought it was appropriate to see what happened at the administrative stage, there is that point that is made, that the method was set out and not addressed.

MR. READ: Sir, can I be clear where we are on that, because we say that, despite what Ofcom has said and the cross-examination it put to Mr. Coulson, it is not actually that obvious from the provisional Determination what it was that was being suggested. But what BT does accept is that if it had dived deeper and said, "What does Ofcom actually mean by this?",

and actually gone through the model and worked through the model, it would have been possible to have ascertained what Ofcom had actually done. But we are not suggesting that if we had dug deep enough we would not have been able to actually identify the point ultimately. That is what we did at the end, partly, I understand, because the model, in fact, was slightly easier to understand with the Final Determination, but I do not think that is a point you have heard evidence on so perhaps one should not take that any further. But what we do say is that you do have to look at this in the context of the provisional Determination and, in particular, the length of it and, in particular, the number of points that were being put forward by BT, and again particularly, the somewhat limited timeframe that BT was actually given to deal with it. It is not a criticism of Ofcom because Ofcom, in fact, were trying to keep in mind, no doubt, the fact that disputes are supposed to be resolved in the shortest possible timeframe and, in any event, save in exceptional circumstances, within four months. Ofcom, as it happened, imposed upon BT quite a tight timetable for putting responses in. That is dealt with in our reply. I think the point is set out at paragraph -- (After a pause): I have lost the reference. Maybe someone can find me the reference. Leaving that aside, the point is, we say, that we were given a very short timeframe from the publication of the provisional Decision until we were actually supposed to deal with it. I think we had about three or four weeks. Again we do not criticise Ofcom on that point but it is a factor that has to be kept firmly in mind when one is saying, "Well, BT ought to have picked this point up and dealt with it". There was an enormous amount that was being dealt with and an enormous amount that BT had to comment upon.

Again I do make the point, Sir, the evidence is before you. If this is the right adjustment to make it would, in our respectful submission, be wrong for the Tribunal, reviewing this on an appeal on the merits, to say, "Despite this being the right adjustment, we will not actually make it because we think BT was perhaps slightly dilatory or more than dilatory in actually raising the point at that stage". Sir, one can debate at length the extent to which BT should or should not have picked it up. We accept we did not pick it up but, that said, if the material says the adjustment was actually wrong then it is one that this Tribunal, in our respectful submission, should make.

Can I turn to provisioning costs? Can I deal with 2006 to 2008 first? We do say again that it is slightly problematic the way that Ofcom have actually approached this in this case. They have said, in their defence, that Ofcom would of course be willing, if it would assist the Tribunal, to provide its views in relation to the impact which the new evidence would have had. That is para.226 of the defence. It did not advance any positive case on the

adjustments; it did not seek any directions at any stage from the Tribunal, whether the Tribunal wanted to hear Ofcom's views. BT raised this all in correspondence. It raised it before the hearing in the letter of 25th October, in the correspondence just before the start of this hearing, and Ofcom's letter of 25th October, four days before the opening day (and that is at AD2, Tab 22):

> "We have indicated in the defence and skeleton argument that even if Mr. Coulson's evidence were accepted as factually correct, Ofcom cannot say with any certainty whether or not it would have made the adjustment proposed".

That has changed, for the very first time, in the closing, para.110 of the closing document:

> "Ofcom can confirm that, given the impact on other services, Ofcom would not have made the adjustment to the level of provisioning costs".

That is the first time that that statement has actually been made in the case and we say that it really is not an appropriate way for the Tribunal to decide the case on a statement like that, when Ofcom had so much opportunity previously to actually deal with the point and were, indeed, invited by BT to deal with the point but did not.

Sir, as regards that suggestion, the suggestion that it might have affected other items with regulatory errors, that has simply not been addressed by Ofcom in evidence. Mr. Myers simply said it was "troubling" but he was not the person, as he openly acknowledged, who dealt with it. The only evidence from someone who could comment is that of Mr. Coulson and his answer was clear, "It would not materially affect the position". That is Day 9, p.74, lines 2-11. That is ----

THE PRESIDENT: It would not materially because the amount is small relative to the large number of other services.

MR. READ: Absolutely.

THE PRESIDENT: It would not affect the price of the other services. But there is the separate point, which I think Mr. Coulson accepted, that if it is not allocated here and should have been there but was not, and those are past services, it means that BT would be recovering twice.

MR. READ: That is right but it is the obverse of what Ofcom itself has accepted in the course of the Decision, which is that where it says it should exclude costs from the RFS, like 21 Century costs, BT loses the opportunity to put those costs elsewhere. They are gone. That is the point that Mr. Coulson makes in his first report, quite clearly, that in fact, if you are going to apply a system that makes effectively exclusions of certain costs, because you say that they are not the right baseline for comparing costs with charges, then that is, in our

respectful submission, equally true of the position where you have a situation where BT has, through an error, omitted the figures.

On provisioning costs for 2008 ----

MR. HARRISON: Are there any examples of it going the other way, where Ofcom actually put costs in as opposed to excluding costs from Ethernet? Were there any of their adjustments that actually put costs in?

MR. READ: For the most part, and I think we can see this from the tables, it is all exclusion.

MR. HARRISON: I just wanted to confirm that. That is all.

MR. READ: I think it would be fair to say that when you come to some of the earlier revenue adjustments, it is possible that there might be some changes that worked in favour of some products rather than others. But for the most part, certainly when it comes to the question of has BT correctly captured the cost, it is all one way. It is all exclusion.

MR. HARRISON: Thank you.

MR. READ: Provisioning costs for 2008/2009, BT's case on that is summarised at para.239 of the notice of appeal, and I want to be quite clear about this because it is said that this was all a question of allocations. The starting point was that we say there was a failure to capture the proper costs of the provisionings for this year 2008/2009. We say that that is not really surprising given the fact that there plainly was not proper capture for the earlier period, 2006/2008. There was also raised by BT an issue, during the dispute resolution process, about the allocation between connections and rentals, but BT's appeal is not *per se* about that allocation. What it is actually about is saying we simply did not capture the right amount of costs. It is fair to say, and this is set out in para.296 of BT's notice of appeal, that what we say thereafter is, "Well, look, because there has been an obvious under-recording of provisioning costs, therefore you should actually make the adjustment on the basis of the revised allocation methodology, because if you are doing the job of capturing them properly that is the correct method to do it. So from that point of view we are saying that because of the error actually when you come to the stage of correcting the error you do need to reallocate, and that is the point we make at 296, and that is the point that Mr. Coulson makes in his evidence. But, it is not *per se* the issue of the allocation that is the primary focus of BT's appeal on this. So the suggestion that this is all an allocation methodology we do not accept. I think that that probably deals with Ground 4, apart from to say this, that obviously there is quite a lot of evidence about the incentive effects. We say that two of these adjustments in any event are ones that Ofcom have done, and the question is whether Ofcom's methodology on that is right or wrong. You do not get on to the whole question of

incentive effects under the 11.39 methodology in the Decision because, in fact, you are not actually looking at that because Ofcom has already decided to make the changes. So it is only provisioning costs that it may actually have affected and we say for all the reasons that this is not an instance where the incentive effects are going to be significant. They would have been on the dot C, dot L methodology, which is the methodology that, of course, Ofcom looks at in section 12 of the Decision at some great length, and where they say in terms that this would actually cause huge great incentive effects because it would cause a massive shift in the reallocation of costs between various services, but that is obviously not being appealed by BT. It is focused on a single area where even Ofcom itself accepts that they thought that there might be a problem, but they were not sufficiently convinced by what BT had said at the time.

We have had a lot of evidence from Mr. Scott and Mr. Holt on this point and all I would simply say is that the Tribunal itself can form its own view as we set out material in the closing submissions. We say that this is not the big factor that they contend it is, and the Tribunal should be very wary, if it thinks that the adjustments are right, of excluding them just on those points.

Can I then turn to interest? We obviously say with interest that the first question is the one of jurisdiction, and can I briefly summarise this by making eight points?

First, the starting point, which I do not think anyone has sought to challenge is the clear statement from *Sempre Metals* that interest can only be awarded under (i) Statute, (ii) Equity; or (iii) Common Law, and the reference to that is para. 29 of BT's intervention skeleton argument, skeleton argument bundle, tab 5, p.8.

Secondly, we know from the PPC case in the Court of Appeal that orders under s.190(2)(d) are not based upon equitable or common law analogy, and that is para. 82 of the judgment. Therefore, and it seems to be agreed in this case that the only way that there can be jurisdiction to award interest in this case is if s.190(2)(d) provides for it.

Thirdly, the critical issue is accordingly whether Parliament at that time that it passed s.190(2)(d) intended that interest should be recoverable under that section.

Fourthly, there is no express mention of interest in either s.190(2)(d) or anywhere else in Chapter 3, Part 2 of the Act which deals with dispute resolution.

Fifthly, BT contends that the failure expressly to mention interest is a major indicator that Parliament did not intend to give jurisdiction to award interest. It is in total contrast to what Parliament normally does when it intends that interest should be available, which is to make an express provision for it, and there are the myriad of examples that we have quoted both

in footnote 86 of our statement of intervention and in the skeleton argument as well.

THE PRESIDENT: There is the further point, is there not, I can quite see your argument that it is a question of the statute, and it is a question of the statutory provision, that this is clearly designed to give effect to the Framework, and to be interpreted, so far as possible, to give effect to the Framework.

MR. READ: I think that was my seventh point!

THE PRESIDENT: Right, so one can therefore say is it, on the proper view of the European Framework, intended that interest should apply because, if so, the fact that a whole lot of other Statutes, you may say, say this or that dealing with other things is not really very relevant, it is then saying: "Are the words of s.190 sufficient to admit an order for interest?"

MR. READ: The position seems to be, from having analysed the various skeleton arguments of Ofcom and the CPs, that they do not say in terms that there is any provision in the CRF that expressly says there needs to be a provision from interest. Cable & Wireless put it at para. 211 of their closing as there is nothing in the Framework "precluding" the payment of interest. That, we say, is turning the whole situation rather on its head, because effectively what it is saying is "Simply because there is nothing there it does not mean that Parliament did not intend it to be there", whereas we would turn it round the other way and say: "If there is nothing explicit within the CRF that actually requires interest to be awarded then you have to look to whether or not Parliament itself ----

THE PRESIDENT: Well, not Parliament - you are talking about interpreting the CRF.

MR. READ: Absolutely, Sir. The point I am making is that if you cannot spell out from the CRF something that says in terms "interest is necessary in these circumstances" it would then be up to the national regulator to decide whether or not it actually wanted to make provision for it or not.

THE PRESIDENT: As we know European legislation is not drafted in the same way as domestic legislation and if there are in European jurisprudence principles that suggest that interest should be awarded, the fact that it is not spelt out in Directive this or that when it talks about adjustments, does not mean, as it might do if it was a purely domestic piece of legislation that you can draw the same conclusions.

MR. READ: I absolutely fully accept that. But when one comes down to the way that this has all been analysed, it is primarily focused upon Article 8 of the Framework Directive ----

MS. ROSE: I do not want to interrupt my learned friend, but he has mischaracterising our submission. We very clearly state at para. 222 that European Law does require there to be the power to award interest. He should not understand us as merely saying it does not

preclude it.

THE PRESIDENT: Well, that was the point I was putting, that the principles of European Law would apply to interpretation of the CRF and if Ms. Rose's point is right - you may say it is wrong - if it were right then it could be argued that one could interpret s.190(2) to that European principle.

MR. READ: Perhaps we can just look at para. 211 because of Cable & Wireless's ----

THE PRESIDENT: Paragraph 211 of what?

MR. READ: Cable & Wireless' submissions which I think is at tab 3 in the [closing] submissions bundle. There are two points about this because what they are saying is that Article 23 requires it, and if one perhaps turns back - the trouble is I do not think I have really got time to actually deal with this point at any great depth - if you look at 210 you can see:

> "As set out in relation to Ground 5 Ofcom is required by Article 23 FD to take decisions aimed at achieving the objectives set out in Article 8. For reasons explained above the Article 8 objectives are met in this case by requiring BT to repay the interest. Any other outcome would enable BT to retain the benefit of its overcharging."

So it was the point I was moving on to which is the way that this is all put forward on the basis of the CRF is that it is driven by the Article 8 objectives.

The Article 8 objectives as we know, and I do not think I need to turn them up, obviously are drafted in generic terms that apply to all NRAs duties in carrying out its regulatory tasks. But we do make the point that Article 8 *per se* does not suggest that Parliament had to allow interest because obviously in applying Article 8 it is going to be entirely dependent upon the specific considerations involved. Now, we say that that is a point that Parliament was perfectly entitled, when it was passing the Act, to actually deal with.

Of course, I should add to this that, in respect to this particular point, we are going further because we actually say, and this piggy-backs off our Ground 5 arguments, that when you look at the Authorisation Directive and the Article 13(3) of the Access Directive, in fact it actually precludes interest, but that is linked into the Ground 5 arguments and therefore I am effectively on the back of Mr. Thompson, so to speak.

We say, in any event, there is nothing *per se* within the CRF that drives the need for Parliament to have introduced a provision expressly requiring interest in the absence of that. One asks the question that if actually Parliament believed that the CRF required the provision of interest, consistent with the way that it has dealt in all other instances with interest, one might expect Parliament to have expressly provided for it. Can I just ask you

very briefly to look at authorities bundle 1 on this point. I could take you to numerous examples, but I want to take you to one, which is the Competition Appeal Tribunal Rules at tab 13.

THE PRESIDENT: Yes, Interest, Rule 56.

MR. READ: Yes, and one can see that there is express power for the interest to be awarded by the Tribunal. (1) where there is effectively a penalty, and (2) where there is a damages claim brought before the Tribunal.

We do say, Sir, that given what Lord Justice Toulson said - it is the point I referred you to in the 0800 Numbers case preliminary point - we do say that the fact that at the very time the Communications Act 2003 was being passed, Parliament felt it necessary for it to make an express provision for interest in respect of Competition Appeal damages claims, and in respect of penalties. We say it is a fairly clear indicator that Parliament, in fact, assumed that it was necessary to have some express provision if it wanted interest to be recoverable.

So, very briefly, finishing on this point, can I say ----

THE PRESIDENT: I did say that you could go to 11.40 because we started 10 minutes late.

MR. READ: I am grateful. Very briefly on this point, I should just say there is a debate obviously that could go on between Ms. Rose and myself about what exactly the law was or was not before *Sempre Metals*. What we have done is, in fact, attached as an annex to the end of our skeleton argument a passage from **McGregor on Damages** for 2003, so this reflects the law that there was as at 2003 when the Communications Act was passed. We say that that clearly sets out that whatever the law actually was there was certainly a lack of clarity as to when exactly interest would be allowed by the Courts and our point is simply this that if Parliament knew that there were significant issues about when the Courts would and would not award interest and, in particular, whether Parliament needed to expressly provide for it, then that reinforces the point that we were making earlier that you would have expected Parliament specifically to deal with it. I draw your attention - I do not read them to you - especially to the introductory para. 15.01 and the conclusions at 15.024 and 15.025. I am simply putting this point on the basis that there was not clarity in the law. Parliament knew that on occasions the courts had said in terms the absence of a statutory remedy would mean that the courts would not allow interest to be recovered. So, we say, at the end of the day that means that Parliament would have been very focused on whether or not it should make express provision for interest if that is what it wanted to do.

Finally, sir, can I just say that there is a series of linguistic points that are taken about the wording of s.190(2)(d). We say if you are down to that sort of level of argument then it

really does, in our respectful submission, reflect the problems that there are in trying to spell out a jurisdiction to award interest when Parliament has not expressly provided for it. We have dealt with those linguistic issues at paras.36, 38 and 39 of our Intervention skeleton argument, skeleton arguments bundle 5 pp.11 to 30.

Sir, can I very briefly say a couple of things about the *Gamma* decision. Can I ask you to look at the additional document bundle 2 tab 16. Sir, the key point about *Gamma*, we say, is to note what it was and was not dealing with. Perhaps I can try to analyse this by analogy with a contractual variation. It was dealing with one, possibly two, situations out of three. First, although Ofcom did not actually order a change to the contract (and there were good reasons why it did not do that, namely that it would only bind parties to the dispute), in fact what was being sought was very clearly a change to the contractual terms. One can see that from para.2.10 of the Decision where it sets out what *Gamma* was proposing:

> "Gamma therefore proposes that Ofcom should make a determination amending the definition of the OIR in the SIA such that the applicable interest rate would be defined as 'the average cost of debt …'"

So they were effectively seeking an amendment to the contract term. Of course, an amendment to a contract term can work in two ways. It can work prospectively, so in other words from 25th October when this decision came out, any award thereafter would apply a higher rate for the period after 25th October, which would effectively be a prospective type of amendment to the contract. The second stage is that having amended the contract, it would retrospectively apply in respect of any dispute brought after 25th October. So in other words, if Gamma brought a dispute on 26th October, got a repayment, it would argue that in fact that meant that it could claim interest at the higher rate, all the way back to the beginning of the dispute. One sees that from para.2.12 of the Decision. That is regardless of the date of the initial payment.

That was the point that Ofcom did not, at the end of the day, decide it necessary to adjudicate upon and one can see that at para.4.88. 4.77 sets out the remedy and 4.88 sets out BT's contention that the revised interest rate should only apply to interest payable on charges paid on or after the date of the Final Determination (p.63 Decision). That is what Ofcom were actually not deciding.

If one has the first stage about what happens going forward on interest rates, that was plainly decided. One has the second stage of what happens on monies repayable if the dispute is raised after 25th October. Then that was something that Ofcom said would wait for another day.

But the third stage is if you have a dispute that is raised in respect of monies going back many years, with a clear contract saying what the interest rate is, whether Ofcom then should completely ignore the fact that the parties have been transacting on the basis of a contract that had set out what their respective rights should be. That is the point that was never in issue in *Gamma* because Gamma were saying: we would like to change the contract terms; not: we would like to override the contract terms for a period going back to 2004, 2005, 2006 and ignore what the clause might say, for example clause 12.3 in this case. That really feeds into the key point that we say is essential in this case.

THE PRESIDENT: But does not asking the regulator to change the contract term, or asking the regulator to override the contract term, amount to the same thing: that you are then ignoring (if you do it) the way that the parties have conducted their business?

MR. READ: If BT's point in 4.88 was right.

THE PRESIDENT: Yes.

MR. READ: Perhaps I can pose it like this. Suppose that one had said: we would like an arbitration clause in this contract, and the arbitration clause was inserted as at 25th October. If you had a dispute that came up after 25th October, regardless of whether that dispute related to matters before, you would then say it has to be referred to arbitration because that is the clause that has been put in. We can see the logic of saying: if you have amended the interest rate as at 25th October and you have raised your dispute after 25th October, that in fact can govern the dispute and what happens on the repayment of a dispute for the period earlier. That was the second stage.

But the third stage is to say in terms that even though the parties have been dealing with it for such a long time, even though no-one has actually challenged the contract previously, Ofcom should still override the contractual terms on that basis. That is a retrospective amendment because it would apply back to the year 2005, 2006, 2007, and that is our point and why we say *Gamma* is not relevant. At the end of the day contractual certainty, in our respectful submission, has to be given a great deal of weight. That is what Ofcom has previously said, and that is what we say should happen in this case.

There is a lot more I could say on interest, sir. I do urge the Tribunal to look in some depth at the points we make in our closing submission.

I very briefly and finally just want to mention three things on ground 3. First, Ofcom's position is that BT's argument on ground 3 starts in the wrong place because the construction of HH3.1 is a matter of law, and BT should not have expected Ofcom to make it clear what it had to do in order to comply. We say that that is far too narrow a focus, but

in any event, it ignores what HH3.1 itself was stating at the time. Firstly in that respect, we do rely upon the accounting obligations because they were intimately linked with Condition HH3. They were not simply about what BT had to report at, but also the level of data that BT had to capture. That again is set out in our closing submissions at some length.

If, as we know, BT was not required under the obligations to capture data at the granulated levels that it actually is now being assessed on, if it was not required to do that formally until 2008, and it was only required informally in July 2007, then in those circumstances we say it would be wrong to be assessing BT (certainly for the year 2006/2007) without regard to the accounting obligations.

Linked to that is the terms of HH3.1 itself, namely that BT is required to demonstrate to the satisfaction of Ofcom. What Ofcom cannot do, given that wording, is to indicate a level of satisfaction with which it is happy in 2006 and 2007 and then in 2012 prescribe a much more detailed level. We say that that is true in respect of the accounting obligations and also the whole process that Ofcom went through in 2006 (the evidence of Mr. Jones and Miss Wray) and the THUS dispute which we set out at para.192 of our reply, and paras.13 to 24 of Annex C. It is in an annex, but it is highly relevant, we say, in this regard.

Secondly, we were concerned yesterday that the Tribunal seemed to be fastening on aspects of Mr. Coulson's evidence reflecting what seemed to be an overarching failure by BT to pay any attention to the DSACs when pricing. We say the Tribunal needs to be very careful about this evidence, and it needs to review the whole of the evidence itself. There is unchallenged evidence from Karen Wray that BT was juggling a number of factors; there is evidence from Mr. Jones; and there is a series of matters that we have in fact set out in paras.221 to 228.

THE PRESIDENT: Forgive me, does Karen Wray deal with how BT went about its pricing?

MR. READ: Yes, effectively what she says is that BT had a number of challenges. Sir, I am conscious of the time. It is set out in paras.221 to 228 of our closing submissions. We ask also that you look carefully again at her statement.

Mr. Coulson's evidence itself we say was more nuanced. What he essentially said was that there was no clear dialogue going on between regulatory finance and pricing. We know that because there was confusion about the connections and rentals electronic costs. But what he did not say, we say, is that the pricing people were ignoring what was in the RFS. He said that the RFS people were keeping the score, that it was regulatory affairs who were considering the pricing, and we know also from Mr. Coulson that BT were not simply looking at a single year's focus but were looking at aggregates over time. We particularly

request that you look very carefully at the whole of the evidence on this. The one thing that Mr. Coulson was saying was that he was not actually involved in the pricing decisions and so therefore he cannot per se be saying what was and was not governing the position of the pricing.

Finally, sir, the third point is that Ofcom suggests at various stages that they were not rigid and mechanistic because they were asking BT to provide evidence and failed. BT does not accept that. BT provided a large array of evidence. One can see that from various sources. Can I take just one example. Ofcom effectively use as a reason that for WES 10 rental BT had raised prices on it on three occasions. Yet BT had made clear to Ofcom at the time that this was a staggered price rise to prevent too much of a shock to existing customers, it was discussed with Ofcom at the time, and BT could, if it had wanted to, have put its prices up higher for the years 2006/2007 and 2007/2008 and still have been within the DSAC level. It did not do that precisely because it was staggering it which Ofcom knew. The problem with the approach that Ofcom has taken to the evidence that BT put forward is it set the bar too high. That is why BT passes on nothing, because at the end of the day the evidence that Ofcom has required BT to provide is simply too high in the circumstances of the specific cases that we have listed in ground 3 of our Notice of Appeal.

Sir, that was quite a canter.

THE PRESIDENT: It is very clear, Mr. Read.

MR. READ: Mr. Thompson has now arrived. I do not know whether you want to raise that point now.

THE PRESIDENT: Before you sit down, just a moment. (After a pause): Thank you very much, Mr. Read. Mr. Thompson, you are not here right at the beginning, which is not, I make it clear, a criticism, but I wanted to raise, and it might have been possibly mentioned to you, something in the BT closing which I think is within your department, as it were. Which is, if you take your closing, some paragraphs beginning at 440 on p.158 where, under the heading: "Scope of Ofcom's power in the context of dispute resolution", and you quote in para.440 what I think is Article 20, para.3 of the Amended Framework Direction.

MR. THOMPSON: Yes.

THE PRESIDENT: Emphasising existing obligations.

MR. THOMPSON: Yes.

THE PRESIDENT: The point that I think you go on to make is that the dispute resolution power, under certainly the amended directive, is only with regard to existing obligations and the obligations covering much of the period of these disputes was expired and was repealed on

8th December 2008, so they were not anymore existing. You say in 443 the fact that this has been in force since 19th December 2009. Technically that is correct and that the Directive has been in force, but in fact this amended provision is only applicable from 26th May 2011.

MR. THOMPSON: Yes, that is correct.

THE PRESIDENT: So it only applies from 26th May 2011.

MR. THOMPSON: It is a vexed question. If I could first of all apologise for not being here earlier on.

THE PRESIDENT: No, that is all right.

MR. THOMPSON: In my submission, there are two issues. One when the EU legislation enters into force, which is specified in the Directive itself, the date that I have referred to, and the second question is when the member states were required to take steps to implement that Directive.

THE PRESIDENT: No, surely it is more precise here. The Directive says that its terms shall only be applicable from 26th May, irrespective if the member state fails to implement it. The member state might be in breach but the correct implementation would be, would it not, if you look at Tab 3, is it not, of Bundle E.

MR. THOMPSON: Tab 4.

THE PRESIDENT: The Framework Directive? I think you had it slightly differently tabbed, if I remember, but anyway we have it at Tab 3. It is the Framework Directive and then Tab 4 is the amending directive. Then if you go to p.66, it says, in Article 5(1), and then the first paragraph is the requirement for member states to adopt … implementing, but then the second paragraph is "they shall apply those measures" from 26th May 2011.

MR. THOMPSON: Yes.

THE PRESIDENT: So they not only adopt the legislation but the legislation shall only apply from 26th May 2011.

MR. THOMPSON: Yes, exactly, so there are three dates. 19th December is specified in Article 6 as the date when the legislation enters into force; 25th May is specified as the date on which the member states must amend their legislation or administrative measures, and 26th May is adopted as the date that the measures implemented on 25th May must be applied.

THE PRESIDENT: So if the Determination was issued on 24th May 2011 then it would not be governed by the revised Article 20(3)?

MR. THOMPSON: Indeed.

THE PRESIDENT: That raises the question, I suppose, of what about a Determination that has been accepted by the regulator before 26th May but the decision was only issued on 28th

May. Is it then governed by this provision, because there is no transitional provision, or is it, because the dispute was accepted and the dispute resolution started long before 26th May, is it then treated as under the old regime rather than the new regime?

MR. THOMPSON: Yes. I think there are two points here. First of all, this Determination obviously was adopted on 20th December 2012, so, on any view, that was well after this date, and, secondly, in my submission, though this is something we have not gone into in any detail, as a guide to interpretation of what community law means and requires, a clarificatory amendment that enters into force on 20th December 2009 is something that a court considering what the EU legislation means ----

THE PRESIDENT: There are those issues. I do not want you to elaborate them. The point that I am making is this, there would be one issue as to whether it affects all these disputes or only disputes that were accepted by Ofcom after 26th May 2011. But whether it applies to some or all, there was a difference between the date of the acceptance in the different disputes. If the point that I think you are making is right, namely that because of the amendment to Article 20 -- I think I said 20(3), it is 20(1) -- governs the dispute resolution process, Ofcom had no jurisdiction to resolve these disputes at all, to decide whether there is an overcharge let alone repayment. That is down the line. But they just had no power to accept the dispute because it was not a dispute regarding an existing obligation. That is the point you are making, is it not?

MR. THOMPSON: I think it does have that implication ----

THE PRESIDENT: It must do.

MR. THOMPSON: -- in relation to the obligations that ran up to 8th December 2008 but not thereafter.

THE PRESIDENT: So it is a very far-reaching submission of considerable consequence.

MR. THOMPSON: It is.

THE PRESIDENT: It does not just go to Ground 5.

MR. THOMPSON: That is true.

THE PRESIDENT: And one cannot just restrict it to Ground 5 if one is to consider it. It also is an argument that is not, correct me if I am wrong, a ground raised in your notice of appeal.

MR. THOMPSON: I think I said yesterday that what had generated this was a challenge as to whether or not this was an abuse of process given the findings in *PPCs* and that one of the notable differences, which I set out in Appendix D to our closing, was that whereas *PPCs* was indeed limited to the 2004 to 2008 Market Review, this case is not, and that is not simply a formal issue. It is also an issue that arises because of the closure of the THUS

complaint on terms that that issue would be addressed in ----

THE PRESIDENT: However it was raised, if it is an argument being advanced it is not something in response to any abuse of process. It is a fundamental argument challenging the jurisdiction of Ofcom to entertain these disputes for any period prior to 8th December 2008, and the entire determination, the finding of overcharging, has to be quashed because it is without jurisdiction. That is something that should clearly have been raised, if that is going to be advanced, in your notice of appeal, because it raises very major issues, including the fact that the UK legislation, when amended, did not incorporate this change, so we are then left with the question, as we are acting under the UK legislation, can we interpret the amended Communications Act, s.185, I think, or 186, consistently with this or not on which, as you know, there is quite a lot of case law. None of that has been gone into. Ofcom has not had the chance to consider this and address us on it and I really do not see how we can entertain an argument of that kind, not in your notice of appeal, and you were not here at the beginning today when Mr. Read reminded the Tribunal very emphatically that the grounds being relied on must be set out in the notice of appeal. That is a firm principle on which these appeals are conducted. I just do not see that that is open to you now as a line to raise of such great significance in your closing submission.

MR. THOMPSON: It is true, as put to me now, not only the point we have been discussing about what the implications of a Directive coming into force on a particular date has, and particularly where it is a clarificatory amendment which appears to be intended to define the scope of dispute resolution in a way that has implications going back in time, but also, as the Tribunal puts to me, it does have implications for the nature of this case and, of course, as a point of law arising out of EU law, it is a point that the Tribunal cannot duck because it is under an obligation, as a court of the Union, if necessary to take such points of its own motion. So the ----

THE PRESIDENT: I think we can still operate under the rules of procedure which say when points have to be taken, but there is no way that I think one can fairly address that now. As I say, you will have to consider the question also that Ofcom is exercising its power under the statute, not under the Directive, and the statute does not include the word "existing obligation". The amendment that was made in 2011 does not reflect that. It may be wrong but that raises major issues.

MR. THOMPSON: They are major but they are fairly well trodden, which is that the legislation must be construed so far as possible to comply with the measure that it seeks to implement.

THE PRESIDENT: That is the issue. What is "so far as possible"? As you know, that issue has

been addressed by a number of courts in this country, of what is possible, what is beyond the limit.

MR. THOMPSON: Yes, and obviously it is unfortunate ----

THE PRESIDENT: It may be well trodden but it is complex and it has to be explored. It has not been explored at all in this hearing. It is not explored by you in your closing. There is no reference to any of that, what we should do about the wording of s.185. It is not addressed by anybody else, not considered by anybody else because, of course, it only came in a closing which is the very reason why, under the closely case managed regime in which these cases are heard, which has enabled, though with great pressure on everyone, this case to be heard in the timeframe it has, one has to adhere to those principles.

MR. THOMPSON: I think the only other point I would raise is that I did in fact raise it in my opening as sitting very uneasy with Ofcom's case, and no reference has been made either to object or to respond to the point at any point in these proceedings until now.

THE PRESIDENT: It may be my failing. I did not pick up a point in your opening to the effect that Ofcom had no jurisdiction to determine the disputes for any period prior to 8th December 2008.

MR. THOMPSON: I did not put it in those terms. I put it in terms that since 2008 the 2004/2008 measures had been repealed and that the reference to "existing obligations" in the amended version of the Framework Directive sat very uneasy with Ofcom's entire case.

THE PRESIDENT: To say it sits uneasily and to say that in fact it means there is no jurisdiction is rather a different thing.

MR. SAINI: Sir, I think, given the importance of this point, it is worth looking at what Mr. Thompson did say on Day 1 because, I must say, if this point was being made it went over my head at least.

THE PRESIDENT: It went over our heads up here.

MR. SAINI: It is worth seeing exactly what Mr. Thompson was saying on day one, if you have the transcript. The Article 20 point is at p.19 of the transcript. I believe that was all that was said at line 6.

THE PRESIDENT: Yes.

MR. THOMPSON: I think we are on a different point.

THE PRESIDENT: I made it very clear that we do not think that without amendment to your notice of appeal that point is open to you and you will have to try and persuade us that it can be considered, in which case it is clear that possibly not only Mr. Saini, but the other parties must be given an opportunity to address it properly, because it is a very far reaching point

both for this case and for the whole dispute resolution regime. As I say, you need to look at the way the UK Statute has been amended, which does not include the words "existing obligations", and so you would have to be submitting that it is possible to read that in a way that is limited to conform with the wording of Article 20 and you have not addressed that point.

MR. THOMPSON: Well, Sir, I am not sure I can accept that because that is really our Ground 5 case.

THE PRESIDENT: Where have you addressed the wording of s.185 and how it is possible to reconcile that with the wording of Article 20, para. 1 on which you rely, and referred us to the Court of Appeal authorities on when it is possible? What are the limits of possible interpretation? You have not. We would have to consider all of that.

MR. THOMPSON: In a sense you are putting a case into my mouth that I have never made. The point that I made in opening was at pp.6 to 7 about the revocation of the 2004 Conditions in 2008. It is certainly true that these are difficult questions of law and have been taken at a very considerable pace in this case, and it was certainly a concern expressed at the case management conference.

THE PRESIDENT: It is not taken at a pace, I am referring to your notice of appeal, that is where we start, which I am sure was drafted with great deliberation. This point is not there and, as you have accepted, I think, it is a very far reaching point and, if correct, a complete answer to much of Ofcom's case, it is not a Ground 5 point, it is a general point.

MR. THOMPSON: I think in the notice of appeal - I do not know whether we need to turn it up - the Tribunal will recall that our position was that we considered the preliminary issues Judgment of the *PPC*s to have been wrongly decided for a number of reasons, not least it did not consider the CRF hardly at all in the relevant questions and, in particular, did not consider this provision. The position we adopted was that we were not seeking a full frontal assault on the jurisdiction to conduct retrospective investigations, but we were limiting ourselves to the positive power to impose repayments, which is a narrower question, which is a specific obligation which we said was precluded by Article 23 of the Framework Directive.

THE PRESIDENT: I understand all your other arguments about repayment and so on which you summarised yesterday, about repayment and prospective, and so on, but this is a particular point on the language of Article 20, para. 1, which is not about repayment, it is about the power to determine disputes, and one cannot just say: "Oh well, we accept the language of that can cover the power to determine disputes, but it does not cover the power to order

repayment" - that is nonsense, is it not? One has to consider the implications of the submission. So that is why I say it is those paragraphs, it is not the other part of your Ground 5 where you address the retrospective payment point. That is a point that has been clear from the outset.

MR. THOMPSON: Yes, I think Ms. Rose takes the point against me that the Article 13(3) argument inherently challenges the jurisdiction to make retrospective investigations so it is, as it were, not a new issue. I can only say that the way we have put it is that we are not challenging the retrospective jurisdiction in these proceedings and have not been, but what has been put to me, and I think to some extent you put it to me in opening and in closing, but the implications even in relation to Article 13(3) do tend to suggest that the preliminary issues Judgment of the Tribunal in *PPC* was wrongly decided and, to some extent, that is true and I have made it clear on a number of occasions that I think it was wrongly decided, and this is a further argument which leads into why I say it was wrongly decided.

I am not quite sure what the Tribunal is inviting BT to do.

THE PRESIDENT: What I am saying is that our present view is that this Ground, the amended Article 20 para. 1 Ground, set out just in these four paragraphs, because as you say in 4.4 leaving that issue on one side, etc. - so that is where it has been taken - is one that is not open to you because it is not one raised in your notice of appeal, and I am telling you that that is our view so that you can respond to that, as you have done, so you know that that is our present thinking, and so the other parties also know that is how we view it.

MR. THOMPSON: Given the level of detail that has been put into the pleadings and the skeletons where the true construction of Article 20 of the Framework Directive is very much in front of the Tribunal, I am not quite sure what is being proposed as to the approach that the Tribunal is proposing to take to the construction of Article 20. If the current wording is to be taken into account then it is what it is, and it is difficult for the Tribunal to avoid reaching a view on its meaning. If the Tribunal is saying they will not take a view on its meaning unless we seek leave to amend, then we will obviously have to consider that. It is a very exceptional circumstance given the EU issues at stake and as put to me by the Tribunal it is not particularly a point I raise but I recognise the force of it, the breadth of the implications, it might very well be a case where late permission to amend would be the best way forward so that everyone could address the issue properly. If that is the view of the Tribunal then clearly BT will take advice and seek to put forward an application to amend in a proper form as soon as possible, and the matter can then be properly debated as a matter of law possibly in the New Year, if that is what the Tribunal is suggesting. But, otherwise, the

law is as it is, and the provisions are before the Tribunal, and I think it would be quite difficult for the Tribunal not to address the issue.

THE PRESIDENT: Thank you. Mr. Saini, is there anything ----

MR. SAINI: I have some observations to make in relation to this.

THE PRESIDENT: What do you say in relation to this, because it affects Ofcom's powers substantially.

MR. SAINI: Absolutely, it is a fundamental issue going to the route of the dispute resolution powers, but you will be aware, Sir, that there was a separate appeal before this Tribunal in relation to Ofcom's decision to accept these disputes. There were many argument made - this argument was not made. You have also identified, and I do not believe it is disputed by Mr. Thompson, but I say it just for the record, that this particular point does not feature in the notice of appeal, and if we may respectfully say so, you have dealt with it in the correct way, the way that is indicated in the *Rolled Steel* case, where an issue arises in the course of a trial and it looks like it is a matter that is not pleaded the court should raise the matter and leave it to the party that is trying to put forward the argument, either to make an application to amend the pleading, or to let the point go. It should not be left hanging.

The position now is it is not pleaded, it is not open to my learned friend to run this argument. If he wants to run the argument he needs to make an application for permission to amend the notice of appeal and that application will have to be considered in the light of the history of this case, the time at which the application is made, and in particular, going back to the history, the fact that arguments as to jurisdiction to accept the dispute were fully ventilated before this Tribunal and we would respectfully submit that it is an abuse to come up with yet another argument when there has been a separate CAT hearing on jurisdiction. So we are not accepting that my friend should be able to amend, but if he wants to amend he needs to make a proper application.

If I can add one further point, which is that you have explained to me, without any disrespect to my friend, what the argument appears to be, but it would be good to see it on paper, the argument in relation to Article 23 and in particular how it is meant to relate to domestic legislation.

THE PRESIDENT: It is Article 21, I misstated.

MR. SAINI: Indeed. So an application needs to be made to amend. What cannot happen, and this is made clear by the *Rolled Steel* case, is that the matter cannot just lie there without anyone having made a decision. The Tribunal has made its position clear, which is it is not pleaded, I do not believe my friend disputes that, therefore either he has to amend, make an

application to amend, or the matter rests there, it cannot be left hanging.

THE PRESIDENT: Yes. (After a pause): Mr. Thompson, we do not want to take up a lot of time on this for obvious reasons. Technically you can reply to that, but we are very firmly of the view that if you wish to run that argument you will need to seek to amend your notice of appeal, and if there is no amendment sought, or amendment is sought and not allowed, then these paragraphs are not open to BT and therefore will not form part of our Judgment.

MR. THOMPSON: Can I clarify which paragraphs are being referred to?

THE PRESIDENT: I think it is 440 to 443. As far as I could see, but like others we have had to read this at quite a pace, that is the only place where this point is taken.

MR. SAINI: If one goes back in the skeleton argument to 401 to 405 that is where the compromise position also appears, pp.148 to 149.

THE PRESIDENT: You are quite right that it is 401(4), which is just a sort of heading which leads into those paragraphs we have identified. Yes, I see. Indeed, it says in 405 that the Decision falls to be set aside, and that would be right if the argument were correct, it is not just the repayment it is the Decision as a whole. I think, to be fair, Mr. Thompson, I cannot say with certainty it is just those four paragraphs, that is where I think the argument is developed as to the basis on which it is said; there may be some other paragraphs. It is what is called the "compromise solution" but it may be the compromise can be put forward on a different basis.

MR. THOMPSON: It turns partly on the meaning of where an operator has an obligation.

THE PRESIDENT: Yes, there are various other points which you have which have been clear.

MR. THOMPSON: As regards ground 5, the compromise to some extent represented a partial concession and obviously puts the timing back to 8th December 2008 on the present findings.

THE PRESIDENT: Yes, but it has got to be on a justified basis.

MR. THOMPSON: One takes into account both 13.3 and 20.1. This whole thing does go back to the footnote to the Notice of Appeal where we made it clear by reference to the judgment of the Tribunal on the Preliminary issues case that that case had itself been limited to the issue of jurisdiction and had not looked at the issue of s.190(2)(d). There may be the same issues of logic about whether or not that was really a possible route.

THE PRESIDENT: This is not a s.190(2)(d) point.

MR. THOMPSON: I think it is, as it were, the converse because whereas the Tribunal in the Preliminary Issues case looked at the jurisdiction but not at the s.190(2)(d) point, I was inviting the Tribunal to look at the 190(2)(d) point but not the jurisdiction point. I think the

point that is being put to me is that at least on Article 20.1 it would be too blinkered a view to look at the issue simply in relation to the power to order repayments because it goes wider and goes to the entire jurisdiction of Ofcom in relation to the period before 8th December 2008.

I am conscious of the time. Can I discuss it with those instructing me?

THE PRESIDENT: You consider it and others can consider it. We do not want to take up time on it.

MR. THOMPSON: I will undertake to put in any application to amend within a limited period.

THE PRESIDENT: Yes, we will have to decide how that is addressed. Right, we have taken up some time on that. Who goes next? Ms Rose, it is you. Ms Rose, we will give you a bit of extra time as a result.

MS ROSE: Half of my time has in fact been taken up so far. I will seek to reclaim it.

THE PRESIDENT: Yes, you were due to start at 11.30.

MS ROSE: I was due to start at half past 11.

THE PRESIDENT: Yes, we will try to see if we can give you a bit extra – I cannot promise 45 minutes, but 30 minutes.

MS ROSE: Sir, I will need 45 minutes. I made clear from the outset I would need an hour and a half.

THE PRESIDENT: Yes.

MS ROSE: Can I deal first with BT's appeal, and then with our appeal on the issue of interest. Coming first to ground 1, the proper interpretation of Condition HH3.1. We deal with this at paras.3 to 20 of our written submissions. Issue 1 turns on the meaning of the phrase "each and every charge offered, payable or proposed for network access covered by Condition HH1."

THE PRESIDENT: Sorry, would you pause a moment. (Pause) You need not address us on ground 1.

MS ROSE: I am grateful. Can I then turn to ground 2. This is addressing our closing submissions at paras.21 to 105. Of course, what I say on ground 2 is influenced by the indication that the Tribunal has just given me that I do not need to trouble the Tribunal on ground 1. Our primary submission, as Ofcom's, is that the only way in which ground 2 could be relevant is as an aid to the construction of HH3.1. If we succeed on ground 1 in that the Tribunal is satisfied that properly construed HH3.1 requires a separate cost orientation of charges for connection and rental, then ground 2 is of no relevance to this appeal.

It is quite difficult to understand, from the way that BT has presented its case, precisely what it says is the relevance of ground 2. One can see how it could be relevant to an appeal against the imposition of Condition HH3.1 on the basis that the imposition of such a condition was disproportionate because it was not reasonably necessary to meet the regularly objectives. But, of course, BT never did seek to appeal the imposition of HH3.1, and it is very difficult to see how the economic arguments advanced under ground 2 have any relevance at all to the question of its breach of HH3.1 properly construed.

What BT now says is that ground 2 is relevant to three issues which it says are, first, the scope of HH3.1; second, BT's compliance with it; and third, the level of the repayment that BT ought to be ordered to make. That appears in BT's closing submissions at para.95.

In fact, though, these are not separate points. On analysis, the first question: the proper interpretation and scope of HH3.1, is also dispositive of the second and third. If we are correct that properly construed, HH3.1 requires that the charges for connections and rentals should each be individually cost oriented, then it is difficult to see how it could be argued that when considering whether BT has complied with those conditions it could be proper or appropriate to aggregate the charges. Such an application would subvert the intention of the condition, which was that each charge separately should be cost oriented. So we say once you have decided issue 1 in our favour, the second point that is raised on ground 2 falls away.

The same point applied to the third of BT's arguments, which is that ground 2 is relevant to the issue of the amount of repayments. Once the Tribunal has concluded that BT is in breach of Condition HH3.1 because it has overcharged either for connections or for rentals considered separately, it is very difficult to see how at that stage it could then be appropriate to conclude that when looking at the amount of the repayment that is due you should aggregate connections and rentals. Looking at the repayment in that way would leave BT with some of the benefit that it had achieved as a result of its breach of the condition imposed upon it and thus would not fully incentivise it to comply with its obligations.

THE PRESIDENT: I suppose it might be possible if, for example, the interpretation of compliance was not very clear, and this Tribunal would say: what is required to comply, what is the correct interpretation and determine breach, but then say on the amount of repayments one should allow for the fact that at the time until this decision it was not clear and so it is relevant to the extent of repayment.

MS ROSE: That is a different point. That is not a ground 2 point; that is actually a ground 3 point. What BT says under ground 3 is: it was not clear to us what HH3.1 required, and

Ofcom did not give us any clear guidance, and for that reason we ought to be given some mercy in relation to the repayments. That is ground 3. That is different from ground 2 because under ground 2 BT seeks to argue that in economic terms it is not meaningful to assess cost orientation in relation to connections and rentals separately.

If that argument fails in relation to the interpretation of HH3.1, it must also fail in relation to compliance – that is a necessary corollary. We say it also fails in relation to repayment, because otherwise at either the compliance or the repayment stage you actually subvert the proper intention of the condition by permitting to BT a form of aggregation that the condition does not permit.

So we say that properly analysed ground 2 in fact adds nothing to BT's case. The substance of the way BT put the point on repayment in relation to ground 2 was simply for it to say that it was not fair or proportionate to require BT to repay separate overcharges where communications providers had purchased a whole circuit on the basis of whole life costing because then the communications providers would get a windfall. That was the argument that Mr. Thompson advanced. That, of course, is a retreat by BT to the fallacy that underlies so much of the way that they have put this appeal, which is the same fallacy which was rejected by the Court of Appeal in the *PPC* case. Namely, the fallacy that the purpose of this provision is to compensate CPs for losses rather than to incentivise BT to comply with its obligations.

I would add, of course, that there is an underlying assumption every time BT makes this assertion, which is an assumption that the losses of the CPs are less than the amount of the overcharge. There is, of course, no evidence before this Tribunal as to the amount of the losses sustained by the CPs as a result of this overcharge because, as the Court of Appeal held in the *PPC* case, that is an irrelevant matter. But one can, without any difficulty at all, posit circumstances in which in fact the losses of the CPs would be significantly greater than the amount of the overcharge.

THE PRESIDENT: Yes, because of the volume effect.

MS ROSE: Exactly, precisely. Volume effect is an obvious example. Another example, which might not apply in this case but could apply in other cases, would be where you had CPs who were actually driven out of the market, who were unable to compete or to enter at all because of the level of an overcharge. In that situation the level of the overcharge might be very small.

THE PRESIDENT: Yes, but that is not this case.

MS ROSE: No, it is not this case, but the point I am making is a general one about the

interpretation of 190(2). It has been put by BT constantly as if the effect of 190(2)(d) is to give a windfall to the CPS. But of course, it may be that the amount is significantly less than the losses they have suffered, and if it is then they are left to their other civil remedies. That, of course, also goes to BT's argument that the interpretation applied by Ofcom to 190(2)(d) deprives s.104 of any force. There is still an obvious role for s.104 and civil claims by the CPs if they think they have suffered losses greater than the amount of the overcharge. That is the relevance of ground 2.

The next point is the actual substance of ground 2, because we also submit that even on its own terms ground 2 fails because BT has not established the proposition that connections and rentals considered separately have no economic meaning. We deal with this in detail starting at para.33 of our written closing submissions, but in outline our submission is that in fact all of the experts who gave evidence on this issue were agreed that connections and rentals do have separate economic meaning, and that an overcharge in rentals could cause economic distortion. The only difference between the experts was the question of the significance of that effect. Once you come to that position this argument simply fails, because in order to be sustainable it has to be, as Mr. Thompson put it so eloquently, that connections and rentals are a snail and a shell; there is no difference between them. But the evidence establishes precisely the contrary proposition.

I do not intend to go through the detail of all of this material now.

THE PRESIDENT: Well you have set it out and we have read your closing.

MS ROSE: We have set it all out, and the Tribunal is very familiar with it because you have heard the evidence. Of course, there are different categories of circumstances in which economic distortions can arise. At the outset where there may be inefficient build or buy decisions made.

THE PRESIDENT: Yes, you have set them out; we have got them.

MS ROSE: Yes, all of those points. Just to pick up a couple of points, BT made the assertion in its closing written submissions that relatively low connection and high rental charges are good for communications providers (para.98). The Tribunal knows that is not correct. The position is, of course, that it may be good for some communications providers who are seeking to enter the market, but relatively bad for others who have established networks and who are more interested in the amount of rental. The position of THUS in the THUS complaint in 2007 is a good example, and another is the position of Cable & Wireless. The Tribunal will recall Mr. Parker's evidence about the substantial proportion of Cable & Wireless' circuits that migrated from LES or were transferred from other communications

providers.

Mr. Harman did accept that charges for connection and rental were separately meaningful and had the potential to cause economic distortion. His evidence essentially amounted to the argument that that effect was minimised by three factors that he relied on. The first, and by far the most important for his argument, is his argument that it is uncertain how costs should be allocated between connections and rentals and therefore it is very difficult to assess the true DSAC. His second was that the effect was mitigated by whole life costing and his third was that Ofcom had taken an aggregated approach to connections and rentals in the 2009 LLCC.

Very briefly in relation to uncertainty in cost allocation, our submissions on this are at paras.49-68 of our written submissions. The first problem with that submission is that it is now clear, contrary to what is said by Mr. Harman in his second report, where he says all of the costs could be attributed to either connections or rentals, that that is simply incorrect. The position is that a substantial proportion of the costs allocated to rental, namely the electronics costs -- allocated to connections, I beg your pardon, the electronics costs could, Mr. Harman posits, equally reasonably be allocated to rental. Even on that basis there are other connections costs that could not equally reasonably be allocated to rental, and the Tribunal heard evidence about the provisioning costs that BT considered. They were more appropriately allocated to connections than to rental. But, secondly, and more importantly, it is accepted by everybody that there are a substantial proportion of rental costs which could not be allocated to connections and that, therefore, there is not a complete overlap between these two provisions. That is the problem with his argument.

The second problem is Mr. Dolling's evidence because Mr. Dolling gave evidence that BT does not allocate costs arbitrarily. It goes through a very careful process according to its own detailed methodologies and it makes a series of structured judgments about how best to align costs with causality. Not only that, BT has a regulatory obligation to do that and the other communications providers rely on the output of BT's regulatory obligation, which is the way that costs are allocated and shown in the regulatory financial statements. BT cannot, therefore, complain that it is somehow unfair to hold it to the judgments that it has made on cost allocation when considering whether its charges are cost orientated, even if some of those costs could legitimately have been allocated in different ways.

The third problem with Mr. Harman's argument is that he accepted that it is not some special situation that applies to connections and rentals, but that the same point could be made wherever you have services that share a substantial proportion of common costs. That

is the case for very many of the regulated services that are provided by BT. So if Mr. Harman is right then the whole enforcement of cost orientation becomes uncertain and, on his terms, impossible.

Whole life costing I do not need to say any more about. It has been dealt with in detail in our evidence. The only point I want to flag up is that, in fact, Mr. Harman accepted that notwithstanding the existence of whole life costing, where you had circuits of different duration or circuits that had transferred, you could get an economic distortion so significant that they would actually have to be dealt with by differential rents. We submit that that evidence from Mr. Harman wholly undermined his evidence on this point.

Finally, the 2009 Leased Lines Charge Control. We deal with this starting at para.87 of our closing submissions. The first point is that a document dating from 2009 cannot be an aid to the construction of a condition imposed on BT in 2004. The second is that in the very paragraph relied on by Mr. Harman, which is para.94, Ofcom is stressing that its analysis in this document is without prejudice to the proper assessment of cost orientation. Indeed, that is actually the heading of the paragraph on which Mr. Harman relies, and it is very difficult to see how a paragraph that says "this is without prejudice to cost orientation" could then be taken to be in some way relevant to cost orientation. The third is that in any event Ofcom's approach in the LLCC does not assist BT, and the reason for that is that Ofcom did two things in that decision. First, when it was assessing the starting charge it looked at connections and rentals together, but, secondly, when it was applying charge caps it applied separate sub-caps individually to the charges for connections and rental specifically in order to avoid a rebalancing of those charges in a way that could be discriminatory. So in fact the substance of Ofcom's decision, the 2009 decision, entirely supports the proposition that Ofcom has always regarded these as separate charges which have economic meaning. So for those reasons we say, even on its own terms, whether relevant or not, Ground 2 fails.

Very briefly on Ground 4, the amendments to the RFS. We have dealt in our submissions, at paras.109-134, with the question of the incentives that BT has to propose adjustments to the RFS, particularly after a dispute has been raised, which favour its own position and the information or asymmetries which make it possible for BT to do that. That does not appear to be seriously disputed. The response of BT to our evidence on this took a completely false path, which was that they construed our case as if we were alleging that BT was in some way acting improperly or in bad faith. But that is not our case. Our case is that BT, like any commercial entity, acts in accordance with its own commercial interests and that, where there is a dispute alleging an overcharge, its incentive is to look for errors in the RFS

which will reduce the amount of the overcharge. That is not seriously disputed.

Of course those incentives on BT apply with even greater force once you get to the stage of an appeal to this Tribunal against a decision of Ofcom requiring it to repay, and we say that is a further reason why this Tribunal should be very cautious before permitting BT to argue that there are errors in adjustments made to the RFS which it did not raise at the time of the administrative procedure.

Ground 5, I approach this with a certain amount of trepidation in the light of the exchanges that we have just heard, but dealing with Ground 5 as it is pleaded, and even before hearing Mr. Thompson this morning, it has been, with respect, very difficult to pin down what BT's position is on Ground 5 because it has constantly changed. This is an argument less like a snail in a shell than like a slug reacting to the application of salt. Every time it comes under pressure it shrivels. So that has been a serious difficulty in responding to it. But we say that actually the position is straightforward. The starting point is the 2004 Act. Section 190 is very clear in its terms. It clearly permits repayments and payments of sums by way of adjustment of an overpayment. We say the same is true of s.94 to 96 where Ofcom is carrying out an investigation of its own initiative. It is clear from the investigation that the Tribunal carried out yesterday with Mr. Saini into those provisions that they also permit Ofcom to require BT to correct the consequences of a breach of a condition and, if it does not do so, then it is penalised for not doing so. That also would require BT to make repayments. So there is no mismatch between the Ofcom own initiative investigation and the resolution of a dispute.

The question, therefore, is whether there is anything in the CRF that precludes the construction of s.190 in accordance with its clear meaning. It has to be shown that the CRF does not permit the exercise by Ofcom of the power to award repayment. The CRF, of course, is a suite of directives, not regulations, and the general approach of the community legislature in relation to directives is that directives may set out the aims to be achieved but they generally leave it to member states to sort out, in accordance with their own legal systems, that they will use to achieve those aims. It is therefore not surprising that the powers that the CRF requires member states to bestow on national regulatory authorities are described in general terms and are described by reference to the objectives to be attained and not the precise remedies which are to be at the disposal of the NRAs. Indeed, there is no provision anywhere in the CRF which seeks to lay down the precise scope of the remedies which an NRA may give, either on a dispute resolution or any other kind of investigation. So we say the relevant provisions are these. First of all, in the Framework

Directive, recital 32, which makes it clear that the objective of the NRA when resolving a dispute is to seek to ensure compliance with obligations arising under the directives. That is why the proper approach of Ofcom in a dispute such as this, when asking should there be a repayment and, if so, how much, is is this repayment proportionate in order to incentivise BT to comply with its SMP conditions? That is always the question. That is why we say, coming onto interest slightly out of turn, that the right approach to interest is whether interest is necessary to incentivise BT to comply with its obligations. The starting point is always that if BT retains the benefit of overcharging BT will have a strong incentive to overcharge, because, of course, there is always a chance BT will not get caught at all, in which case it will retain the full benefit of the overcharge, but if it can be confident that even if it does get caught it can keep some of the money or even keep the benefit it obtained from the use of that money over a period of time, it is always going to be in the black so it will always be in its interest to do that.

So then Article 20, and it is worth just looking at Article 20(3):

> "In resolving a dispute, the [NRA] shall take decisions aimed at achieving the objectives set out in Article 8".

So there is the key requirement for the NRA, a reference to the Article 8 objectives of promoting competition, preventing a distortion of competition and so on. Then:

> "Any obligations imposed on an undertaking by the [NRA] in resolving a dispute shall respect the provisions of the Directive …".

The first thing to note there is that Article 20(3) takes it for granted that the NRA has the power, when resolving a dispute, to impose obligations on the party to the dispute. You do not find anywhere a provision that says, "In resolving the dispute the NRA shall have the power to impose obligations". Instead it simply says "any obligations imposed in resolving a dispute". Not surprisingly, the approach that has been taken by the community legislature is that there is not much point in giving the power to an NRA to resolve disputes unless the NRA can impose obligations on the parties that will effectively resolve the dispute in accordance with the objectives of the European scheme. So it simply proceeds on the assumption that there is to be the power to do that, because otherwise the dispute resolution process would not be effective.

THE PRESIDENT: I do not think BT is saying you cannot impose any obligations.

MS. ROSE: Indeed, it is not, Sir, but that really exposes the flaw in its whole approach, because BT's argument is there is no express provision in Article 20 that says that the NRA can require repayment, and there is no express provision in Article 20 that says the NRA can

require the payment of interest, and therefore it is to be inferred that the NRA precludes the award of a repayment or the award of interest. That is actually the structure of their argument. That does not work because there is no provision in Article 20 that defines the scope of the NRA's power to impose obligations at all. It simply proceeds on the assumption that the NRA is to have sufficient powers to impose obligations effectively to resolve disputes and to meet the regulatory objectives of the CRF. That is the function of Article 20 in this scheme.

So, we say that the point that BT makes about repayments or about interest could be made equally well about any other obligation that Ofcom imposes when resolving a dispute. The limitation is only that when resolving the dispute any obligations that are imposed must respect the provisions of this Directive, or the specific Directives. So the NRA could not impose obligations that were inconsistent with the rest of the CRF. But it is extremely difficult to see how an obligation on a party, which was subject to a cost orientation obligation, a type of obligation expressly envisaged at Article 13 of the Access Directive, and has overcharged, how an obligation on that party to repay the amount of the overcharge is in any way inconsistent with the CRF. On the contrary, it is the most obvious and effective remedy for incentivising that party to comply with the obligation imposed on it under Article 13(3) of the Access Directive.

THE PRESIDENT: The obligation imposed on it - sorry?

MS. ROSE: The obligation that BT is in breach of here is the obligation under the Access Directive, because under the Access Directive ----

THE PRESIDENT: Yes, I am sorry, I am with you, yes.

MS. ROSE: The obligation is 13(3) of the Access Directive because BT has SMP it is under an obligation ----

THE PRESIDENT: So is it right that you say that the power to order repayment is really envisaged by Article 20(3) ----

MS. ROSE: Yes.

THE PRESIDENT: It is not Article 13(3) ----

MS. ROSE: That is right.

THE PRESIDENT: -- that Lord Justice Etherton, in looking at Article 13(3) in the appeal, which I think you were involved in, went astray?

MS. ROSE: Sir, we do say that the power is more appropriately lodged in Article 20, because it is Article 20 that is addressing the functions of the NRA when resolving the dispute. But the significance of 13(3) is that when it is resolving the dispute the NRA is doing so in a way

which respects the obligations on BT under 13(3).

THE PRESIDENT: If, when the authority is acting on its own initiative then it is presumably acting under 13(3) - would that be right? If it is not a dispute resolution?

MS. ROSE: No, it would be under Article 5(4) of the Access Directive. Article 5 is quite important in relation to access because 5(1) places a duty on NRAs to ensure adequate access and interconnection, and gives additional powers to NRAs to impose obligations on entities that control access even where they do not have SMP. But then at 5(4):

> "With regard to access and interconnection Member States shall ensure that the NRA is empowered to intervene at its own initiative where justified, or in the absence of agreement between undertakings at the request of either of the parties involved in order to secure the policy objectives of Article 8 in accordance with the provisions of this Directive, and the procedures referred to at Articles, 6,7, 20 and 21 of the Framework Directive."

So 5(4) refers you back to the dispute resolution power in Article 20, but it also makes it clear that the NRA must have the power to intervene of its own initiative to ensure adequate interconnection and access, including appropriate terms for access.

THE PRESIDENT: Yes. And that is the basis, you say, of the general power to enforce SMP obligations?

MS. ROSE: In relation to access that is an obligation on the Member State. There is also the power in the Authorisation Directive at Article 10 that we looked at yesterday. One of the interesting things about the CRF is that there is a general scheme in relation to the enforcement of SMP conditions, and resolution of disputes, and own initiative investigations. But then there is an extra reinforcement of that in relation to access because the Community regards access to networks as particularly important. So you get an extra duty under 5(4).

THE PRESIDENT: The general power to enforce SMP obligations is in where? Article 10 of the Authorisation Directive?

MS. ROSE: There is Article 10 of the Authorisation Directive, yes.

THE PRESIDENT: And Article 10 is the basis of the UK provisions, is it not?

MS. ROSE: Sorry?

THE PRESIDENT: Article 10 is clearly the basis of the provisions in the Communications Act about enforcement?

MS. ROSE: That may well be right, but ----

THE PRESIDENT: The whole process of notification, opportunity to give representations, etc. It

is quite clear.

MS. ROSE: Quite specific.

THE PRESIDENT: Yes. It is very detailed.

MS. ROSE: In relation to Access that has to be read together with Article 5(4) of the Access Directive.

We say that there is a coherent scheme both at European and at national level, and that underpinning both of those schemes is the appreciation that the NRA must be able to give effective remedies that will resolve the disputes before it and that will meet the regulatory objectives of the framework, which include the principal objective that a communications provider should abide by the obligations that have been imposed upon it.

The result of BT's submission is, we submit, that that scheme is wholly undermined. As I have said, it is not that easy to understand exactly what BT's case is and exactly what is the date on which it says repayments can be ordered. At some point yesterday it seemed to be submitting there was no power at all to order repayments. At other points it seemed to submit that repayments could be ordered up to a date which might be the referral of the disputes to Ofcom. If the latter is its position it is, with respect, internally incoherent, because BT have not explained where that power comes from. That power, of course, could only be implicit in Article 20 in order to ensure the effective resolution of disputes, which is precisely the point.

In any event, which ever position BT adopts defeats the effective implementation of the regulatory regime, not least because BT could avoid any adverse consequences with the greatest of ease.

THE PRESIDENT: Yes, I think we have understood that point.

MS. ROSE: Well, Sir, there is one further point which is that the inconsistency of BT's position on this is not simply a matter that has been pursued in this hearing. The position that BT has taken before this Tribunal in relation to the power to order repayments is inconsistent with the position that BT took when it appealed Ofcom's decision to receive these disputes.

Can I just show the Tribunal this, because I do not believe we have looked at this before? It is authorities bundle 3, tab 48.

Mr. Harrison will recall this decision. What happened was this was an appeal against Ofcom's decision to receive two sets of disputes, one set, as you can see here, are the disputes that were the subject of this appeal, and the other was a separate set of disputes from mobile number operators. The argument of BT was that it was premature for Ofcom to have agreed to receive those disputes, because the parties had not engaged insufficient

negotiation for it to be said that they could not agree and for a dispute to have crystallised. In that situation it was said there was no dispute and Ofcom therefore had no jurisdiction to consider the dispute.

If the Tribunal goes to para. 43 you will see:

> "Finally, BT urged the Tribunal to adopt a narrow construction of the word "dispute" in section 185 on what were described as pragmatic grounds. There are good policy reasons, BT argued, for ensuring that the right to require OFCOM to determine a dispute only arises where all commercial avenues of negotiation have failed. Otherwise there is a risk that the regulator has to deal with a host of premature disputes that might otherwise have settled without the need for its intervention."

Then over the page at para. 45, this is dealing with the mobile number operators' dispute but it obviously applies to both:

> "We agree with the MNOs that, just as BT is entitled to protect its own commercial position by serving NCCN 1007, so they should be allowed to protect their commercial position by referring a dispute to OFCOM reasonably soon after the disputed prices come into effect. Miss Lee [*acting for Ofcom as she does now*] countered that even if the Tribunal accepts that a 'dispute' does not in fact arise until many months after NCCN 1007 comes into effect, the MNOs are not in fact thereby disadvantaged. This is because section 190(2)(d) of the CA 2003 provides that OFCOM have the power to backdate any determination on NCCN 1007: see paragraph 7 above. The extent of backdating does not appear to be limited to the date when the dispute was referred and, as Miss Lee pointed out, in the Termination Rate Dispute appeals the Tribunal did direct OFCOM to backdate the new charges to a date earlier than the date on which the disputes were referred."

Then the Tribunal says they do not accept that that section is a complete answer to the MNOs concerns.

> "We note, first of all, that BT was not prepared to give the MNOs any comfort that it would hold back from contesting the full exercise by OFCOM or the Tribunal of the backdating power in the event that a long period elapses between NCCN 1007 coming into force and the date of OFCOM's determination of disputes."

So, as you can see, BT at that stage, in this very same dispute, was positively advancing a case to the Tribunal to persuade this Tribunal to rule that Ofcom should not have accepted the disputes. BT was positively advancing the case that there was no prejudice to the CPs

because if the disputes were referred later they could still get backdated awards of the repayment. Wholly inconsistent with the case now run in the same dispute on this appeal. Finally in relation to ground 5, Mr. Thompson sought to characterise a repayment under s.190 as "a radical exercise of public power, requiring the reopening of commercial transactions". Of course, it is nothing of the sort; it is simply the exercise of a power to enforce a regulatory obligation which BT has breached. BT was under a regulatory constraint as to the sort of transactions it could lawfully enter into. It was not permitted to charge above DSAC; it was not permitted to charge prices which were not cost oriented. It broke that obligation, and it is not in any way radical or surprising that it should be required to take the consequences of that breach.

Very briefly, may I deal with ground 6 before lunch and then deal with interest after lunch. Ground 6, we say the answer to this is simply to be found in the judgment of the Court of Appeal in the *PPC* case at core bundle E tab 11.

THE PRESIDENT: Yes, we have been over that.

MS ROSE: Yes, sir. It is paras.81 to 91.

THE PRESIDENT: Yes, we have the authorities in mind.

MS ROSE: The point I wanted to stress – and I know the Tribunal has very much in mind the point that there is indeed a presumption and that it is up to BT to show good reason why it should not be exercised and so on. There are two further points I want to stress. The first is that the good reason that BT has to put forward is a good reason why a lesser repayment or no repayment would better achieve the objectives of the Act and the CRF than a full repayment. That is the question. The stress is always on what is the remedy that would best achieve the objectives of the statute and the CRF. That is why we say, both in relation to the repayment itself and in relation to the question of interest, the central point is always the question of the incentives on the party. If you have a situation where there is an incentive on BT to overcharge, if it is not required to repay and not required to pay interest, then you would have to show some good countervailing considerations why, notwithstanding that incentive, it should not be required to pay the money back. We submit that BT has never come close to identifying anything of the sort.

The second point is that BT's complaint that it is unfair or disproportionate to require it to pay the money back because it has not been shown that the communications providers suffered loss or that they did not pass on the --

THE PRESIDENT: That is also dealt with.

MS ROSE: It is not only dealt with, but the conclusion of the Court of Appeal is that that would

not be a proper ground for impugning the exercise of discretion. It is simply irrelevant to the exercise of discretion because that is irrelevant to the question of what would best meet the statutory and regulatory objectives.

That concludes our submissions on BT's appeal. It might perhaps be a convenient moment.

THE PRESIDENT: Then we will deal with the issue of interest.

MS ROSE: I am going to deal with interest at 2 o'clock.

THE PRESIDENT: And that is it, is it not?

MS ROSE: That is it, yes, then I will sit down.

THE PRESIDENT: Although you said you will need an hour and a half, I would have thought you could deal with interest in half an hour?

MS ROSE: Sir, I will certainly seek to do so.

THE PRESIDENT: Do your best.

MR. READ: Sir, I indicated that we would have a note ready. It is ready and I will circulate it round to the Tribunal.

THE PRESIDENT: This is about the Sky/TalkTalk?

MR. READ: This is about the Sky/TalkTalk.

THE PRESIDENT: That is very helpful, thank you.

MR. SAINI: Sir, we have one as well, which is just one page actually. It is same issue, just a list. (Handed)

THE PRESIDENT: Thank you. We will resume at 2 o'clock.

Adjourned for a short time

THE PRESIDENT: Yes, Ms. Rose.

MS. ROSE: Sir, if I can now to the interest appeal. If you pick that up in our written submissions, it is Section H which starts at para.154. Just to also note that we also adopt Sky's submissions in relation to interest, as in their closing submissions. Sir, we submit that the proper question to be addressed when deciding whether interest should be awarded is the question posed in s.190 as interpreted by the Court of Appeal in the *PPC* case, namely what is the sum which should be paid by way of an adjustment to the overpayment in order to give effect to Ofcom's determination of the proper amount of the charge and in order to achieve the objectives of the Act and the CRF. So we say that is the correct question and that Ofcom, rightly, in the *Gamma* decision focuses on the question of whether the payment of interest was necessary and proportionate to avoid an incentive on BT to breach its SMP conditions and whether there are any adverse effects of awarding interest that would make it inappropriate to do so. So that Ofcom's focus in *Gamma* is correctly on the question of how

the balance of incentives works out.

Today submissions were made by Mr. Read in relation to the *Gamma* decision suggesting that it should only apply, or might only apply, prospectively. Can I just take this up with the *Gamma* decision, which is in Additional Documents 2, Tab 16? The relevant section is paras.4.82 to 4.88 of the *Gamma* decision. Our submission is that BT has misunderstood what Ofcom is saying in these paragraphs. The position in *Gamma* was that Gamma had sent the dispute to Ofcom on the basis that it objected to the inclusion in the interconnect agreement of the term saying that interest should be awarded at a particular very low interest rate on a determination by Ofcom, and it was asking Ofcom to override that contractual provision and to instruct the parties to draft a different contractual provision. Ofcom declined to do that and the reasons it declined to do that need to be read in full. If you go to para.4.82, they say, first of all, that their view is that the OIR, which is the interest rate in question, is generally unlikely to be an appropriate interest rate to apply when making a direction for repayment in a dispute. Therefore, they say, the rate of interest applicable under the paragraphs of the SIA is not fair and reasonable. Therefore they say:

> "In this Determination, … it is appropriate to exercise our powers…to make a declaration to the effect that [it is] not fair and reasonable".

Then they say:

> "We have also considered whether it is appropriate to exercise our powers under section 190(2)(b)… This would involve directing the parties to amend the terms of the agreement … [and] fix an alternative rate of interest".

Then they say there is a balance to be struck between regulatory and commercial certainty and ensuring that the approach to interest is sufficiently flexible to ensure that the level of interest in a particular dispute achieves the regulatory objectives and is fair as between the parties. Then they consider their powers under s.190(2)(b) and they say:

> "Such a direction would only bind BT and Gamma".

Then at 4.85 Ofcom's position is that the appropriate interest rate is likely to be the Bank of England base rate plus 1% unless the parties can show another rate that would better serve the objectives or would be unfair.

> "Directing a particular fixed rate in the contract would not allow for this flexibility".

Then this:

> "In the light of the above considerations, we do not therefore consider it appropriate to direct the Parties to amend the relevant contractual provisions".

Then they say:

"It is for the parties to decide whether an amendment or deletion of the contractual provisions is appropriate, in line with the Determination, and we note that both BT and Gamma have indicated industry should be in a position to take this forward".

What is clear from that reasoning is that what Ofcom is saying is, "Whether or not this provision is in the contract, when we are determining a particular dispute our focus is going to be on the question whether the award of interest and, if so, at what rate, is appropriate in order best to achieve the regulatory objectives". That is the reason they say it is not necessary to amend the contract, because they want simply to retain regulatory flexibility. That stance would make no sense unless what Ofcom is envisaging is that, whether or not this term remains in the SIA, Ofcom would still approach its jurisdiction to award interest by reference to the regulatory objectives and not to the contract. Then at 4.87 they say, "Even though we are not directing the parties to amend the contract, it is important that we provide both parties and other CPs which are parties to the SIA with sufficient clarity as to the rights and obligations that should apply in this case".

Then they say:

"We therefore set out guidance in Annex 2, based on our conclusions in this Determination, which we would intend to follow when deciding whether interest should be payable, and if so, at what rate, in the context of a dispute determination relating to charges payable under the SIA".

Note, that is in relation to charges payable under the SIA irrespective of the fact that this clause remains in the SIA. Then at 4.88:

"We also note that BT has argued that a revised interest rate…".

This, of course, is the paragraph that Mr. Read was relying on this morning.

"We also note that BT has argued that a revised interest rate should only apply to interest payable on charges paid on or after the date of Ofcom's final determination and not to payments in respect of charges for services rendered prior to the date of this Determination. As Ofcom is not directing that the contractual provisions be amended, we do not consider it necessary to consider BT's arguments further in this Dispute. Ofcom will consider, in the circumstances of a given dispute, how any payment of interest ought to be applied in order to meet our statutory objections".

In my submission, it is quite clear that Mr. Read is wrong to say that Ofcom did not rule on BT's submission that the guidance given in *Gamma* should be prospective only. Ofcom did rule on it. What Ofcom said was that it is simply immaterial because Ofcom is not overriding the contract, instead it is going to consider each dispute in accordance with the

regulatory objectives. So the question of prospective or retrospective simply does not arise. That becomes even clearer when you look at the terms of the guidance that Ofcom gives at Annex 2, p.67. The first point to note is that this is general guidance addressed to the parties and it certainly does not say anywhere here that this is guidance that applies only in relation to charges incurred after the date of the decision. The second point is that it explicitly provides for Ofcom's approach where there is an applicable contractual interest rate. So it envisages that Ofcom may be awarding interest at a rate different from that in an applicable contract. You see that heading just above A2.5 and we see the approach that Ofcom adopts, which is that where there is an interest rate Ofcom says it will have regard to the extent to which it would meet their regulatory objectives, and then at A2.6, they will consider whether it evidences what the parties had agreed would represent a fair and reasonable proxy for the benefit to the overcharging firm, and then at A2.7:

> "However, where we have grounds to consider the contractual rate would not meet our statutory duties and regulatory objectives, we may decide that it is not appropriate to apply the contractual rate and will need to consider what rate to apply to ensure our statutory duties and regulatory objectives are met".

So it could not be any clearer that Ofcom is saying there, even in a situation where the parties have agreed what interest rate is to apply to a determination by Ofcom that there has been an overpayment and an order of a repayment, even in that situation, if Ofcom thinks that that rate does not meet its regulatory objectives it will not apply it.

So then turning to the question of the incentives, which we say Ofcom rightly places at the heart of its analysis in *Gamma*, we analyse the incentives at paras.162-188 of our written submission, and again we submit this is a matter on which there is now no significant dispute between the experts because all of the experts agree that if BT retains any of the benefit of its overcharge then that will give BT an incentive to overcharge in future, or, putting it another way, will weaken its incentive to comply with its regulatory obligations, because the time value of money is a part of the benefit that BT has received from the overcharge. Everybody agrees that. Originally Dr. Maldoom was putting forward the assertion that there should be set off against this an alleged incentive on the CPs, if interest were awarded, to delay in bringing forward disputes. We submit that following the oral hearing it is clear that that incentive is purely theoretical and that Dr. Maldoom accepted that it had no application in the real world. In our written submissions we have gone through all of the highly artificial and, indeed, implausible assumptions that would have to apply in order for it to arise.

Dr. Maldoom also accepted that there was a separate incentive on BT, which is an incentive to delay the progress of a dispute if it knows that interest cannot be awarded. That is a clear incentive on BT. It does not require any application of any assumptions. It is an obvious incentive. Indeed, the Tribunal can see it operating in this case where BT brought an appeal before this Tribunal seeking to argue that it was premature for the disputes to be referred to Ofcom.

THE PRESIDENT: I do not know if they did that because of interest.

MS. ROSE: Sir, I accept that, but what it shows is that there are ways and there are actions that they can take, which will delay the resolution of a dispute. The third incentive which Ofcom considered in *Gamma* was whether there was any distortion on incentives to invest and that is not a matter that has been seriously pursued in this appeal. So we say that Ofcom's conclusion in *Gamma* that in general, and in most cases, it is appropriate to award interest, is plainly correct and has not been seriously challenged on this appeal.

So what are BT's arguments now against the recovery of interest? First of all, it relies on commercial certainty. We address commercial certainty at paras.193 down to 207 of our written submissions. The fundamental problem with this argument is that we are not proposing any redress which would override any contractual right which BT has. This is a point that I made in opening, which is that under Clause 12.3 the only effect of that clause is that the CPs do not have a contractual entitlement to interest in the event that Ofcom orders a repayment by virtue of that repayment being ordered.

THE PRESIDENT: But would they anyway? I do not follow that.

MS. ROSE: Only if there was a provision in the contract entitling them to it. But the point is that, as Mr. Cox explained, this was a carve out. It was a carve out from the first sentence of 12.3 because 12.3 did give the CPs a contractual right to interest in the event that they had overpaid for a service in certain conditions at a particular rate.

THE PRESIDENT: I am sorry, can we go, because I am finding this a little hard to follow. It is in the contract at E17, is it?

MS. ROSE: You can see it in our closing submissions actually at para.189.

THE PRESIDENT: You have quoted 12.3.

MS. ROSE: Yes. So if you look at 12.3, you have to read it as a whole. The first sentence gives a contractual entitlement for interest to a communications provider.

> "If a refund is due to the [CP] by BT … the [CP] may charge daily interest on late repayments in accordance with the Late Payments of Commercial Debts (Interest) Act for the period beginning on the date on which the parties agree BT shall make the

repayment and ending on the date that BT actually makes payment".

So that gives a contractual entitlement to interest at a particular rate. As Mr. Cox said in his evidence, BT wanted a carve out from that provision, and the carve out is that this does not apply if Ofcom orders repayment by virtue of the repayment. So:

> "If any charge is recalculated or adjusted with retrospective effect under an order, direction, determination or requirement of Ofcom, or any other regulatory authority or body of competent jurisdiction, the parties agree that interest will not be payable on any amount due to either party as a result of that recalculation or adjustment."

So there is not a contractual entitlement to interest on a repayment as a result of the order of the repayment by Ofcom. That is all, it is just a carve out from the first sentence.

THE PRESIDENT: So what you are saying, have I understood this, if the second sentence were not there, and if Ofcom ordered a repayment ----

MS. ROSE: Yes.

THE PRESIDENT: -- and did not order interest, then by reason of the first sentence the CP would have a contractual right to interest. Is that the point?

MS. ROSE: From the date on which the parties agree that BT shall make the repayment and ending on the date BT actually makes the payment, it is limited to that period.

THE PRESIDENT: The first sentence does not read as though it is really directed at an order of Ofcom for repayment.

MS. ROSE: It is simply referring to a refund due, it does not say on what basis.

THE PRESIDENT: It is not really a refund in the true sense, is it? It says: "… for the period beginning, on which the parties …" when would the parties agree? Ofcom makes an order - there is no question of the parties agreeing.

MS. ROSE: Sir, I agree. We know ----

THE PRESIDENT: I cannot see how that would bite in that circumstance.

MS. ROSE: It may be asking too much to expect this clause to be particularly coherent because you will recall how it came into the contract, very late in the day. The first sentence was at the request of the CPs. Then Mr. Cox thought BT needed a carve out, went back, this was the carve out that was proposed, it went into the contract and was never really discussed. The intention was clearly to put beyond doubt that the rate of interest under the Late Payment of Commercial Debts Act was not going to apply in this situation.

THE PRESIDENT: Well, no interest would be, not just that rate ----

MS. ROSE: But no interest as a result of that recalculation or adjustment, those words are crucial.

THE PRESIDENT: Recalculation and adjustment by reason of an order of a regulator?
MS. ROSE: Yes, the point it is making is that if Ofcom makes a regulatory order requiring a particular payment to be made, contractual interest will not be payable on that order, by virtue of that order.
THE PRESIDENT: Why is it only contractual interest? Why is it not just interest? Why does it not mean what it ----
MS. ROSE: Because, Sir, this is a term in the contract and it is saying when you have an entitlement under this contract for interest ----
THE PRESIDENT: But you can contractually agree that I will not, as a matter of obligation to you, ask the regulator to award interest.
MS. ROSE: Yes, you can, but they have not.
THE PRESIDENT: Well ----
MS. ROSE: That is the point.
THE PRESIDENT: That is your submission.
MS. ROSE: In my submission it is clearly correct, because what the parties are doing here is identifying an entitlement to interest. They are not seeking to fetter the discretion of the regulator as to what is the appropriate adjustment or order for a repayment to be made. As you have just put to me the parties could have agreed that they would not ask the regulator to award interest as a part of a recalculation or an adjustment, but that is not what they agreed.

We make the point that this was recognised in the 2008 contract reviews.
THE PRESIDENT: Is that relevant?
MS. ROSE: To the extent that any of the evidence about the negotiation is relevant at all. I accept that it is ----
THE PRESIDENT: These are rolling contracts as we heard, are they not?
MS. ROSE: Yes.
THE PRESIDENT: They are not renewed each year.
MS. ROSE: But people start them at different points. Some were entered into after 2008 and the point was made in 2008 that if interest was ordered by Ofcom it would be payable.
THE PRESIDENT: I did not find it extremely clear that evidence, this was based on the spreadsheet with abbreviated comments by the different parties to this round table negotiation was it not?
MS. ROSE: That was part of the review of the contract, yes.
THE PRESIDENT: The 2008 review, yes.

MS. ROSE: It was accepted by Mr. Ewbank that that is what was being said at that time. That is the first point.

At para. 195 we make the submission that commercial certainty should not be over-ridden by the award of interest by Ofcom in this case, because that award would not ----

THE PRESIDENT: Yes, that is the point you have just made.

MS. ROSE: Yes, I am just showing you how we set it out here. And by contrast, where the parties had agreed that interest would be payable on an overcharge ordered by Ofcom to be repaid, at a particular rate, an order by Ofcom requiring the payment of interest on top of an overcharge could engage the principle of commercial certainty, either (i) because the award of interest might itself carry contractual interest ----

THE PRESIDENT: Why would it carry contractual ----

MS. ROSE: You can see an argument in a situation where, if Ofcom made a single lump sum payment covering both the time value of money, and the amount of the overcharge, if the contract said "any repayment by Ofcom shall carry interest at a rate of X" that might itself carry interest which would be a matter for Ofcom to take into account when deciding whether or not to award interest.

The second point is that it would engage commercial certainty if interest was then awarded by Ofcom at a rate different from that agreed between the parties, and that is the point that is made in the *Gamma* case. If the parties have reached an agreement that they both consider to be a reasonable proxy for the time value of money that carries some weight. That is the first point.

The second point is we say in any event ----

THE PRESIDENT: I think the other points are very clear.

MS. ROSE: Yes, it is a regulatory environment, BT ----

THE PRESIDENT: BT has SMP and it all came in rather late, and we can look at them, yes.

MS. ROSE: There is the very important quote from the Court of Appeal. So it is clear that this was not a clause of the type contemplated by Ofcom in *Gamma* in which the parties were seeking to identify a reasonable proxy for the time value of money, because it simply says no interest will be payable. So it clearly is not that. On that basis we submit that it really takes you no further when you are conducting the right analysis which is in order to incentivise BT to comply with its obligations, is it appropriate that BT should also surrender the benefit it has obtained from having the money over a period of time when it should not have happened.

THE PRESIDENT: I see that. That applies whether it is governed by the contract or not.

MS. ROSE: Yes, it does. All of the other points that I make here apply whether it is governed by the contract or not.

THE PRESIDENT: I did not quite follow, Ms. Rose, in para. 206, this was the counter incentive which you say is theoretical any way and not supported by the evidence, I have all that.

MS. ROSE: Yes.

THE PRESIDENT: You say that the example given does not work.

MS. ROSE: This is not quite the counter incentives, this is another point which BT made. BT said that 12(3) was not one-sided, it was symmetrical, it could work for the benefit of the CPs. Actually, BT has never identified any situation in which clause 12(3) could work for the benefit of CPs.

THE PRESIDENT: Yes, you analysed one situation which was suggested, the price increase ----

MS. ROSE: That is right.

THE PRESIDENT: -- you say it does not work?

MS. ROSE: The reason it does not work is because BT has a unilateral power under the contract to raise the price with 90 days' notice. So whether or not the CP disputes the price the price increase still comes into effect.

THE PRESIDENT: Ofcom cannot, there is no interim power.

MS. ROSE: The only power Ofcom has, and again you will see this under the contract, Ofcom can direct a longer period than the 90 day period. That means that in order for this ----

THE PRESIDENT: Ofcom's only power comes from the contract?

MS. ROSE: In relation to this point, yes.

THE PRESIDENT: Nothing under the Statute?

MS. ROSE: That is right. This is different from the TRD case, because in the TRD case there was a contractual provision that if one CP objected to a price increase ----

THE PRESIDENT: Sorry to interrupt you - the CP had notices. You say here the provision is - where is the price increase?

MS. ROSE: It is clause 17.1, if we go back to the contract.

THE PRESIDENT: Yes, that is bundle E, tab17.

MS. ROSE: That is one of the places it is, yes, that will do. "Changes to this Contract":

> "BT may change this Contract at any time by giving not less than 90 calendar days' notice (or such other notice period as may be directed by Ofcom)"

That is the residual power. "… before the change takes effect in order to:" and (b) is: "change the charges payable under this Contract …" and that is different from the TRD

disputes' position where under the contract if there is a dispute before the charges come into effect you can suspend the implementation of the charge.

THE PRESIDENT: 17.2, yes.

MS. ROSE: 17.1(b). Yes, 17.2 is the procedure point.

THE PRESIDENT: "The charge shall take effect".

MS. ROSE: That is right, that is the point. That is the reason why we say that the Maldoom example does not work. That is the only example that has ever been put forward by BT. It is striking that it was not put forward in submissions, it was not put forward by a factual witness for BT, it was put forward by an economist, when it is clearly a matter outside his expertise.

MR. READ: Sir, just to correct my learned friend, if one goes to the transcript on day three, p.24 line 20, Mr. Cox dealt with the matter.

THE PRESIDENT: Yes, I think it was in the factual evidence as well.

MS. ROSE: Sir, Mr. Cox did not give an example.

THE PRESIDENT: Never mind, it does not matter. I think this is the example we have been given.

MS. ROSE: Yes, but that is quite an important point.

THE PRESIDENT: It does not matter whether he is a factual witness or not.

MS. ROSE: The factual witness who negotiated this contract never produced an example.

THE PRESIDENT: I just did not follow - I now understand.

MS. ROSE: We make the point at 206(d) - I know I have said this before but it is quite important - because it may be that Dr. Maldoom did not appreciate the contractual framework ----

THE PRESIDENT: Yes, you have made that point.

MS. ROSE: Yes. The course of the negotiations themselves we submit is simply irrelevant. But in any event we say there is no real dispute about what happened, and we have set it out at paras. 202 to 204, and I do not propose to say any more about it.

Can I now turn to the power to award interest, which is the last point I want to address. This is in part a retread of ground 5 which I have already dealt with, but there is also a submission that is made that as a matter of English law interest could only be awarded if expressly provided for in the statute. We say this is not the right interpretation.

The first point is that we say s.190(2) itself is plainly on its face apt to include an award that encompasses the time value of the overcharge. So there is nothing in the wording of the statute to suggest that interest is excluded.

The second submission is that in any event we submit it is necessary for 190(2) to be

interpreted in that way in order to comply with the CRF, because in the absence of a power to award interest there would be a limit on the power of the NRA effectively to resolve a dispute as required under Article 20 Framework Directive. You already have my submissions about the scope of the powers that must be required for the effective resolution of disputes under Article 20. We submit that logically that must include interest.

Before I leave this, the *Metallgesellschaft* case. This is authorities bundle 5 tab 63. This is the European decision which led to the decision of the House of Lords in *Sempra Metals*. This is the reason why the common law anomaly was considered by the House of Lords in *Sempra Metals.*

The problem that had arisen was that companies that were established in another member state did not get the same benefit as having to delay the payment of corporation tax that English companies had. So they were paying their tax earlier than other companies. That was the complaint, the breach of European law. They were saying that they ought to be entitled to interest because effectively they had lost the value of the money in the period when they had paid the tax before they should have done.

If you got to para.83 p.663:

> "It is important to bear in mind in this regard that what is contrary to Community law, in the disputes in the main proceedings, is not the levying of a tax in the United Kingdom on the payment of dividends by a subsidiary to its parent company but the fact that subsidiaries, resident in the United Kingdom, of parent companies having their seat in another member state were required to pay that tax in advance whereas resident subsidiaries of resident parent companies were able to avoid that requirement.
>
> "According to well-established case law, the right to a refund of charges levied in a member state in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by community provisions as interpreted by the court: [various cases are cited, then] The member state is therefore required in principle to repay charges levied in breach of Community law".

Just pausing there, before we come on to the question of interest, in my submission this paragraph is important also in relation to ground 5 because it is a clear recognition by the European Court that where there has been a wrongful payment which breaches a European obligation the appropriate remedy is the repayment of the overpayment. Of course, here BT was under an SMP condition imposed in accordance with the directive (Article 13.3) and in

our submission it is easily understandable why the NRA in that situation, in order to be able to provide an effective remedy for the breach, should be able to order repayment.

Then at 85 we see the familiar language that it is up to member states what procedural provisions they have domestically, subject to the principles of non-discrimination and effectiveness. Then at 86 it is likewise for national law to settle ancillary questions including the rate of interest and date from which it must be calculated.

THE PRESIDENT: It is "such as the payment of interest, including the rate of interest".

MS ROSE: What they are saying is: "ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date", so whether there should be interest, how much and the date. Then they say:

> "In the main proceedings, however, the claim for payment of interest covering the cost of loss of the use of the sums paid by way of advance corporation tax is not ancillary, but is the very objective sought by the claimants' actions in the main proceeding. In such circumstances, where the breach of Community law arises, not from the payment of the tax itself but from its being levied prematurely –

THE PRESIDENT: That is rather different, is it not?

MS ROSE: Of course. I am not suggesting that this case is on all fours with ours. Of course it is different, and the key reason it is different is that what the court is concerned with here is a breach which consists of premature payment.

THE PRESIDENT: So the only loss is interest.

MS ROSE: So the only redress is interest. But there are two points to make. The first is the principle to which I have already drawn your attention, which is that where a charge is unlawfully levied the normal remedy is repayment.

THE PRESIDENT: That is ground 5, yes.

MS ROSE: Yes. The second is the recognition that the award of interest represents the: "reimbursement of that which was improperly paid and would appear to be essential in restoring the equal treatment." What we say is the relevance of that is that in a situation in which BT has wrongly obtained a benefit from the overcharge which consists both of the overcharge itself and of the free use of the money that it has wrongly received, it is entirely appropriate that interest should in principle be payable on that sum to enable an effective remedy because if not, as I have submitted before, you are left with a regulatory gap which is that BT always retains some benefit from its overcharge.

THE PRESIDENT: That may be because of the framework. I am not sure, to be honest Ms Rose, this case really helps you. It seems to me this is an ancillary question. If you go to para.86,

as far as *Metallgesellschaft* is concerned here, the principle remedy is the large principle sum. It is in such circumstances where they say the question of the payment of interest is left to national law. I do not know if this really advances it.

MS ROSE: Sir, in my submission that is not quite right, with respect, because when you look at the CRF, what you have in the CRF is a provision where the focus is on BT being incentivised to comply with its obligation not to overcharge, its obligation to maintain cost oriented charges, and on the NRA having sufficient powers to resolve disputes about that, and to impose appropriate obligations on BT. The question is would it be compatible with that for the NRA to have no power at all to award interest on the overcharge, regardless of the effect that that would have on --

THE PRESIDENT: I understand that. I do not think that depends on *Metallgesellschaft*.

MS ROSE: It may well not.

THE PRESIDENT: This seems to me a little bit of a red herring.

MS ROSE: I apologise for the red herring so late in the day. We submit that both on ordinary principles of statutory construction of s.190 itself, and when s.190 is read in the context of the CRF, the conclusion is clearly that there is a power to award interest.

The only argument that is put forward against this is the argument both on the proposition that historically, in some areas of the common law (by no means all), interest was not awardable on certain types of damages and therefore was expressly provided for in statutes. With respect, the answer is that is irrelevant. First of all, it is absolutely clear that there were always some areas of common law, including tort and including special damages for breach of contract where interest was awarded in any event. Secondly, everybody agrees that this is not about common law damages; it is a self-standing statutory scheme and this is purely about the interpretation of the statute. Thirdly, statutory provisions that were introduced in order to fill the gap left in the common law are of no relevance to the statutory regime in this case.

The answer to the question whether Ofcom has the power to award interest depends on the proper interpretation of s.190. It does not depend on the interpretation of different statutes dealing with completely different contexts.

THE PRESIDENT: Yes.

MS ROSE: Sir, unless I can be of any further assistance, those are the submissions.

THE PRESIDENT: Yes, Mr. Pickford.

MR. PICKFORD: Sir, members of the Tribunal, the principle espoused by Mr. Thompson in these proceedings under his ground 5 is that a regulator is powerless to put our charges back

to where they should have been, where there has been overcharging on a massive scale. Putting aside all the other difficulties faced by Mr. Thompson on that particular submission, we say that the present case well illustrates why that would be an inappropriate basis for regulation. We have heard candid evidence in these proceedings from Mr. Jones and Mr. Coulson about the inner workings – or rather, lack of them – at BT when it comes to compliance with its cost orientation obligations. But we do just need to remind ourselves what they imply.

BT is one of the UK's very biggest companies. It has vast market power across a wide number of markets. It is for that reason that it is subject to deliberately strict and tough regulation, particularly in relation to matters such as pricing. Yet, what we are gleaning from the evidence is that it had little in the way of robust internal management systems for paying proper regard to its SMP pricing conditions. That demonstrates, we say, a serious and concerning disregard by BT for those conditions. If there was ever a need, we would suggest, for a company to be given very strong incentives to take its SMP obligations seriously, it is demonstrated by the events in this case. BT has been overcharging on cost oriented services on a vast scale of hundreds of millions of pounds every year.

Mr. Myers and Ofcom may be sanguine about £600 million between friends, but we are less so. The CPs in these appeals are rivals to BT in highly tough, competitive retail markets. Being overcharged by BT collectively to the tune of several hundred million pounds is no small matter. It puts my clients and it puts Ms Rose's clients at a serious competitive disadvantage. That is why we are here today (and have been for the past four weeks) to put right Ofcom's failure properly to address that issue.

Turning to ground 1, there are two important points I would like to make at the outset. We say Ofcom's and BT's failure properly to appreciate them colours their entire response to our case. The first point is on the right approach to construction.

THE PRESIDENT: This is BT's ground 1 or your ground 1?

MR. PICKFORD: I am sorry, sir, this is my ground 1. I do apologise. That was a short diversion to BT's appeal. That is all you are going to get about BT's appeal from me, sir.

THE PRESIDENT: Quite right.

MR. PICKFORD: On my ground 1 I would like to make two points at the outset and then go through it in some more detail. The first is on the correct approach to construction. It now seems to be agreed certainly between us and Ofcom that Mr. Myers cannot help us with Ofcom's subjective intention. He was not the decision maker, that was Ofcom's board; he was not the author of the document, he did not actually recall the reasoning behind it. He is

quite clear that the best he can do is to simply offer the same view as effectively anyone else in this room.

But there is another reason why he cannot assist us. Because Ofcom's subjective views are, we say, entirely irrelevant. May I just ask you to turn to BT's skeleton for a proposition that I would like to make. We can find it in BT's written closing for this case at p.18 para.45. Here, BT cites Lord Hoffmann in *The Attorney General v. Belize and Belize Telecoms* case. It is a fairly well established proposition, but it is worth just reminding ourselves of it in relation to the correct approach to construction in this case.

> "The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed".

The objective meaning is in the standard legal terminology. So, firstly, subjective intention therefore is irrelevant; secondly, what we need to consider is the background knowledge of the audience at the time of the imposition of the condition. So the reasonable person would have had available to them the materials produced by Ofcom and Oftel up to and including the 2004 Statement. They would not have had obviously materials postdating the 2004 Statement, and that includes Mr. Myers' witness statement and, indeed, his oral evidence. So all of that material is irrelevant as evidence. It is merely submission. That is the most that the Tribunal can derive from it.

The other point, of course, is that HH3.1 has a particular meaning at the time it was imposed. That meaning cannot evolve at any time after June 2004 when it was imposed. That is a point of general legal principle, but we say it applies *a fortiori* in this case where the point being advanced against us, the defence to our point on Ground 1, is that it would have been unlawful to have imposed our approach because whether or not it is superior to Ofcom's approach, they say it would have been contrary to legal certainty. We say that submission is manifestly unsustainable insofar as it seeks to rely on *ex post* inferences about what Ofcom might have meant, as Mr. Myers does in his witness evidence and as Ofcom does still in its written closing, albeit that I detected from Mr. Saini's oral submissions that he seemed to be backing away from that position yesterday.

So the second ----

THE PRESIDENT: I thought it was legal certainty because it is not how at the time, in the light of what was generally available, it would have been understood.

MR. PICKFORD: That is how it now seems to be being put, but just so we are very clear ----

THE PRESIDENT: Which is consistent with what you are saying.

MR. PICKFORD: It is, yes. If that is now how it is put then we do not object to it as a matter of legal principle. Obviously we do object to it on the facts or on the documents. The second point is our test. Whilst Condition HH3.1 does have a particular meaning, we do not say, and we have never said, that our proposed test is the unique means of satisfying that condition. We say it is a sensible means of doing so and it is a pragmatic means of doing so, and, indeed, we say it is entirely practicable, but it is not the unique means necessarily of satisfying Condition HH3.1. What we do say about it is that it is the only test that has been advanced by anyone in these proceedings that satisfies the following six key criteria, and they are as follows: First, the need properly to accord with the language of Condition HH3.1 in its statutory context; second, the need to give effect to the principle that has been acknowledged in documents produced by Oftel, by Ofcom, by the International Regulators Group, by the European Regulators Group, and in the *PPC* case, that multiple recovery of common costs constitutes excessive charging. Third, it needs to give effect to the need for consistency with the relevant public statements about cost orientation and how it should be approached by Ofcom in the run up to the imposition of Condition HH3.1. Fourth, it needs to satisfy the objectives underlying the imposition of Condition HH3.1 as set out in the 2004 Statement. Fifth, there is a need for consistency with the factual findings in the 2004 LLMR statement, including, in particular, the absence of prospective competition in the wholesale AISBO market. And, sixth, there is a need for consistency between PPC charges and LLU backhaul charges, and also between the treatment of LLU backhaul from the LLU Backhaul Decision, and the treatment of LLU backhaul in the 2004 LLMR, because that is what the 2004 Statement requires.

PROFESSOR MAYER: Can I just be clear, those are six criteria that you regard as being relevant? They are not actually stipulated anywhere in particular?

MR. PICKFORD: No, that is my means of effectively summarising for the Tribunal what I say are all the points that point to our construction being correct. If there was another construction that satisfied those criteria then that, we would say, would also be permissible. BT's consistent refrain is that it could not have predicted every nuance of how we suggest and how Dr. Houpis suggests that our approach might be applied in this case. We say that

is misdirected because Condition HH3.1 places the onus of demonstrating compliance on BT. Obviously that is an obligation but it is also an opportunity for BT because it is BT that gets to choose how it satisfies Condition HH3.1, so long as it chooses a method which we say satisfies the criteria that I have just outlined. We are only in the position that we are, where it has fallen upon my clients to propose a test, because, firstly, BT has failed to do its job under the Condition and, secondly, we say Ofcom has also failed to adopt an appropriate test as well. Of course we have to specify a test in some detail in the context of these proceedings concerning an overcharging dispute because in order to get an effective remedy we need BT to pay back amounts that it should not have charged us in the first place. So in that context, it is inevitable that one would have to grapple with questions that could have had a number of different answers if they had been approached *ex-ante*. That is simply a function of the fact that we are now in the Tribunal and it falls upon the Tribunal to take a view on our appeal, but there is no requirement to adopt our approach going forward, even if it is a sensible approach. If BT can find another approach that satisfies my criteria then we say it is welcome to adopt it.

There is a third introductory point, albeit a less important one, which is that Ofcom say that they have got five points. We suggest that they really just boil down to two. Their essential legal case, which really wraps up four of Mr. Saini's points, is legal certainty, and the second point that they make is about the *PPC* case and they say that the point we raise has already been decided against us. Obviously I will come on to deal with both of those.

Then if I could turn to the detail of our case. The first point is statutory construction. I am not going to go over these points in detail again because I went over them in my opening, but these are the following key points that we draw from the statutory context. Firstly, cost orientation is regarded as being at the heavy end of the regulatory spectrum. We see that in recital 20 to the Access Directive. Secondly, the *raison d'etre* of imposing the cost orientation obligation is to prevent excessive pricing. Why is it that national regulatory authorities are supposed to worry about high wholesale prices? It is because they reduce the extent of downstream competition and therefore are liable to lead to higher prices for consumers and therefore less desirable outcomes for them.

What do we draw from those points on the facts of this case? Firstly, where there are significant common costs shared between services, excessive pricing can only be meaningfully judged from an economic perspective across services taking account of the interrelationship between them. That appears to be accepted on all sides. In the light of that, we say that Ofcom's stance that it takes in its defence, that it decided in the 2004 LLMR

Statement that action in relation to Ethernet services to prevent over-recovery across a group of services was not needed, is a rather puzzling approach from the outset. The second point is this, allowing BT to earn a return on capital of over three times its weighted average cost of capital, and to recover several hundred million pounds over the last few years, does not look like the imposition of heavy regulation designed to prevent excessive charging. I am sorry, I said several hundred million pounds. Several hundred million pounds over its fully allocated cost. It suggests to us a case of regulatory failure and it would need a very compelling justification, and we do not find that justification anywhere in the 2004 LLMR. One point Mr. Saini makes in response to my reliance on the rate of return that was allowed, is he said, "You can ignore all of that because it postdates 2004", but that is not right, because Ofcom would, or certainly should, have known the rough relationship between FAC and DSAC when it was imposing the cost orientation obligation in the first place. There is no evidence advanced by Ofcom that DSAC and FAC diverged after 2004 in some manner that they could not have anticipated. So therefore the fact that we know that DSAC in fact allowed a return on capital, would have allowed a return on capital of up to 36%, speaks volumes, we say, in relation to the imposition of the control in the first place.

Sir, if I could then turn to the issue of the language of Condition HH3.1 itself. Again I made my points in opening but I would like to just briefly summarise them because they are really the stepping off point for the entire analysis. I do not think we need to turn it up. Hopefully we are all pretty familiar with what it says. The first point I make is this, the middle element, the second element of Condition HH3.1, is the appropriate mark-up for the recovery of common costs. We say that recovery means just that, allowing BT to get back what it has expended, including of course an appropriate return on capital employed. That is the third part. But on Ofcom's test recovery does not mean getting back, it means getting back and then having some more or quite a lot more. We say that that is not recovery.

The second point is this, what constitutes an appropriate mark-up for common costs where multiple services share significant common costs, is an issue which has two dimensions. One goes to structure, whether any one service is recovering too much relative to others, and the other goes to the overall level of recovery of common costs across the group of services as a whole. We say mark-up are completely inappropriate if they lead to over-recovery on that second dimension. DSAC, as a test, is capable of addressing, to some extent it is slightly arbitrary, but it does address the first of those points, the structure issue. But we say it is not fit for purpose if it is being used in order to address the second issue because, as is common ground, it allows multiple recovery of common costs.

The third point is that Condition HH3.1 is highly precise and specific. It requires a forward-looking long run incremental cost and it requires an appropriate return on capital employed. That precision just gets thrown to the wind if one can say in relation to the middle element, the appropriate mark-up for recovery of costs, "Well, do not worry about that. You can have those as many times as you like or certainly a number of times for all we care, and indeed you can have a multiple of FAC but we do not necessarily know exactly what the multiple will be". We say that is plainly inconsistent with the careful and specific approach that is taken in the language in Condition HH3.1, and, of course, in this case it is the common costs that matter. They are the big issue. They are the really big numbers. So it simply, we say, makes no sense to adopt that construction on the language of the condition itself.

So what do Ofcom and BT say in response to my linguistic point? Essentially they do not say anything. They do not grapple with the language. They rely on their legal certainty point but they appear to have no answer to the basic points on construction.

PROFESSOR MAYER: Could I just raise some questions in relation to what you have just said. You first of all refer to a 36 per cent rate of return?

MR. PICKFORD: Yes.

PROFESSOR MAYER: Now, that happens to be the highest number in the table?

MR. PICKFORD: Yes.

PROFESSOR MAYER: And it refers to the position before there is recovery for prices above DSAC and the numbers drop to 20 or so per cent.

MR. PICKFORD: Yes.

PROFESSOR MAYER: In particular I would like to understand what you feel is the relevant benchmark against which we should be comparing these numbers. As I understand it, you do argue that there should be some account taken for the riskiness of the investments, so what would you have regarded as being a reasonable set of numbers to have appeared from these tables?

MR. PICKFORD: As regards the second point of benchmark, we say the appropriate *prima facie* benchmark is the weighted average cost of capital. Now, we say it would be open to BT just as Ofcom allowed it open to BT, for BT to come along and argue that that was not appropriate in respect of, and I would emphasise here, particular products. What we see in 2004 LLMR, and I can take you to it if you would like, is that there is a section dealing with the potential riskiness of new products, and what it says is that it would do it on a case by case basis, and if there are particular products that are risky, then it is open to BT to argue

that it should have a higher return, and so that is effectively the fair bet argument, and BT can make those points. On the facts of this case BT did make those points and they failed, because what was said by Ofcom in response to them is there is nothing particularly special or risky about BES and WES relative to any of the other things that you do that we allow your weighted average cost of capital for, or the rest of BT weighted average cost of capital, which is a bit higher than the main BT weighted average cost of capital. The reason why they said they are not very much more risky is because the investments in relation to them are nearly all sunk, and they are all nearly all common to other services that BT is already providing. So they make the point that, given that those investments have been made already for other services, there is not really a great deal of risk that BT is taking by rolling out the same duct and the same fibre that is already there and using it to provide new services. So that is on the benchmark.

PROFESSOR MAYER: But you are not then ruling out the possibility that a case could be brought forward for a deviation from the base cost of capital.

MR. PICKFORD: Not as a matter of principle. We say on the facts of this case, no, but not as a matter of principle.

PROFESSOR MAYER: So if we look at Part 4 of the table, where they report rates of return on essentially external revenues excluding the excess on internal revenues, the number there is around about 17 per cent, which might be about 6 per cent or so in excess of BT's underlying cost of capital. So would you accept that it could be argued that that differential is a reflection of the particular riskiness of this market?

MR. PICKFORD: No, because of the reason that I gave on the facts of this case, there is no additional riskiness. I would make the other following further points. You are currently referring to table 1. We say table 2 is actually the most appropriate table, because that is the adjusted model, and that better reflects BT's true costs. On that case, we are looking at the 22 per cent figure. Further, I would say, column 4 is not the right figure in any event, because our point is that BT is able, if it wishes, on Ofcom's test to price up to DSAC or thereabouts, and if it did that it would not earn 22 per cent it would earn 36 per cent, that is the first column. We say that the relevant benchmark against which to judge this test is what it permits, because the fact that BT in this case, we know, priced some prices above DSAC and some below DSAC and what Ofcom are doing here is they are cutting off all the ones that were above DSAC and assuming that all the ones that are below DSAC would have remained there. There is no basis for that assumption because BT, had it been aiming for DSAC, and this comes on to an issue about what BT did or did not believe, it may well

have priced entirely differently.

PROFESSOR MAYER: The justification for that approach is that that is precisely how the regulatory system works, that it looks at cases of overcharging and it seeks potential recovery for cases of overcharging, those where prices are below DSAC are not in that respect violating the cost condition. Indeed, Dr. Houpis' test made very much the same sort of point.

MR. PICKFORD: That is true, but we say that is essentially fortuitous. Saying in this case that there were some services that were below, so therefore we will look at those but not report the ones above falls into exactly the trap Mr. Saini said we should not be falling into, which is looking at events post-2004. My point is that if you were in 2004 and you were Ofcom, and you said to yourself: what could BT charge if we put all prices at DSAC? You would have to answer, based on your knowledge of the relationship between DSAC and FAC, "We presume something pretty close to 36 per cent", obviously it would not be exactly because it would be making forward looking assumptions about what the relationship between FAC and DSAC was, but that is the point in time we judge it. We say to ourselves: what could BT earn under this particular obligation.

THE PRESIDENT: But they are not price-setting for BT. What they are saying is that no individual charge can go above DSAC and in so saying would they not recognise that this does not mean, therefore, that one should expect that BT is therefore going to say: "Whoopee, we'll set all our prices at DSAC" because there will be all sorts of other commercial conditions that will apply, and that is indeed one of the reasons why it is an each and every charge obligation.

MR. PICKFORD: There may be but BT is also a profit maximising undertaking and there is, we would say, a very compelling reason for BT to put up its charges generally ----

THE PRESIDENT: Well then it was obviously very foolish because it did not charge all its services at DSAC.

MR. PICKFORD: That depends on two points. First, it depends on the assumption that BT knew that it was permitted to charge all prices up to DSAC and there is evidence, as we put in our written submissions, and I can come to it in due course, that BT did believe that there was an overall DSAC limit, but also that BT believed that there was some kind of aggregate limit. In particular, we see recognised in one of the documents that BT said it thought cost-orientation meant CCA FAC, or LRIC plus mark ups, which we take to be LRIC plus EPMU. So the proposition you put to me depends first on the assumption that BT believed that the test they were operating under was Ofcom's test, and we say that is not correct.

Secondly, it assumes a level of understanding and knowledge in relation to BT's pricing that we have not actually had any evidence on. We say any profit-maximising undertaking can be expected to try to exploit the freedom that it is given in a profit-maximising way. That may well not bring your prices up towards DSAC but it could be. It could be that that is the best thing for BT to do, ex ante in 2004 Ofcom certainly could not rely on that being a potential outcome or something relatively close to it.

Sir, if I can move on if I have satisfactorily addressed your questions?

THE PRESIDENT: Yes.

MR. PICKFORD: I was about to go to the Determination at para. 9.143 just very briefly. We see here Ofcom says:

> "We recognise that cost orientation does not necessarily prevent over-recovery of costs and we take that into account when choosing the appropriate set of SMP conditions to impose in a market review. "

We say that is just a misdirection. Costs over recovery is not permitted, we say by Condition HH3.1, it is contrary to its language. It goes on to say:

> "As set out below, the applicable circumstances for AISBO services in the 2004 LLMR Statement meant that we placed greater weight on other considerations, such as that noted in the 2004 LLMR Statement …"

Then they cite:

> "Ofcom considers that the cost orientation condition […] enables competitors to purchase services at a rate which will enable them to develop competitive services to the benefit of consumers, whilst at the same time allowing BT a fair rate of return which it would expect in a competitive market."

Neither of those points listed are promoted by preventing over recovery. If you prevent over recovery you encourage both of those considerations, you encourage the purchase of the services because they will be at lower prices and you do not achieve a fair rate of return, we say, for BT by allowing it to over recover its common costs, so we say there is a misdirection from Ofcom right at the outset.

If I could then move, please, to the PPC Judgment, and again I went through that at some length in my opening, so I am not going to go through it again in that detail. I would just like to summarise the following essential points that I draw from it.

First, it is quite clear from para. 83, that you have been taken to a number of times, so unless the Tribunal would like to I do not intend to go to it again, but in the context of cost orientation that condition is intended to prevent excessive charging and multiple recovery of

common costs leads to an unreasonable level of profit and therefore constitutes excessive charging. That is a point that is also made by the IRG, and it a point that is made by Ofgem, and it is a point that is made by the ERG, indeed, it is also a point that even Ofcom make in the 2004 statement. I can see that, Professor Mayer, you have picked it up so if you would like to go to it, just to make good the point, para. 83, which is in CBE tab 9. The tab here is talking about SAC, the same concern applies to DSAC if it is applied across multiple products, and it says:

> " if a multi-product firm prices at LRIC it will make a loss (because there will be no recovery of common costs), and if it prices at SAC it will make an unreasonable profit (because there will be multiple recovery of common costs)."

So it is there equating unreasonable profit with multiple recovery of common costs, and that same problem, albeit to a lesser extent also afflicts DSAC.

The second point we make in relation to PPC is this: whatever the focus of the dispute may have been at the administrative stage, by the time the matter got to the Tribunal no one was arguing about anything other than a single product. Therefore, it is unsurprising that in that context the arguments that have been canvassed for you by my clients were not addressed by the Tribunal.

THE PRESIDENT: The arguments may not have fully been addressed. You were not there and Dr. Houpis was not there. But the test being applied was for a condition. Again, as you said, it is the interpretation of the condition which applied to a whole number of products. It cannot have a different test to one of them, just if one of them goes on appeal, can it?

MR. PICKFORD: That is true. That is not our case. Our point is that because the Tribunal's focus was only on one product, that was all anyone was arguing about, then one can see why its attention was not focused on what we say is the big point in our appeal, which is as soon as you broaden out your focus and look at a number of products together, it is then that the DSAC test breaks down. If it is just applied to one product, if that is all one cared about, then arguably that would be sufficient.

THE PRESIDENT: Ofcom, who appeared in it, clearly were concerned about the number of products.

MR. PICKFORD: They were, but Ofcom take the view that they take on DSAC, and we say that they are mistaken in that view. What is quite clear from that case is that no-one took the point that we are now advancing. There is no suggestion made in the judgment that there was any party that was advancing our case.

Let us just suppose that someone could have raised the arguments that we now make in this

case in the *PPC* case. We say so what? They did not, and there cannot be any estoppel in addressing these issues now. We were not even parties, as you, sir, have rightly pointed out, to that case. We say there is no need therefore, as BT somewhat extravagantly claim, for us to dissect precisely what was and was not put in front of the Tribunal in that case. That is a red herring. If there was an issue about *res judicata* then that might be necessary, but it is not. The point is, we have raised these issues in front of this Tribunal and it is this Tribunal that is called upon to determine them.

THE PRESIDENT: That may be as far as you are concerned, but they do consider the question of FAC versus DSAC.

MR. PICKFORD: Yes, but in relation to a single product. No-one was suggesting in that case the test that we are advancing which is that one would allow aggregate FAC across a number of products. What was being suggested is that BT should have to price exactly at FAC, and that is why the Tribunal rejects it, because they say that would be very strict.

THE PRESIDENT: It goes beyond that, does it not.

PROFESSOR MAYER: It is not quite a single product in the sense that FAC equals DSAC, as would be the case were it really --

MR. PICKFORD: Yes, that is true.

PROFESSOR MAYER: So they did have to address the issue of the difference between DSAC and FAC.

MR. PICKFORD: To be clear, I am not saying that these issues could not have been canvassed; I am saying it is understandable why they did not form the focus of the Tribunal's attention in that case.

PROFESSOR MAYER: I understand that.

MR. PICKFORD: That is my position. We say in the light of that, given that they are now being canvassed front and centre of our case, this is the case that needs to decide them, and you cannot rely on what was or was not decided in *PPC*.

THE PRESIDENT: You are saying that para.287 is wrong, are you not?

MR. PICKFORD: As against the alternatives that were being proposed in that case --

THE PRESIDENT: It says "the only satisfactorily available course".

MR. PICKFORD: Sir, one has to read that in the context of the other arguments.

THE PRESIDENT: The other one was combinatorial testing.

MR. PICKFORD: Yes, that was rejected because it was impractical.

PROFESSOR MAYER: If you read the sentence above, it actually said:

"Had Ofcom sought to use FAC as the test for BT's compliance with Condition

HH3.1 then we consider that this would not have been an appropriate course."

MR. PICKFORD: Yes, and the reason that they give is because at the top of that, 286(2), FAC could have been used as a means of fully allocating common costs, but it would have effectively imposed a single price on BT for its PPC services. But we are not advancing FAC as imposing a single price in this case. We say that BT can price any of its services at whatever level it likes up to DSAC and down to DLRIC so long as that in aggregate it does not recover more than its FAC. So our test was simply not being advanced in the *PPC* case. It is unsurprising, we say, that they rejected what did seem to be being discussed, which was simply a flat FAC for every single product, but that is quite plainly not what was being addressed in that case.

PROFESSOR MAYER: So your concern is that essentially they are using the wrong, or not the sort of FAC test that you would like to see applied?

MR. PICKFORD: That is correct. You can see that from the fact that it says "imposes a single price" and our test does not.

Sir, may I move on.

THE PRESIDENT: Yes. Is there anything else you want to say about *PPC*

MR. PICKFORD: Sir no, I think I have said all I need to say. Obviously, I still rely on the detailed points that I made in my opening submissions. But I have got a lot to get through, so I think I can leave it in terms of the summary of my case on those central points.

If we then turn, please, to the issue of the documents that preceded the 2004 LLMR.

THE PRESIDENT: Before you move on, you say that is why they reject that FAC test, single price, but although they are concerned about multiple recovery of common costs, and although they would have appreciated that a DSAC test would or could involve multiple recovery of common costs, they nonetheless find that it is the only satisfactory course for Ofcom to use. You may say there is an inconsistency there. They have, having regard to the fact that you should avoid multiple recovery, nevertheless concluded that the test which could enable multiple recovery is the right test.

MR. PICKFORD: I suggest, because they do not appear to be focused at that point on the wider issue – because if one goes back to para.83 the Tribunal itself recognises that multiple recovery of costs constitutes over-recovery, excessive charging, unreasonable profits.

THE PRESIDENT: Really, no-one was clever enough to suggest another test at the time?

MR. PICKFORD: I would not put it quite in those terms, but no-one did suggest the test that we invite the Tribunal to consider in this case.

THE PRESIDENT: The more sophisticated test.

MR. PICKFORD: Could I then turn to the issue of the documents preceding the 2004 LLMR. I am going to go through this relatively briefly. Not briefly, because there is quite a lot to say, but at some speed because I need to try to ensure that I finish within time. We begin with the 1997 and 2001 charge control guidelines. There are three points to make in relation to those, and I can make them without going to them. Firstly, they are concerned with charge controls, as their title suggests and as one can see from para.2.2. I simply give you that reference, but it is not a surprising proposition given their title.

THE PRESIDENT: The same paragraphs in both?

MR. PICKFORD: Sorry, that is para.2.2 of the 2001 guidelines. I cannot immediately give you the reference for the 1997 guidelines.

THE PRESIDENT: Thank you, that is all right.

MR. PICKFORD: We say that is extremely important because it is common ground that at least in that context where you have a charge control and also you have some kind of cost orientation obligation being imposed simultaneously, that the cost orientation obligation performs a subsidiary role of providing upper and lower bands for individual prices. The reason for that is because the question of what is the appropriate mark-up for the recovery of common costs is answered by the price control as regards overall recovery. So effectively, what the price control does is it removes BT's discretion as to how it might choose to recover its common costs consistently with not over-recovering them, and it imposes the answer. So obviously if it imposed the answer in relation to that issue, via a price control, you cannot sensibly expect the cost orientation obligation to do the same thing. So it answers what is appropriate in that context, and therefore has the subsidiary role.

THE PRESIDENT: Which is then just the structure, not the level.

MR. PICKFORD: Exactly. But by contrast, in the present case, the cost orientation obligation sits alone. It is not being accompanied by a price control. Therefore, it needs to be concerned with appropriateness in both of its dimensions, both as regards structure (hence the outer limits that we are happy to see stay) and as regards overall recovery (hence aggregate FAC). That is the first point we make about the charge control guidelines.

The second point is that in view of the first point I have just made, you obviously need to find an explanation of how one does interpret cost orientation obligations when they are imposed on their own. Where do we find that? We find that in a series of documents from 2001 on to 2003 that pre-date the 2004 statement. I will come on to those in a moment.

The third point to make about the 1997 control guidelines is that even on their own terms, which we say is not applicable on this case, the SAC ceiling, or DSAC ceiling as it is also

called, is a first order test for a charge. Nowhere is it being suggested that it is being advanced across all charges, or is anything other than a first order test. That is obviously for the first reason that I gave, because in that context it is supplementary.

THE PRESIDENT: But they do not refer to any sort of FAC test, do they?

MR. PICKFORD: No, they do not, because they would not, because it is in the context of charge control guidelines. So it necessarily plays that subsidiary role.

May I then go to the next set of directions which we say are relevant. They are the three PPC directions: the initial, the phase 1 and the phase 2. Perhaps the most convenient way of addressing these is if you could perhaps take up p.38 of our written closings. We set out various quotes there. We start at para.98 with the March 2001 and we quote two central paragraphs from it, 1.33 and 1.36. I do not think I need to read them again, certainly not the first one because I take it the Tribunal is quite familiar with that. You, sir, debated it with Mr. Saini at some length yesterday.

THE PRESIDENT: Yes.

MR. PICKFORD: What we say about it is as follows. In the *PPC* case Mr. Myers' evidence was quite unequivocal that in the context of a practical cost orientation test a SAC ceiling meant DSAC. I refer there to para.29 footnote 20 of his witness statement in the case. Since then he has become less sure and Ofcom are less sure. I would suggest that DSAC is still the only sensible interpretation, and this is why. We know, and what I am referring to here is the penultimate sentence in para.1.33, that SAC for an individual service can be in the order of magnitude of potentially billions because of the very large common costs that are shared across a huge number of BT's services. We are also told by Mr. Saini in opening that BT had many thousands of different services. So let us just apply the SAC of a billion at an individual level to thousands of services. We would be saying in that case that you can interpret the SAC ceiling as allowing BT, subject to the combinatorial tests (and I will come onto that in a moment) and the discrimination tests, as allowing something in the order of a trillion pounds' worth of revenue. That is in the same order of magnitude as the GDP of the entirety of the United Kingdom. It is certainly one interpretation of the document but we say it is not a very sensible one, because on that interpretation Ofcom is saying to BT, and indeed not merely BT but actually also my clients and Ms. Rose's clients and others in the industry who rely on these kinds of conditions to inform their business decisions, that subject to some tests, combinatorial tests that everyone knows are not a sufficient constraint in their own right because they are not sufficiently practicable, as long as BT does not recover total revenues that are more than something like the GDP of the entire UK, then it is

not going to be too worried. We say that simply cannot be right. So we say the SAC ceiling must in that context, as everywhere else, as Mr. Myers emphasised previously, mean DSAC. If I am right about that, if I am right that SAC ceiling means DSAC, then Ofcom here is contrasting the DSAC approach which it would apply in markets which were effectively or prospectively competitive, with the LRIC plus mark-up approach, our situation, where there is not sufficient competition. That, of course, makes perfect sense.

THE PRESIDENT: Does it make perfect sense because if you have a DSAC ceiling why do you also apply combinatorial tests?

MR. PICKFORD: Because DSAC, of course, does allow multiple recovery of common costs. You might still be concerned that even if you are allowing pricing at DSAC that you could have excessive recovery.

THE PRESIDENT: But this is a competitive market or moving towards.

MR. PICKFORD: Indeed, it is moving towards.

THE PRESIDENT: So you would not.

MR. PICKFORD: You probably would not and it may just be belt and braces. I think we are all agreed it is not the clearest of paragraphs, but we say of the two competing alternatives ours is the better one.

THE PRESIDENT: But the other point was that if this -- and I have not got in my head the chronology of the European discussions on this where DSAC does not feature, nor DLRIC, and the only expressions are LRIC and FAC, and this is just sort of copying over the concepts that appear in international discourse on this subject.

MR. PICKFORD: Sir, my submission in relation to that is we do not know that the European approach really means SAC either, and I suggest for exactly the same reasons it would not be that sensible in the European approach either. Deutsche Telecom would be in exactly the same position as BT in terms of its enormous SAC and its very large number of services.

THE PRESIDENT: There was no one who suggested that the DSAC is used outside of the UK. Indeed, I cannot remember who it was who made the point that DSAC is not widely known and widely used. I think Dr. Houpis said something like that as well. That this is not a general ----

MR. PICKFORD: I thought it was Mr. Myers.

THE PRESIDENT: It may have been someone else, but they were not challenged in any event. I thought that was common ground.

MR. PICKFORD: We simply do not know, is the answer, as to what the European notion of SAC is.

THE PRESIDENT: Mr. Myers gave evidence about that and he was again not challenged and was very clear that it is not used outside the UK.

MR. PICKFORD: Sir, my point is this, that whatever it might say in the European legislation, this is purporting to be practical guidance as to how Oftel would actually apply a cost orientation standard, and we say in that context it does not make a lot of sense for the cost standard effectively to permit revenues to the GDP of the UK. That is my essential point.

THE PRESIDENT: Yes.

MR. PICKFORD: The approach we say makes sense here because where markets are prospectively competitive what they are saying is that they will adopt a relatively light touch, but where they are not prospectively competitive, and BT cannot be expected to limit its own cost recovery, Oftel/Ofcom will step in and take a much more robust approach and, as it goes on to explain in para.1.36, limit prices closer to the LRIC floor, and we interpret that, as did Mr. Myers, as LRIC plus EPMU. Which category did the AISBO market in 2004 fall into? It is quite clearly the latter category of these two contrasted situations. Indeed, even if I am wrong about the SAC and DSAC point, it does not actually ultimately matter because Mr. Myers did concede that the second situation was the tight constraint, as I think he described it, of effectively LRIC plus EPMU. We say that is the applicable market context in our case.

The other point to draw from this direction is in para.1.36 where it is said:

> "… as a general rule, and other things being equal, [Oftel will] expect the appropriate price to be close to the LRIC 'floor' for those services which are least competitive. This would mirror the approach taken, for example, in setting network charge controls".

So far from saying here that the decision to set a cost orientation obligation necessarily implies a different cost standard to a price control, which was Mr. Saini's proposition which the Tribunal rightly challenged him on yesterday, this point is saying the opposite. Obviously Mr. Saini's point fails as a matter of logic but it also fails because it is contrary to what Ofcom were saying themselves that they would apply as a general rule. It is the opposite.

So we then have the Phase 1 decision which we deal with over the page, and there is not a lot extra that one gleans from that. The Directive says he would be minded to interpret the cost orientation obligation requirement in the same manner that we have just discussed. We then have the Phase 2 decision, and I have set out the key passages at paras.105 and following, and we draw three points from those. Firstly, that the -- I emphasise "the" as the

word that was used in para.3.9 -- the appropriate method to determine cost orientated prices under a cost orientation condition, applying to the PPCs, was LRIC plus EPMU. The second point, that LRIC plus EPMU allowed BT to recover the LRIC of providing PP services and also a reasonable contribution to the recovery of common costs, words that are very similar to those used in Condition HH3.1. Then, thirdly, that a reasonable proxy for LRIC plus EPMU was CCA FAC, and that does not seem to be challenged at all. That proposition is pretty much common ground.

The Phase 2 direction also tells us something else very revealing about BT, because if we turn over the page to para.107 we see a quotation from para.3.78. It is referring to a BT submission "in which BT refer to cost orientation as meaning a charge based on CCA FAC or LRIC plus mark-up for common cost". Mr. Myers accepted that LRIC plus mark-up for common costs meant LRIC plus EPMU. So here is Oftel telling the world, or telling BT, that it believes that BT thinks that a cost orientation obligation means CCA FAC or LRIC plus EPMU.

If I could then turn, please, to the August 2002 Final Direction on LLU Backhaul? We deal with that at para.113. Again that case the same approach that was taken in relation to PPCs is reiterated and then applied in the context of BT being required to provide cost orientated backhaul services to local loop unbundlers. That is people like my clients. Sky and TalkTalk are the two main local loop unbundling providers of telecom services in the UK. It is particularly important because the key product that they buy for that purpose, BES, is a form of LLU backhaul. So here we have in 2002 Ofcom saying how it would treat, in effect, BES services. I will come back, if I may, as to how this then is translated in the 2004 Statement because it is dealt with expressly in the 2004 Statement, indeed, Sir, as you noted and discussed with Mr. Saini yesterday.

The next document is the May 2003 Financial Accounting Consultation.

THE PRESIDENT: Before you go on to that, these documents, which you put to Mr. Myers, but were not put to any of the BT witnesses or the BT expert, including your interpretation of what SAC ceiling might be ----

MR. PICKFORD: That is correct.

THE PRESIDENT: -- and they had no opportunity to deal with any of this, as to what their understanding would be to them at the time.

MR. PICKFORD: The points I make in relation to that are, firstly, these are issues of construction. They do not, we say, turn on expert evidence. It is true that I canvassed a number of them with the Ofcom witness and, in fact, the Ofcom witness was not really able

to help us greatly beyond, he said, the same interpretation that anyone could give in relation to them.

THE PRESIDENT: You put a discussion of what SAC might mean sensibly and so on. You might say that is something an expert might have a view on.

MR. PICKFORD: Yes, and I explained also to the Tribunal that in relation to the approach that I was going to take to Dr. Maldoom, given that I had a very compressed time to do it in, that I was not going to be able to put everything to him, all the same things that I put to the main respondent, and I was going to focus on the key economic issues rather than issues of construction. That was the basis on which I then carried out that cross-examination. I could not have done everything and I did set out -- it is in the transcript at p.91-93.

THE PRESIDENT: No, I accept that.

MR. PICKFORD: So we say it was not incumbent on me to put all of these legal points, because that is ultimately what they are, to the ----

THE PRESIDENT: It is not a legal point. The legal point is the construction but you say the construction is to be carried out in terms of the factual circumstances at the time the condition was imposed, and that includes the various documents that were then available. You deal with legal certainty in your notice of appeal and you refer to the two guidelines, but you do not refer to any of these as assisting on construction or legal certainty. No one was aware that you were relying on them until you put them to Mr. Myers.

MR. PICKFORD: Sir, there are some, I think, that were already in but I take the point that most of these documents were new at that time. But in relation to the pleading points, I do not think there can be any pleading point taken against me in relation to the general issue of whether we took issue with what Ofcom said about legal certainty. We said that Ofcom were wrong about their claim about legal certainty. In the Determination what Ofcom is saying that they were saying to you is principally it is focused on the 1997 and 2001 guidelines, and it is focused on the *PPC* judgment. We said in our Notice of Appeal that none of those help you. If you analyse those properly none of those give effect to what you say is the legal certainty that is binding upon you. So what Ofcom do in their defence, and what BT do in their defence, is they continue to assert and they say in any event – and it became particularly strong and particularly powerfully developed by Mr. Saini in his opening submissions in this hearing when he said everyone knows that DSAC is the right test. So they went beyond, at that point, saying that it was the 1997 and 2001 guidelines, and the *PPC* case. He asserted that everyone knows it is DSAC.

In response to that, which is Ofcom's defence to our case – it is not our positive case. Our

positive case is simply that the FAC approach, CCA FAC aggregate approach, was the right means of giving effect to the condition. But it is said against us that that would offend legal certainty. So all we have done is assisted the Tribunal in providing the documents that actually go to that issue. I would say this. We do not take this as a point against Ofcom at all because we found the documents and we are content to rely upon them. But these are quasi-public law proceedings. There is no process of disclosure here. We would say that actually you might expect the respondent to provide document within its possession, its own documents, so they are highly pertinent to support the case that it is advancing.

THE PRESIDENT: There is no process of disclosure because we have a rule that documents you rely on should, so far as possible, be provided with your Notice of Appeal. If you say you could not do it then because you did not anticipate how the defence would come, I do not think anyone would be objecting if you had sent them a week before the hearing even, saying in light of the way the case developed we propose to draw these to the attention of the Tribunal.

MR. PICKFORD: What I can say is that we did not hold back any of these documents. It became apparent to me, after Mr. Saini's opening, that there was a very sustained proposition being made that everyone knew what the answer was. I could not understand why that proposition was being made on the basis of the documents that were advanced to support it by Ofcom, because it is their defensive proposition. So I went away and investigated that issue, and looked at the documents preceding the 2004 statement to understand myself in better detail whether what they said could really be true. I discovered what was in those documents and I presented them before the Tribunal at the earliest opportunity. It was during the cross-examination of Mr. Myers.

I am not saying that in an ideal world some of these things might not have been discovered earlier, but one has to remember that this is very complex litigation in a very compressed time frame. We had Ofcom only yesterday advancing two new documents that it relies upon.

THE PRESIDENT: I think you rely on them, do you not? Do you not refer to the PAD?

MR. PICKFORD: We did not positively rely on them, but I am going to take you to them.

THE PRESIDENT: I thought you referred to it in your Notice of Appeal, did you not?

MR. PICKFORD: I do not recall that I positively relied upon it.

THE PRESIDENT: Whether positively or negatively, I thought you referred to it.

MR. PICKFORD: I am afraid, sir, I cannot immediately recall. Anyway, they were advanced by Ofcom. Ofcom did not say in which manner --

THE PRESIDENT: This is the PAD, is it not?
MR. PICKFORD: The PAD is the document from yesterday, yes.
THE PRESIDENT: Yes, it is para.104 of your Notice of Appeal. So obviously that has been under consideration. But indeed in the context of regulatory certainty, in the very context in which it was raised, so there was nothing new there.
MR. PICKFORD: No, I freely admit that these documents were not raised by me then. Of course, as I said, the focus of the attention at that point was on the way that Ofcom put their case in the Determination. In the Determination they rely on certain documents, and we say those documents do not get you there. Then, notwithstanding our position on that, they still came back and said in very bold terms: everyone knows it is DSAC. All we have done is try to assist the Tribunal as best we can in seeing whether that proposition is a valid one.
THE PRESIDENT: It might be assisting the Tribunal, but the Tribunal has to operate in a way that is fair to the party against whom you are seeking to advance an extremely important financial case. We are not assisted if that party has not had a fair opportunity to comment.
MR. PICKFORD: Sir, I come back to the points that I made in relation to Dr. Maldoom. We do not see how, as a matter of law, Dr. Maldoom would have been able to assist us on these points. They are points of submission. All the points we make about that are points that I can make to you now as counsel. I do not require anyone's economic evidence in order to make the points that I do in relation to these particular documents.
MR. SAINI: Sir, may I raise one point. It is quite important, given what my learned friend just said. He has just suggested I advanced a case in opening which was different from the case that we had ever asserted before. I do not want you to turn it up, but in the Determination at p.117 para.9.172.3 it is important to note that from the outset Ofcom's position has been that BT could not have reasonably anticipated that we would apply any other than DSAC. That has been our case throughout, and I said nothing in my opening which sought to expand that case or change that case.
MR. PICKFORD: Sir, I am not suggesting that point had not been raised. We addressed it to the extent that it was based on, what was it, 1997/2001 materials in our --
THE PRESIDENT: But you are asserting a positive case that they could have expected it, and you are doing it on the basis of documents which were put to the very last witness who is not from BT, saying: Look at this, Mr. Myers of Ofcom, surely on the basis of that BT could have anticipated this.
MR. PICKFORD: We say that is an objective point. To be clear, I am not relying, I do not need to rely, on Ofcom/BT's subjective views. BT's subjective views are not relevant to the issue

of construction. That would be contrary to the approach that I took you to, sir, at the outset, the objective approach outlined by Lord Hoffmann.

What I was showing you in relation to BT's views is what Ofcom themselves were saying about them. We say what Ofcom themselves were saying about them is inconsistent with the case that they are now advancing in defence against our essential position that our test is the appropriate one. And particularly appropriate, we said (and we advanced evidence on this in relation to this appeal) economically it is the right test. What happened is that effectively Ofcom abandoned their economic case.

THE PRESIDENT: They have not.

MR. PICKFORD: Sir, if we are going to argue about whether a case has been put, I would say that Mr. Saini did not put in any detail Mr. Myers' economic case to Dr. Houpis. Dr. Houpis was not challenged in detail on the issues of allocative efficiency or dynamic efficiency. There were some very general, high level points taken about whether Dr. Houpis would disagree that different people can have different views.

MR. READ: With respect, BT put that case and part of the reason in trying to have a focused hearing is that not everybody cross-examines on the same point. The same could be true between the Altnets and Sky and TalkTalk. I think it is unfair to criticise Mr. Saini for not putting points that BT put at length.

MR. PICKFORD: We do not accept that BT put them either.

THE PRESIDENT: He was asked quite a bit about dynamic efficiency and how it works with his test and DSAC.

MR. PICKFORD: We do not accept that the full range of issues were canvassed with Dr. Houpis by either BT's counsel or Ofcom's counsel.

THE PRESIDENT: That may be, but this is a somewhat different point about documents you say are very material being introduced very late when they were used to rebut an important part of Ofcom's decision making based on regulatory certainty, which you realised was an issue right from the beginning, when the parties have not had the opportunity they should have had to address them. We all appreciate the burden you are all working under and that it is a complex case, but the other side of that, it makes it all the more important that people have a proper chance to consider a document that has been produced.

MR. PICKFORD: Sir, I can only repeat my submissions in relation to the fact that these are ultimately objective questions of construction of documents that there is no need for economic evidence on. In so far as the Tribunal are of the view that they need economic evidence on them, and that they should have had economic evidence from Dr. Maldoom in

relation to them, then obviously I cannot put my case on that basis. But I say I do not need to put my case on that basis in order to succeed. The points that I make in relation to them are plain on their face to any person. They do not need specialist economic input in order to understand them.

There are some specialist economic issues in this case and they are the ones that go to allocative efficiency and dynamic efficiency and all of that. But they are not the points that one needs in order to properly construe these documents. My submission, sir, is that we could have had this case in relation to these documents and not called any witnesses. We could have dealt with it effectively as if it were a judicial review, and we could have construed these documents on their face. So for that reason I say it is not unfair, it has not materially undermined or prejudiced the opportunity of either of the other parties to address the case that I am advancing.

In so far as the point that the documents were raised relatively late on, we accept that. They were documents which Mr. Read says he is very familiar with because he says he dealt with them all in the *PPC* case. They are Ofcom documents. Ofcom could hardly particularly complain about not being familiar with them. I come back to the point in relation to these proceedings, given that there is no disclosure and there is a duty of candour on public authorities in relation to the defence of decisions, we might have expected that Ofcom would produce these documents.

MR. SAINI: I object to that. If my friend is going to suggest that we have in some way breached the duty of candour he needs to say it fairly and squarely. It is a very serious allegation to make, and he knows better than to make this submission in an indirect way. I ask him to withdraw that suggestion there has been any breach if he is making that suggestion.

THE PRESIDENT: I do not think he is suggesting there is any impropriety, but it may be that it was not necessary for you to put them one by one to Mr. Myers, although you did by cross-examination of Mr. Myers use that to put the case of what Ofcom's approach was to cost recovery and more particularly cost orientation. You asked him a lot about that. But that does not depart from the fact that if this were, to take your analogy of a judicial review case, you would not be putting in material documents right at the very end of your closing submission. If there were grounds for challenging a decision of a public authority you put them in with your Notice of Application, or at the very least if not with your witness statement, with your skeleton argument. You refer to them in your skeleton argument and give parties an opportunity to address them. That is what concerns us. I have to say, I think it has been difficult for the other parties when we have a very short time for closings, when

we all had just one day in which to absorb extensive closings covering the whole range of issues, to expect people to be able to take instructions and address these points along with all the other points.

MR. PICKFORD: I do understand that, sir, but we say that documents have been introduced by all parties throughout these proceedings, and that given the points that are taken in relation to them – which are not particularly complex – there is only basically two paragraphs that are referred to. It is the same two paragraphs that are repeated throughout the documents. It does not in fact impose an unacceptable burden. I quite accept it would have been preferable if I had discovered these documents earlier.

THE PRESIDENT: Your clients were familiar with them too, presumably, like everybody else?

MR. PICKFORD: I am not sure they were, Sir. We say in the light of the very limited points that have come out of them, they are important points, yes, but they are very limited points which have been on the agenda now for over a week, that as much as I accept it would have been preferable to have ideally addressed them earlier, we say that there is not any significant prejudice which has been caused to the other parties which actually prevents a fair trial in relation to them as I said, because ultimately they go to very short points of principle of construction of a document. They are responsive to the case made against us. Our principal case, as set out originally, was that the problem with the DSAC test is that it did not deal with the basic economics, the fact it that allowed over recovery, that was our essential case, and remains our essential case.

It is said in defence of that "you are totally wrong because we could not possibly have imposed such a test because of legal certainty", and all we are doing is pointing out that there is a problem in relation to that submission on the basis of essentially two paragraphs repeated in a number of documents.

THE PRESIDENT: Yes.

MR. PICKFORD: Sir, if I could then return, please, to the May 2003 financial accounting consultation. This consulted on the reporting conditions imposed on BT and Kingston in relation to their irrespective SMP markets, and as we quote at para.115 Oftel stated:

> "There is a corresponding set of combinatorial tests in relation to the SAC, which assess whether there is any multiple recovery of common costs and, accordingly, whether charges are excessive on that basis."

So what is being said here is that one way in which charges can be excessive is if there is multiple recovery of common costs. This was actually a document that was already in the bundles at AD2, it was not one of the ones that was put in the clip to Mr. Myers. We say

that is acceptance of our essential principle that multiple recovery of common costs leads to excessive charges.

If I could then turn, please, to the 2004 LLMR statement, which we deal with on p.45 et seq of our written submissions.

In our submissions on this document we explain that that statement contains clear and unequivocal findings that the wholesale AISBO market was both currently and prospectively lacking in effective competition. The approach that one takes to market definition in the context of ex ante regulation, unlike in ordinary competition law is necessarily prospective.

BT had a very large market share of 75 per cent and there were significant structural barriers to entry, which is made clear in the document in a number of paragraphs, I will just quote a couple of phrases from B433: "Barriers to entry are a strong feature of the AISBO market". "In many cases sunk costs represent a substantial barrier to entry in the AISBO market." We quote those on p.50.

To give some idea of scale, Ofcom cited evidence that in order for self-supply of LES circuits, this is on B434 on p.50, that "the capital expenditure required to compete with BT's retail LES products" and LES was the precursor of BES and WES, "can be higher than 10 years' worth of BT's revenues." In order to impose an effective constraint on BT and thereby to actually bring down prices, and thereby benefit consumers any entry would need to be on a very large scale, because of course small scale niche entry would not be likely to bring about substantial consumer benefits.

THE PRESIDENT: Is there a difference between BES and WES in that regard. You were saying LES was the forerunner of BES and WES, was it not the forerunner of BES.

MR. PICKFORD: Of?

THE PRESIDENT: BES, was it not?

MR. PICKFORD: It is principally WES. It is LES to WES. Yes, to both! As I was saying in order to impose an effective restraint on BT you would need pretty large scale entry because this is where you have a market share of 75 per cent. So it is no good thinking about a small scale niche entry for supplying some bank in Canary Wharf, that is not going to bring about large scale benefits for consumers in general. Of course, the reason why there are such high structural barriers to entry is because of the enormous fixed and common costs that are involved in supplying AISBO products. So it is the common costs that are one of the things that gives BT its market power.

There are two implications of that. One implication is that when one asks what is meant by

"the competitive level" in the context of Ofcom being concerned about pricing above the competitive level I would suggest, as a matter of logic you need to abstract away from the thing that actually gives BT the market power in the first place, namely its common costs, and that it would be illogical to answer the question of what is the competitive level at the same time as taking advantage of substantial common costs, so naturally the two are irreconcilable.

So when one is positing a hypothetical competitive level, because it is necessarily hypothetical because, of course BT has market power and would not be expected to price at the competitive level, you have to imagine a world in which it is not able to exploit the common costs that give it the advantage in the first place.

The second point I make in relation to the findings on barriers to entry is that there is no suggestion here or anywhere else in the document that entry would become viable at DSAC but not at FAC. Given the current scale of the costs that are being talked about here for significant entry, it is suggested 10 time BT's entire revenue, that is hardly surprising, but that is perhaps unlikely to be the tipping point.

That is what we say in relation to the findings about significant market power.

If I could move on to Ofcom's objectives in imposing Condition HH3.1, those are dealt with at para. 7.8 to 7.14 of the statement, and we set out various quotes from them. Nowhere in those paragraphs is there any suggestion whatsoever that one of the regulatory objectives that Ofcom had in mind in imposing Condition HH3.1 was the need to stimulate, or even avoid discouraging entry into the wholesale market, and we say that is hardly surprising, given Ofcom's finding of the huge cost that would need to be incurred in order to enter, it simply was not likely on any substantial scale.

What the statement did make clear was that by imposing Condition HH3.1 Ofcom was intending to promote competition and prevent excessive prices at the retail level of the market. That is what it was all about, promoting competition at the retail level. So, as we see at para. 7.10, regulation at the wholesale level is designed to address the problems which result from the existence of SMP in the relevant wholesale market. So it is trying to address the problems that result from the existence of SMP. What it does not say is that regulation at the wholesale level is designed to address the problems which give rise to the existence of SMP. If what it was trying to do was introduce competition upstream it would say "give rise" rather than "result". We go on to quote:

> "In particular it is designed to ensure that the SMP at the wholesale level does not restrict or distort competition in the relevant downstream markets or operate

against the interests of consumers, for example through excessively high prices."

So again, it is not about BT over recovering its common costs so as to stimulate upstream entry, even if that were likely, which it is not, it is about the opposite, it is about making sure that there is no over recovery so as to stimulate downstream entry and thus better results for consumers. It continues:

"Accordingly, Ofcom believes the wholesale regulation imposed in this chapter reflects its duties in section 4 of the Act. All of the conditions imposed by Ofcom will promote competition in the provision of retail leased lines …"

We see a similar point being made in para. 7.54 which we also quote. Again a point there about the result, resulting competition in the retail leased lines market, not ----

THE PRESIDENT: Yes, we see the quote set out.

MR. PICKFORD: A slightly different point in relation to 7.11, the key point there:

"The introduction of regulation in wholesale markets will encourage communications providers to purchase wholesale products and combine them with their own networks …"

"Purchase" them, not "provide" them, so again it is quite clear everything is heading in exactly the same direction in terms of what Ofcom was clearly thinking about.

We then go on to deal with a point which I probably do not need to go back to because I think I largely dealt with it in questions from Professor Mayer, but there are quotes from s.7.59 onwards, at para. 143, and this is where Ofcom is dealing with the issue of potentially allowing higher returns for specific products.

THE PRESIDENT: Yes.

MR. PICKFORD: But the key point is it is based on specific products. It is not allowing a blanket higher rate of return across the Ethernet market as a whole, as DSAC does. The other points to make here in relation to the possibility of entry was we have referred at para. 144 to the 2004 Energis dispute which makes clear that WES, which is effectively wholesale LES was not considered to be particularly innovative - I do not need to take you there, but that is a point that is made there. So similarly in the Determination at 9.234 to 9.240 we see Ofcom's clear view about there being nothing special about BES and WES relative to BT's other activities for which it earns the rest of BT WACC.

Nowhere, in any of these sections, indeed, anywhere in the 2004 LLMR at all is there any suggestion that Ofcom is intending to allow BT to recover its common costs multiple times. We say, on the contrary, it makes it clear that what was being allowed was a fair rate of return as would be achieved in a competitive market, and that is at 7.61 and 7.67 and we say

that is subject to any augmentation for a particularly risky new service, on an individual basis that is its WACC.

We then turn to Ofcom's reasoning in relation to PPCs. That is at 149 and following. The key point additionally we make here is that Ofcom discusses, in the paragraphs that we refer to, the possibility of only imposing a cost orientation obligation rather than imposing a charge control on BT in relation to PPCs. You might expect in that discussion, if they implied different cost standards, that there would be some mention of it but there is no mention of it in that section at all. What Ofcom does mention is the difference between a cost orientation obligation and a price control, is that the price control helps to drive down costs and gives BT better incentives for productive efficiency. That is, I think, common ground and the question then arises, if the price control was so good why did Ofcom not impose them all over the place? The answer that Dr. Houpis gave to that, and what we suggest is the right answer, is that they come at a cost in terms of the need to be relatively confident about future prices. Because when you are imposing a price control you have to estimate what the prices are going to be. You have to set them and they have to be set several years out in advance. In a new market that may be quite difficult and, therefore, as a second best solution effectively you might attempt to achieve similar aims but without the productivity efficiency bit being as pronounced, by imposing a cost orientation obligation but using the same standard. There is no reason to apply a different cost standard just because you are basing it on an outturn cost rather than *ex-ante* costs or *ex-ante* estimates of efficient costs, I should say. So that is what we draw from the discussion of the price control that is imposed in relation to PPCs.

There is then a discussion of the relationship between PPCs and LLU backhaul, and this is a point that one actually gets from the 2004 LLMR Statement. It helps to understand the point if one then goes back and enquires and looks at the LLU Backhaul Decision to see where it is coming from, but you can actually see the points that I make from the 2004 LLMR Statement itself and therefore you do not need to rely on the 2002 LLU Backhaul Statement to make the point. There are essentially three points that can be made in relation to the treatment of PPCs and LLU backhaul.

The first is the point that was made, Sir, by you to Mr. Saini yesterday, which is that one sees from the 2004 Statement itself that the 2004 LLMR was intended to carry forward an approach that it had already adopted in the 2002 LLU Backhaul Decision, and we have seen what the LLU Backhaul Decision says. I would suggest it is not inappropriate, in looking in more detail at the 2004 Statement, to look back at what is being referenced as the 2002

document. So in relation to that document alone, I would say that is a sufficient justification for looking at that document to help understand what is being said in 2004. So that is the first point.

In relation to the LLU Backhaul Decision, obviously we had a debate about what the SAC ceiling means, whether it means DSAC or SAC. I have made my point about what Mr. Myers accepted in any event in relation to the second limb of it. What you certainly cannot say, what you cannot draw from the LLU Backhaul Direction, is that it was clear to the world at large that what cost orientation meant was DSAC. That certainly is not something that you can draw from that statement at all. So Ofcom were a long way from being able to establish that proposition.

The second area of significance in relation to how in the 2004 Statement Ofcom deals with what has gone before, is it says that it is appropriate for PPC services and LLU backhaul services to be dealt with on a consistent basis and indeed it imposes a direction specifically to that effect. Under Condition HH3.1, right at the end of the document, at p.62[8], I think, it imposes a direction which requires the consistent treatment of LLU backhaul and PPCs. BES services are a form of LLU backhaul and so what is being required by that is consistent treatment in relation to the charges of PPCs and BES, amongst others. We know that the PPC price control is based on CCA FAC. We saw that from the second *PPC* Determination. So the only way you can make it all consistent is for also BES services to be based on FAC, otherwise the obligation of pricing consistency as between LLU backhaul (or which BES is part) and PPCs breaks down. So that is a further reason why Condition HH3.1 must be referring to a FAC based standard rather than DSAC being sufficient.

The next point we address, moving on, is Kingston. That is at para.177 and following. I think I can be very brief on that. The Tribunal should already have my point on it because we have canvassed it a couple of times. The essential point here is that, as the Tribunal may recall, there was special treatment being agreed with Kingston that they could definitely satisfy the test on the basis of CCA FAC and that was in order to make their reporting easier. But one has to ask oneself, in relation to Kingston, it would have been rather a strange decision for Kingston to have taken if what the world at large actually believed was that Condition HH3.1 allowed pricing up to DSAC. For it to throw all of that extra revenue away, which, as we have seen, allows you potentially to earn three times your cost of capital, and say, "We are not having any of that because it imposes an extra accounting obligation on us", that would be very strange, we would say, indeed because you would have thought you could probably employ a few accountants in order to deal with the

problem and enable yourself much bigger return. So the fact that we have here Ofcom and Kingston effectively coming to an agreement about the approach, suggests that it was not clear that it was DSAC to the whole world at all.

So finally we get to the now infamous para.7.63 at para.183 and following of my submissions. We say you have to look at the 2004 Leased Line Markets Review statement as a whole and in the light of what preceded it, and there is plenty of authority for that obvious proposition. We set it out in para.189. We refer to the *Tesco* decision and also the *WBA TalkTalk* case. It is not obviously a very surprising proposition. We say that when you look at 7.63 in context it cannot remotely support the weight that Ofcom seeks to place on it because for Ofcom to succeed it needs to be shining beacon of a statement of principle that makes it clear to the world at large about what they were doing, and that in rejecting a price control it is said that they were necessarily also rejecting CCA FAC. We say that looked at in context that just cannot possibly be right.

As a small preliminary observation, I showed in cross-examination that in fact this passage is only in the Determination at all because someone queried and said, "Why have you not imposed a price control?" I do not make a lot of it but it is a rather odd and unpromising start, we would say, for a paragraph that is supposed to be setting out this core principle that everyone is supposed to be guiding themselves. It is just fortuitous that it is actually here at all.

The next point we make is that it is a paragraph that on its face is quite obviously not dealing with a cost standard. The cost standard does not get a mention. DSAC does not get a mention. DSAC does not get a mention as a cost standard appropriate for price controls anywhere in the 2004 document. At 191 I set out the text of 7.63 but I think we are probably relatively familiar with it. We say that Mr. Myers and Ofcom, in particular Ofcom, depend on three assumptions in relation to it. Firstly, the industry as a whole understood that the cost orientation obligations were to be assessed by a single product DSAC test and that it was only ever charge controls that could ever be CCA FAC. For the reasons that I have given, we say that that is just wrong. Second, that in referring to the competitiveness of the market, in the second sentence of para.7.63, Ofcom is concerned with the extent of entry into the wholesale market. Thirdly, they say that they need to demonstrate the choice between SAC and DSAC was the critical issue in determining that future competitiveness of the wholesale market. I have explained why the first point is wrong. In relation to the second point, the competitiveness of the market that is being concerned, it cannot be concerned with entry into the wholesale market for the following

reasons ----
THE PRESIDENT: I think we have read how you put it.
MR. PICKFORD: I am grateful.
THE PRESIDENT: You spell it out quite fully in para.195 and 196.
MR. PICKFORD: We do. I am very grateful. The only additional point I would make is just to also remind the Tribunal of Dr. Houpis' evidence, which is that if what you want to do is promote entry you set a price floor, not a price cap.
We say there are two alternative readings of that which are better and again, Sir, you have my case on that. We say there are two points really. Either it is referring to the competitiveness of the retail market, because that is ----
THE PRESIDENT: I am conscious of the time and, although it can be helpful to have a paraphrase of what is right in front of us, we have got the text.
MR. PICKFORD: I am grateful. In which case I can move on. I think I did not actually start quite at 20 to in any event but, if I may, I would ask for a little more time because we have had some ----
THE PRESIDENT: We will sit to 5 o'clock but we cannot sit beyond 5 o'clock.
MR. PICKFORD: I understand. I am very grateful. So we then get onto the issue of the documents postdating 2004 and we say they are far less relevant because of the reasons that I set out at the beginning. But there are just two points to note. The first is that when Ofcom claim in their skeleton argument that whenever they depart from DSAC they say they signal it in advance. We say that is not correct. The 2005 *Energis* dispute, at para.204 and following of the written closing, is a good example of that because that was a dispute that was determined against BT on the basis that Ofcom looked at a cost orientation obligation that was in exactly the same terms as HH3.1. There was another obligation there as well but in interpreting what was meant by HH3.1 they said it means LRIC plus EPMU, and what Ofcom said in their skeleton was, "Aha, but we signalled that in advance when we imposed the price control". I think it is legitimate therefore to go back to look at that document that Ofcom are implicitly referring to when they say, "We signal it in advance", and when you look at it, it does not show that. It shows that the imposition of the price control was in very similar terms of the imposition of the price control in 2004 LLMR and there is no signalling that it is going to be addressed on a LRIC plus EPMU basis. So that, we say, is a bad point by Ofcom and it is one that one may legitimately make by reference to a document that they implicitly relying upon but did not actually, I think, refer to.
In Section F of our submissions we deal with why the test is not equivalent to a charge

control, and I am not going to go over that. I think the Tribunal should well have our point on that. In Section G we, for completeness, deal with BT's understanding of obligations, but as I explained, that is not the primary part of our case. The Tribunal can read what is said in relation to that, but our point is that the construction depends on the objective face of the documents; it does not depend on what BT did or did not consider.

THE PRESIDENT: Those are points that would have to be put, not to the experts but to the BT witnesses.

MR. PICKFORD: Indeed. I am not resiling from that; I am just trying to explain the relative emphasis of the points that we have in our case.

The next point to make is in relation to the 2005 PAD which we were provided with yesterday. They were handed up yesterday by Ofcom. I think they are in AD2 tabs 47 and 48. We have the primary accounting documents. We were taken yesterday to a number of pages in there. I make four points in relation to them. Firstly, they post-date the 2004 statement and therefore are of no, or alternatively very limited, assistance in construing what it means. Second point, as far as I am aware, nowhere in the entire document is there any explanation of what cost orientation means. There is reference to ceilings and floors, but it is not explained as being the test for cost orientation.

THE PRESIDENT: You say it is not explained as the test.

MR. PICKFORD: I am going to come, if I may in a moment to the words themselves, but if I may make the general points. The third general point is that these documents apply to all services including price controlled services. So they are very general in nature. As I explained, in relation to price controlled services there is no dispute between us that a cost orientation obligation would only mean ceilings and floors.

Then at p.55 (which is where you were taken – amongst other pages – by Mr. Saini yesterday) we see a discussion of network components combinatorial tests and DLRICs. Would you like to look, please, at the last sentence of the second paragraph on p.55 underneath that title we see these words:

> "In principle the fixed common costs can be recovered from any component provided that in aggregate they are recovered."

That is our case, that you can go up to DSAC, you can go down to DLRIC, provided that all you do is recover your common costs, but you do not over-recover your common costs. That takes me back to the point of construction on the language of Condition HH3.1 that I made at the beginning. We say this document does not assist Ofcom at all.

Mr. Saini also took you to the RFS. I did not entirely understand the points that he was

drawing from it. I apologise for that. It appeared to be that the RFS refer here to the DLRIC and the DSAC standards, he said, and they also referred to being produced for the purposes of cost orientation, so there you go, there is your answer. We say that is not a persuasive submission because of course the document that we were taken to also refers to FAC. It is the first point in the column, and it is critically the only audited piece of information that is required.

I just draw your attention in relation to that point about auditing, to something that Ofcom themselves emphasise in their skeleton argument – or at least, they mention it in their skeleton argument at p.32. Could I ask you to turn to their written closing p.32. They set out at the top of the page Article 13.4 of the Access Directive. That provides that:

> "National regulatory authorities shall ensure that, where implementation of a cost accounting system is mandated in order to support price controls [then they helpfully put a footnote in the language of 13.1 of the directive that encompasses both charge controls and cost orientation obligations], a description of the cost accounting systems is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall be verified by a qualified independent body. [We construe that as meaning audited.] A statement concerning compliance shall be published annually."

That is the RFS.

So there is an EU law requirement on Ofcom to ensure that compliance of accounting systems is audited as Ofcom themselves point out. But if you just join the dots in relation to their submission, one sees that the only audited information and what they took us to yesterday is the FAC numbers. So if it is sufficiently important for there to be a legal obligation in the directive for there to be auditing to ensure that the numbers are reliable, we say it is a bit odd that then in your cost orientation obligation your primary focus should then be on the unaudited numbers. It is not clear even whether it is consistent with Article 13.4, but more generally, whether it is or it is not, what is plain is that as a matter of general principle it is very strange that if the focus of your attention was on DSAC and DLRIC, you might think that they were audited rather than it being FAC which Ofcom say is merely the cross check.

Also, on their cross check point, we do find that rather odd, because we do not really understand how it works. It is only applied if BT fails the DSAC test. So if BT is already above DSAC, then it said we come along now and we are going to see whether we might let

you off the hook. In order to do that, we then compare your prices to FAC. Unless there has been some error in relation to the compilation of the figures, you are already above DSAC so you should be even further above FAC. So it is very hard to see what, if any, value being above FAC really tells you.

THE PRESIDENT: As I understood it, what they did is - cross check may be a slight mischaracterisation. It is if BT was slightly above DSAC one year and said do not find us to be overcharging, they would then have a look and say how far are you above FAC? Even though you are very slightly above DSAC you were very substantially above FAC, they may say, that is not good enough. That is the way I understood it.

MR. PICKFORD: That is not very logical, because if your benchmark is DSAC then why worry about how far you are above FAC? The logical thing to do would be simply to say: how far are we above DSAC? We know that there is a fluctuating relationship between FAC and DSAC. Sometimes it is quite big; sometimes it is quite small. So we say their use of FAC is illogical; it does not make any sense.

May I then move on to efficiency considerations. Obviously, there have been a few points made by Mr. Read in relation to this this afternoon when he says that they challenged everything that needs to be challenged on the efficiency case. We say that that is not actually correct and that the detail in relation to allocative efficiency, all of the various points that Dr. Houpis makes on dynamic efficiency, how they are all balanced, and where productive efficiency fits within all of that, is a case where we must win because it is a case that we have pursued in detail with each of the witnesses, but no-one pursued in detail with Dr. Houpis. We also say that in any event, on the facts his evidence is the most compelling. I have not got time to deal with the detail of it, so I am not going to try. The one thing I would say in relation to economic efficiency is it cannot really be written off in the way that Ofcom seems to suggest that you are permitted to do. Efficiency is one of the things that Ofcom actually has to promote. One sees that in the Framework Directive Article 8.2(a); one sees in the Access Directive Article 13.1; and one sees it in s.88(3) 2003 Act.

Moreover, we would say that achieving an economically efficient outcome necessarily lies at the heart of Ofcom's other objectives such as achieving consumer benefits. We suggest that the two naturally go hand in hand. So if it is correct, as I would suggest it is, that our approach is better from the point of view of economic efficiency, that lends, at the very least, very considerable weight to why our approach was objectively the right construction of HH3.1 in 2004, because it would have been equally obvious that it was the right approach then.

Then on practical considerations – these are raised principally by BT, and we say they do not take BT anywhere. May I ask you, please, to turn up briefly bundle CBD tab 1.4.

THE PRESIDENT: That is the expert bundle.

MR. PICKFORD: The expert bundle. This is the joint statement in BT's appeal on ground 2. Could you go, please, to p.13. We see the following statement by Dr. Maldoom:

> "Where there are significant common costs it is impossible to assess cost orientation of one service without simultaneously assessing the cost orientation of the other. A practical cost orientation test should treat these together. "

This is not a statement that he made in the context of our appeal; it is a statement he made in the context of BT's appeal. That, of itself, we say is quite interesting, but the point here being made by Dr. Maldoom is that you have to adopt an approach on the lines that we are suggesting. It is the only way, he says, of assessing cost orientation. It is impossible to assess cost orientation without considering services that share common costs together. Therefore, you need a practical cost orientation test to do so, and all we are doing is presenting one and we say in the light of Dr. Maldoom's assertion here BT's complaints about the detail of our test and, in particular, the aspect of it where we deal with how it should be applied non-mechanistically, take it nowhere. If BT really have a problem with a non-mechanistic approach we would be quite happy to see a test applied very rigidly against them, we have no complaint about that, but we have been far more sensible and fair to BT and we have proposed a test which is not rigid, which I think the parties agree, like any test, would need to be applied with common-sense and non-mechanistically. Obviously if one does adopt a non-mechanistic approach that comes at a price in that it is not as clear cut from the outset. I also turn back to the points that I made in my very opening, which is that we are not saying our test is the only test, but is the test that we have to apply now because of the failures by BT first to come up with its own test and Ofcom to come up with a proper one.

Finally, last 15 minutes on the RAV adjustment.

PROFESSOR MAYER: Just before you move on to the RAV could I just ask you about your interpretation, what you think Ofcom has been considering. You have said the position in 2004 was not consistent with DSAC, what is your explanation for why Ofcom believes that is what it thought in 2004, and what it thought that BT thought?

MR. PICKFORD: The first answer is I do not know, but if I was to speculate I would suggest it is because they took a rather narrow approach to construing the 2004 statement, they honed in on one paragraph which is slightly ambiguous, and when read properly in context we

actually say is against them. They thought it meant one thing and they extrapolated back from that but they have the wrong answer. Had they actually gone back and methodically looked at everything they said prior to that point, and ultimately we did, they would not have arrived at that answer, or we say they should not have arrived at that answer. So that is the best that I can offer. It certainly was not a deliberate approach on Ofcom's part to do something different than what they believe they said. We are not suggesting for a moment they did not believe that they had applied a DSAC standard, we just said they were not sufficiently careful in really looking at what they had done.

PROFESSOR MAYER: So this is a loss of institutional memory, is it?

MR. PICKFORD: That might be. As I said, I am not really in a very good position to assist, I can only really speculate, but it is certainly not our case that there is anything other than an error by Ofcom here that they focused in very much on one issue, and did not really properly address the other issues that have been raised.

MR. THOMPSON: Sir, we are promised 15 minutes on RAV. I should say that BT understood that the closings were due to finish at half past three, to leave time for any other matters, and there are one or two matters that BT needs to raise before we all leave, so I hope I can do it in a matter of three or four minutes, but I do need to say one or two things.

THE PRESIDENT: Yes, just a moment. (After a pause): Yes, well if Mr. Pickford finishes at 5 we will give you 10 minutes, but we are struggling ourselves then for other reasons.

MR. PICKFORD: Sir, I will move on and go as quickly as I possibly can through RAV. It is very much the neglected younger sibling, it has not received any of the attention that its older sister has, but it is not because we do not love it as much. It is just that it is worth less money, but it is just as good a point.

THE PRESIDENT: It is a little less complicated.

MR. PICKFORD: It is a little less complicated, yes. So the starting point we say in relation to RAV is the Court of Appeal Judgment in the PPC case, I am not going to ask you to turn it up, but it is in the case of overcharging in breach of an SMP condition to order repayment of the amount of the excess overcharge, that is the starting point. We say that excess overcharge is on an objective construct and that Ofcom acted contrary to the statement from the Court of Appeal by failing properly to calculate the amount of the excess overcharge. The reason why they did that is because they did not make a RAV adjustment, and they did not make a RAV adjustment because they jumped straight into concerns about BT's subjective understanding of whether they might or might not make one.

If I can now explain that point a little more fully. I think it is common ground now that a

RAV adjustment, if it is not made, will lead to BT over recovering its costs. It is suggested that there might be policy reasons why it might want to do that. It is not disputed that it does actually lead to over recovery. If we can consider the framework within which Ofcom approached most of the issues of adjustment, that is set out in s.11 of the Statement, and I think rather than take you to it for time, I am afraid I am just going to have to rely on summarising elements of it on the basis of my written submissions to make it a little bit faster.

What we say about it is as follows: we see at 11.27 of the Determination that Ofcom's approach was to make such adjustments to the RFS where they are necessary and appropriate. That is the overarching approach "necessary and appropriate", subject to it being reasonably practicable, and it we see reasonably practicable at 11.29.

Adjustments may be necessary to correct straight forward errors, or they may be necessary to ensure that revenues are compared to appropriate costs, and we see that second one at 11.9.2.

Ofcom also said at 11.8, and this is quoted at para. 309 at the top of p.110 that it:

> "considered that the decision as to whether a specific approach is appropriate is necessarily linked to the analytical issue or policy objective that it is being used to address, and that if the approach is evidently inconsistent with the objective, then this would support a conclusion that it was obviously inappropriate."

That is important.

THE PRESIDENT: Sorry, that is at?

MR. PICKFORD: That is at para. 11.8 of the Determination, and I have quoted it at the top of p.110.

THE PRESIDENT: Yes.

MR. PICKFORD: That is an important statement of principle there and we rely on that in a moment. It is the case that even adjustments that are deemed both necessary and practicable under Ofcom's framework may still be not appropriate they say in the light of their overall regulatory objectives. They set out in para. 11.39 a number of potential exceptions when they will not make an adjustment, notwithstanding that they have found that it is necessary to do so. The key point, I am afraid the Tribunal will have to look at it later, is that none of those exceptions deal with BT's subjective expectations. They are all objective matters, and we say that framework is absolutely appropriate, we have no quarrel with the framework, our quarrel is how it has been applied in the case of RAV.

In respect of a number of other adjustments, as I showed the Tribunal very briefly in my

opening, Ofcom make adjustments to ensure that revenues are compared against appropriate costs. That is the heading before para. 13.199 of the Statement. So they are adjustments to ensure revenues against appropriate costs. They make an adjustment for transmission equipment costs, they make one for 21 cn costs, they make one for ECCs, they make one for payment terms. In all of those adjustments what Ofcom was doing it was following its objective framework and it was asking itself the question whether the treatment of costs that departed from the RFS was necessary in order to ensure that the resolution of disputes was appropriate in ensuring that the revenues were compared to appropriate costs.

When it then came on to look at RAV we say it departed from that objective approach, and it did not try to assess objectively at all whether failing to make a RAV adjustment might be obviously inappropriate because you would thereby then fail to reflect appropriate costs within the framework of what it had done under the other examples. It simply went straight to effectively a secondary issue of what could BT have anticipated at the time. We say that is the first and the essential error of approach and it failed to follow its own objective framework that it set out in s.11 that I have summarised, but we deal with it more fully in the written submissions. We say that the subjective approach adopted by Ofcom, looking at BT's understanding, did not actually have any basis in s.11 of the Statement.

For that reason we say that the approach adopted by Ofcom in this case is contrary to the approach, as I have said, set out by the Court of Appeal which looks at the need to determine a repayment on the basis of the excess overcharge, and I would also add this in relation to BT's reasonable expectations between 2005, because the reason given for not making the adjustment is that BT could not have anticipated it. At the very most we say that could only ever enter into the second stage of the Court of Appeal's test. You start from the excess overcharge and then you see whether there are any sufficiently compelling reasons to justify a deviation from it in a particular case. We are not ruling out as a matter of principle that those could come in at the second stage, but you need to go through the first stage first and Ofcom did not. In relation to those reasonable expectations on the facts, between 2005 and 2009 there was no policy by Ofcom that it would not make a RAV adjustment. It had made a RAV adjustment in the different context of copper access. It explained when it was making it in relation to copper access that it was doing so in part because of the ducts that are used for copper access. That is one of the assets that BT had prior to 1997 and I will come in a moment just to explain the relevance of that. We say it could have been inferred by BT that it could well have been made in relation to AISBO products because they also use duct, in particular pre-1997 duct.

THE PRESIDENT: Which is the duct, copper access?
MR. PICKFORD: Yes.
THE PRESIDENT: In 13.227, is it, in the Determination?
MR. PICKFORD: Yes, in the Determination 13.227, that is correct.
THE PRESIDENT: Final copper access statement of August 2005.
MR. PICKFORD: We have set out our case in relation to that in our original skeleton for the hearing, and obviously we explain other points here in the closing submission as well.
THE PRESIDENT: Yes.
MR. PICKFORD: In 2005 what we see is that there was a concern about overcharges if a RAV adjustment was not made, and one of the concerns relating to duct as a sunk asset. Duct is also used for the provision of AISBO services. In 2009 Ofcom decided not to make a RAV adjustment when it was imposing the 2009 Leased Lines Charge Control. The core reason we say why they did it is because they made a mistake about whether AISBO services used pre-1997 duct. But in any event, whether they made a mistake then or not, prior to 2009 BT could not have had any expectation that no RAV adjustment would be made. Given that objectively it is the right way of matching its costs, its true costs, we say that on the basis of the first part of Ofcom's test, it should have been applied and therefore there is no reason not to make a RAV adjustment for that period. We accept that after 2009 it becomes a little bit confused, given that there is a decision made by Ofcom not to make such adjustment albeit on an erroneous basis, and so we do not put our point after 2009 but we do put it in relation to the period between 2005 and 2009. That has obviously been a little bit rushed. It is probably a slightly more complex point than a 10 minute point, but I have attempted to finish exactly at 5 o'clock.
THE PRESIDENT: Yes, thank you.
MR. PICKFORD: Sir, unless I can be of any further assistance. Thank you very much.
THE PRESIDENT: Thank you. Yes, Mr. Thompson.
MR. THOMPSON: Sir, I will simply make hopefully about two minutes of reply and then there is one point I need to address.
THE PRESIDENT: I do not think we have provided for replies because otherwise everyone can reply to everybody because there are a whole lot of appellants. So we have scheduled this on the basis, I think, there would not be replies.
MR. THOMPSON: In that case I will limit myself two points. The first, our note on lateness where our submission is that these are complex regulatory and factual matters in relation to documents whose interpretation is not obvious, but the opening *PPCs* will be a major issue

and was not presaged in the pleadings.

THE PRESIDENT: I am sorry, the *PPCs*?

MR. THOMPSON: A major challenge to *PPCs* was not set out in the pleadings and was not something that BT anticipated, and I understand Ofcom is in the same position. We say that these documents that have been put in very late are ----

THE PRESIDENT: I am sorry, when you say a major challenge to *PPCs*?

MR. THOMPSON: To the findings of *PPCs* in relation to the status of DSAC. I am particularly thinking of the passage from 278 and following in relation to the status of DSAC and whether it was or was not right. Essentially the matter was not pleaded as such in the Sky notice of appeal, which one finds at paras.102 to 110 did address the issue of regulatory certainty which had been set out clearly in the Determination at paras.9.149 to 9.173.

MR. PICKFORD: Sir, just to avoid any confusion, our case is not in that document and has never been that DSACs are not relevant or were not known. Our case has always been that they are not sufficient.

THE PRESIDENT: Yes. We understand your case. Yes, major challenge to the *PPC* judgment you say was not in that notice of appeal.

MR. THOMPSON: And otherwise I rely on the points that we have set out in our ----

THE PRESIDENT: In your note, yes.

MR. THOMPSON: The other major point is the issue that was raised with me this morning, which I have obviously taken instructions over the short adjournment as best I may. Being BT, the decision making process is not entirely within the building, but my instructions are that our current understanding is that we consider that the proper course is for BT to seek permission to amend given the indication of the Tribunal. We have discussed it briefly with Ofcom, who are currently seeking approval within BT. It is obviously not appropriate to go into the matter in any detail now but we would obviously be saying that the circumstances are exceptional. What we would undertake would be to make an application in writing within seven days with a view to a response being made presumably within seven days by those who wish to do so, and the matter being resolved in writing, and if permission were granted BT, for itself, would be content for the matter to be dealt with in writing as a matter of substance as well since that would be the procedure that we would think would be most appropriate. It is obviously unfortunate that it has arisen in this way but it is a matter which, as the Tribunal itself put to me, is one of importance not only to this case but also to the general regulatory framework within the United Kingdom and possibly within the European Union, so that is my instruction.

THE PRESIDENT: Give me just a moment. (After a pause): We are obviously prepared to hear submissions on that from anyone else. Can I just tell you what we are minded to do and you can then address me if you are happy with that? We think to direct that BT make any application, and they obviously have not taken a final decision, within seven days is a fair way of proceedings. We can hear you on any time for a response. We would think that it is reasonable to give a decision on the application in writing. If it were to be granted, and I am not in any way anticipating the outcome, but if it were, I think we would then want a hearing on the substance. With regards to the actual application for permission to amend, we think that can be done in writing without everyone having to turn up. What do you want to say, Mr. Saini?

MR. SAINI: Sir, may I just indicate that the substance of the discussion that we have had with my learned friend's instructing solicitor is very limited, which is simply that we wanted to see what the application was. It goes no further than that. In principle we are content that the matter be dealt with in the first instance in writing. That is the application to amend. No doubt my friends will not only set out the amendment but also explain how, consistently with the Tribunal rules, given the stage at which the application is being made, it right allow it. I would also ask that the Tribunal direct at this stage that the costs of the application to amend, that is their application and our response to it, be paid in any event by BT because it is causing a great inconvenience to the parties.

THE PRESIDENT: I think I understand what you say and I think we will deal with the costs when we deal with the decision and in your response you can make submissions about the costs. I do not think we need to make an anticipatory ruling on costs.

MS. ROSE: Sir, the only point I wanted to make was -- there are two points actually -- the first is in relation to costs. As far as my clients are concerned, this hearing has been very tightly budgeted on the basis of the case management directions of the Tribunal. This development has caused dismay to my clients in terms of the additional expense that we will incur just to look at the application for permission to amend which BT is now making, let alone responding to it and on what may develop in future. I appreciate your initial reaction is, "We are not going to make an anticipatory ruling on costs". You clearly have the power to do that under the Tribunal Rules and, in my submission, there are circumstances where it is appropriate for that power to be exercised and is a good case in point, because the costs that we are talking about here are wholly unnecessary and are entirely the result of BT having some, we do not know what provoked this, but at the very last possible minute deciding it wanted to take a completely new and fundamental point. This is all really wasted costs as a

result of BT's conduct so I would invite you to consider that.

Secondly, in terms of the timing of our response to their application. I am in great difficulty the next week and the week after next. As a matter of fact, I am in the Court of Appeal for three days on the *Pay TV* appeal the week after next.

THE PRESIDENT: This Tribunal, was it?

MS. ROSE: Not you, Sir. You are innocent in this.

THE PRESIDENT: Yes, I know that!

MS. ROSE: But it means that it will be very difficult to us.

THE PRESIDENT: I think you are entitled to some indulgence in a view of the way this has arisen. What are you suggesting?

MS. ROSE: I would suggest the end of the week of 6th December, because I am not ----

THE PRESIDENT: Which is, what, on dates? 6th is a Monday, is it not?

MS. ROSE: 6th is the Monday. I am sorry, the end of the week of the 9th. That would be 13th December for our response, because I am not going to be able to look at it until that week.

THE PRESIDENT: Yes.

MR. PICKFORD: I am also in the same position as Ms. Rose.

THE PRESIDENT: You are in the same appeal, yes. (After a pause): From what you say, it is not going to make much difference if BT do it in less than a week because you are in the same position. I do not think it would be right to impose any burden and inconvenience on the other parties in the way that this has arisen so, in the light of that, we will say that your application, if so minded, within 7 days and response by 13th December. Let me just consult my colleagues on the other matter. (After a pause): Ms. Rose, we note what you say in your *cri de coeur* but we will not make an anticipatory costs order. We will deal with costs when we deal with the application. We will endeavour to give -- I have not established yet the availability of my colleagues -- our decision on the application, even if with only short reasons or possibly with no reasons, in writing before the Christmas break and then we will expand on it in the judgment, and we will deal with it that way. So it is 7 days and that means 4 p.m. next Friday and responses 4 p.m. on 13th December.

MR. THOMPSON: I am very grateful and, to the extent it is my responsibility, I apologise for any inconvenience to the Tribunal. It is an important matter and we will obviously ----

THE PRESIDENT: No, it is important.

MR. THOMPSON: -- proceed with it as fast as we can.

THE PRESIDENT: Yes. Are there any other final matters? Nothing else, Mr. Thompson?

MR. THOMPSON: I do not think so. Given the indications, I will not trespass on the Tribunal's

time anymore.

THE PRESIDENT: You have left us with a lot to think about so we have to, first of all, establish this question of the amendment. Quite aside from that, we will take some time clearly to produce a judgment in the New Year. We also very conscious of the burden which a tightly controlled hearing like this, in a very complex and multi-faceted case, imposes on all the parties' representatives. We are very grateful to all counsel, senior and junior, and the teams behind you, for the very hard work you have done over the past few weeks. We appreciate the assistance you have given us. Thank you all very much.