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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st November 2013

Before:
THE HON. MR. JUSTICE ROTH
(Chairman)
STEPHEN HARRISON
PROFESSOR COLIN MAYER
(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC Appellant

- and -

OFFICE OF COMMUNICATIONS Respondent

AND BETWEEN:

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

- and -

OFFICE OF COMMUNICATIONS Respondent

AND BETWEEN:

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

- and -

OFFICE OF COMMUNICATIONS Respondent

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HEARING DAY FOUR

A P P E A R A N 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.

1 THE CHAIRMAN: Yes, Ms Rose.

2 MS ROSE: Good morning, sir. Our next witness is Mr. Parker.

3 MR. ANDREW GRAHAM PARKER, Sworn

4 Examined by Ms ROSE

5 Q Good morning, Mr. Parker.

6 A Good morning.

7 Q Please could you take up bundle CW2, core bundle. In bundle CW2, if you could go to tab
8 D which you will find towards the back of the bundle.

9 A Yes.

10 Q Do you see there a statement with your name on it?

11 A I do indeed, yes.

12 Q If you go to p.9 of that statement, is that your signature?

13 A Yes, it is.

14 Q Do you adopt this as your evidence?

15 A Yes, I do.

16 Q If you then take up core bundle C tab 19, there we see the same witness statement.

17 A We do, unsigned, yes.

18 Q Could you just wait there.

19 Cross-examined by Ms LEE

20 Q Good morning, Mr. Parker. As you know, I am going to ask you some questions on behalf
21 of BT this morning. Can I start really with your business relevant to this dispute. You give
22 in para.6 of your statement (using the one in C19) a description of your business relevant to
23 this dispute and mention the purchase of both WES and BES circuits. That is right, is it
24 not?

25 A It is indeed, yes.

26 Q Skipping on a little further, in para.9 you mention there that if you cannot self-provide, you
27 may decide to purchase Ethernet circuits, and you may purchase them from third parties
28 including (you mention there) BT and also Virgin?

29 A Yes, I outline two choices: one to self-provide and secondly buy in.

30 Q Again in para.10 you set your BES purchases in context by references there to other
31 purchasers of BES such as Sky and TalkTalk.

32 A I outline how we consume the BES service as part of our backhaul.

33 Q In para.18 we can see that this paragraph is dealing with the material that you produced
34 concerning the overall average circuit duration. In the second and third sentences of that

1 paragraph you talk a little more about the customers, larger business customers opting for
2 longer-term contracts and so on.

3 A Yes, the figure in there is a sort of point in time figure that will change over time as the
4 circuits mature.

5 Q Yes, it is a snapshot, is it not?

6 A Absolutely.

7 Q Have you had the chance to look at Mr. Coulson's evidence at all?

8 A I have not, I'm afraid, no.

9 Q Could you look, please, at para.11.4. There you make some comments of a confidential
10 nature about the minimum term of your contract with your customer.

11 A Yes.

12 Q I was going to ask you, the way in which your minimum terms are arranged stems from
13 your customers' wishes largely, does it not? In fact, I think you say that: the customer will
14 specify its preferred duration and Cable & Wireless will then model the likely outcome. It
15 is customer-determined?

16 A It's based on the requirements captured from the customers in the initial contract period, yes.

17 Q Does it follow from that (would you agree with this) that it is not determined therefore by
18 BT's minimum term in the wholesale contract that you have with BT for WES or BES?

19 A No, the BT minimum term being a year.

20 Q Paragraph 11 also sets out at the beginning the factors that you take into account when
21 deciding, in conjunction with your customer, which product might be the most cost-
22 effective and the most suitable as well for that customer. There is a list of factors that you
23 give. They include things like 11.3 required bandwidth.

24 A Yes.

25 Q Coming on to price at 11.6, when you evaluate the merits of the options facing the customer
26 you obviously take into account the projected costs of each of them, do you not?

27 A We will look at the costs, yes.

28 Q Does the expression whole life costing mean something to you?

29 A It does. I mean, the way we would frame it in this is we would look at the cost per
30 particular solution that's required for the customer over that particular term.

31 Q So in that you would take into account the connection charge, any mainlink, the rental
32 charge, and the projected duration?

33 A Potentially ECCs as well and time related charges.

34 Q You take the whole lot into account when you are deciding whether or not to buy?

1 A We do.

2 Q It is actually the total cost of that package that is important to your customer and to you, is it
3 not?

4 A It's important to us and our customers, yes.

5 Q Can I ask you this: if the connection was perhaps relatively cheap, you might be prepared to
6 pay a little more on the rental provided that the overall package figures remained the same,
7 if you see what I mean, the aggregate overall package remained the same?

8 A Yes, we need to be careful of drawing that simple conclusion. There are some one-off costs
9 that we look at. We need to take account of the real time value of the money. There are
10 other factors that we need to put in other than costs into the decision in terms of potential
11 strategy around building out to a particular location as well. So to base the decision just
12 purely on a cost of a connection and the rental, I think, is --

13 Q Sorry, I think the point that I was putting is that the way in which you would evaluate the
14 cost to yourselves depends on the overall price. So when you are asking whether it is cost-
15 effective or not, the question you are looking at is the overall price?

16 A The overall price and where we take that cost from, from a cash perspective as well – one-
17 off versus recurring.

18 Q Thank you. Having gone through that exercise – and let us say you have decided that
19 purchase from BT is the most cost-effective option – do you agree with me that you would
20 not generally take a fresh decision to buy a different option unless something had happened
21 which changed the original circumstances that you took into account?

22 A I am sorry, could you repeat the question?

23 Q Having gone through the exercise of sophisticated whole life costing exercise and decided
24 that purchasing from BT is the cheapest option and the most suitable option, you would not
25 re-take that decision, would you, unless something changed that affected one of the factors
26 that affected your original decision?

27 A We could. We constantly review the "spend", let's call it, that we have on all our rentals and
28 then sit that alongside the potential growth during the period of a dispute period of our
29 exchange roll out programme, let's call it our co-location, and we may during that period
30 make a different choice to re-provide the service by shortening the main link charge. I have
31 to say, going back to the data sets, which is difficult over this long period of time, that did
32 happen but did not happen as frequently. It was not a massive thing that happened on a
33 regular basis but certainly did happen and we would shorten the main link charge.

34 Q You mention this process in your statement. If you could look at para.25.3 and 25.4, please.

1 A Sorry, is it 25.3?
2 Q 25.3 and 25.4 on p.8.
3 A Yes.
4 Q Is that the process that you were referring to in the answer that you gave before?
5 A Yes, there is a constant. Let me give you an example of acquisition of another company.
6 We may have clients that are in term but we may have, compared to the rental, a more cost
7 effective solution that we could ----
8 Q But that sort of process, where you have consolidated because of an acquisition or a merger
9 and had a closer point for which to connect them, that is possibly a good example of a factor
10 that occurs after you have made the original decision?
11 A After the original decision, yes.
12 Q So it is that sort of thing that causes you to re-evaluate your original decision?
13 A Yes. There are a number of factors that will re-evaluate the decision, acquisition, extension
14 of the network giving us opportunity to optimise, for example.
15 Q In relation to that decision about optimisation, you say in para.25.4 that in order to do so
16 you would be required to connect to a new circuit occurring an additional connection charge
17 for the replacement circuit.
18 A When we look at optimising a WES end to end you would look at -- and we provide the
19 process, so it is providing a new circuit.
20 Q When you come to evaluate whether or not that is more cost effective compared with your
21 existing Ethernet contract with BT you take into account the connection charge and the
22 rentals. You do another whole life costing exercise.
23 A We do a comparator between the baseline cost, the before cost, simply speaking, it should
24 be the rental cost which would include the main link and the opportunity for us would be on
25 the main link by looking at providing a new circuit in a more efficient way.
26 Q You say actually that the connection charge is of prime economic importance and
27 determines the viability of the change there. Is that how you would put it?
28 A Is this 25.4?
29 Q Yes, the last sentence.
30 A Yes.
31 Q If I can skip back now to para.13, please, you say there at the end of the minimum term, and
32 I assume there you are talking about the customer's minimum term?
33 A The customer's minimum term, yes.
34 Q The circuits will renew on the same terms. It is in fact a renewal process or is it a

1 continuous contract that has not been ceased?

2 A It varies massively from contract to contract, so we will have sophisticated major enterprise
3 buyers that will have all sorts of things within their contracts, including benchmarks, break
4 clauses and all sorts of things that puts in a bit of complexity in evaluating the true term
5 here, but there are those that would go through that benchmark and retendering process at
6 the end of the term. There are others that will just roll forward on existing terms. There is a
7 wider breadth to this, I would suggest.

8 Q Is that the customer's term?

9 A That is the customer's, yes.

10 Q So again I think, looking at para.13, is it fair to say that the decision really again stems from
11 the -- assuming nothing has changed, so optimisation is not the relevant point to take into
12 account, the decision is really the customer's. If the customer wants to re-negotiate or re-
13 tender the contract you will look at it again and look at other options?

14 A There are a number of triggers to re-look at our estate in terms of optimisation. I would
15 suggest that is a continual process. But in terms that there is an event, a trigger, at the end
16 of the contract, and many of our particularly large enterprise customers, that we would look
17 at the re-tendering or re-quoting process.

18 Q If I could turn to para.11.4 now, please.

19 A 11.4?

20 Q 11.4 and the second paragraph within that. You say that once a connection to a service type
21 has been laid it may on occasion be transferred to another service type and bandwidth may
22 be altered.

23 A Yes, we could increase the bandwidth of the service, yes.

24 Q At that stage are you saying that you enter into a new contract, a new wholesale contract?

25 A With the client?

26 Q No, with the provider so Openreach or ----

27 A We would take the circuit reference, so the order would be placed with Openreach to
28 essentially increase the bandwidth, upgrade the bandwidth of the service, and there is a
29 quoted price for doing that.

30 Q That price is a significant price, is it not? You were in the Tribunal yesterday?

31 A Yes, I was. I heard the ----

32 Q There was obviously a question about whether it is a called a connection or an upgrade
33 charge, but it is a significant charge, in any event, for the new electronics for the higher
34 bandwidth?

1 A Yes, depending on the level of the upgrade, you know, from a 10 to 100 -- it is a significant
2 charge. It has never been a connection charge for a new service but certainly a significant
3 cost, yes.

4 Q Again when you are deciding whether or not to upgrade, you are doing a whole life costing
5 on that new upgrade with that charge and the rentals in order to see what it is going to cost
6 you to move to a ----

7 A Yes, the upgrade would be driven by the customer requirements at that point in time so they
8 would come to us with the demand to increase the bandwidth of the service that we are
9 providing.

10 Q So presumably the customer's requirement for bandwidth has altered, it is a factor that has
11 altered, since the original decision was taken, so originally they took one bandwidth and
12 now they have decided they would like a higher bandwidth?

13 A To increase their bandwidth, yes.

14 Q In para.17, if you just read the first and second sentences, please. (After a pause): In
15 relation to the second sentence, it is correct, is it not - I think this is common ground
16 between us - that you are evaluating a new proposal that involves a connection and a rental?

17 A Sorry, let me just read the second sentence. That is not quite my understanding. So if we
18 extend beyond the minimum term, if what the two paragraphs are talking to here, so there is
19 a new agreement with the client and that is based purely on a regulatory charge. I think that
20 is what it is saying here.

21 Q But your contract with BT would have rolled over, would have continued, in the
22 background? Is that right?

23 A We would continue the contract with BT for that service.

24 Q Yes, and in relation to that contract you have obviously paid a connection charge originally?

25 A At the front, the initiation of the service. It is a one-off cost, yes.

26 Q So when you say you are purchasing rental separately from connection, really you have
27 purchased a package, have you not, Mr. Parker? You had a connection originally and it
28 carries on.

29 A We have taken a one-off cost upfront on the connection charge for that particular client over
30 a particular term, and then we will sit down with the client at a point in time when we look
31 to extend that contract. There may well be a re-negotiate. There may even be, if the term is
32 extended let's say to five or six years, we may make a different decision at that point. We
33 may go to a build versus buy choice at that point in time.

34 THE CHAIRMAN: A what, sorry?

1 A A build versus buy choice, so we may look to extend our own network because we have
2 built up that trust, let's say for example, with the client. We have had a two year contract,
3 we have done well, let's go and extend that for three, four or five years which changes the
4 dynamic of the decision. That dynamic will be predicated on the rental charge that we are
5 currently paying at that time.

6 Q You talked about the great variety between the sort of contracts you have with your
7 customers. If you have a major customer and they had a fixed term and then, at the end of
8 it, they come to you but they also perhaps re-tender or ask others, then you would obviously
9 look at what price ----

10 A Yes.

11 Q -- you can quote for them to keep the customer.

12 A And there are many factors that would play into the price that we quote, including the cost
13 of change that would occur that we heard yesterday.

14 Q On that one, where you are evaluating whether to, the one option is, continue with BT as
15 your supplier, another is terminate the BT contract.

16 A Yes.

17 Q Have I understood you rightly, you are saying that one is to extend your own, to build out?

18 A If we are given a major new commitment it brings a number of choices to the fore. One
19 could be to choose on-net for that sale or those circuits. It could also, you know, it has been
20 two or three years since we last looked at the marketplace, it could bring in a vendor choice
21 as well.

22 Q Bring in a what?

23 A A different carrier choice, a different supplier choice.

24 Q Then as regards evaluating the cost of staying with BT, are you still looking at the original
25 connection charge or are you focusing on ----

26 A We look at the rental cost. That would be the baseline, it would be the comparator that we
27 would move from. As I say, the decision would be predicated on what we pay today, and
28 what can we look at doing in the future. If we go to another provider there could be a ----

29 Q Can you keep your voice up, please?

30 A I am sorry. The microphone might be helping me here.

31 Q These microphones, I think, do not broadcast. They record.

32 A Oh, do they? I am sorry. I will definitely speak -- I am sorry. Sorry, so, yes, I think I was
33 talking through the choice that we would have at that point in time and so essentially the
34 choice, if there is a major commitment, you know, do we try and do this internally

1 ourselves, not necessarily across the whole piece but certain circuits within the estate that
2 we are offering to our clients, or there could be a vendor choice at that point but that vendor
3 choice would incur a connection and rental. Again the key dynamic here is the term
4 question, I believe.

5 Q Yes.

6 MS. LEE: But the cost of the switch, so that if you were considering purchasing, for example,
7 from a different competitor of BT, for example, you have the cost of the switch which
8 involves a connection charge and a rental. That is your point. That leeway may give you
9 the opportunity to self-build, is that right, because you know that if you can build more
10 cheaply than a replacement package, the cost of the switch, then that is a factor that you take
11 into account?

12 A We would look at the cost to do this, the sales of the competitive costs, before making a
13 decision on the right choice that we make to re-tender for that business over the longer term.

14 Q You say in your statement that Ethernet was an increasingly popular product throughout the
15 period that we are talking about. This is in para.7 of your statement.

16 A Yes, I am at 7.

17 Q And you refer to it actually as a commonplace solution for customers.

18 A Yes, I am talking through the rise of Ethernet over SDH, yes.

19 Q It was relatively new, was it not, at the beginning of the period that we are talking about, in
20 05/06, 06/07?

21 A Yes. I believe so, yes.

22 Q This is right, is it not, the replacement product, EAD, was launched by BT in 2009?

23 A 2009. That is correct, yes.

24 Q In fact, in para.14 you talk about this and say that BT ceased the provision of new WES
25 connections in June 2011.

26 A Yes, that's the first part of the end of life story around WES, yes, before we moved to EAD.

27 Q EAD is a more efficient technology, is it not?

28 A It has better monitoring capability, yes.

29 Q You say there that you expect your installed base to continue via WES over the period up to
30 2017?

31 A Yes, the installed base, or I mean I can talk to the point of why that's the exiting of the WES
32 inventory and the migration towards EAD does take time to execute, it's not a simple task.

33 Q And is that a decision affected by the connection charge of the EAD product?

34 A The EAD product, it will be, yes, and there's offers available in the market place at the

1 moment short term offers for the EAD product.

2 Q Those are offers that your company is able to take advantage of?

3 A Unfortunately not at the current time. The challenges we have are, unfortunately internal.

4 This does cause disruption to our clients, so we must go out, talk to our clients, mobilise

5 those resources, get their permission to do this because it is disruption to the service. It is

6 something we are planning on doing but it is not something currently that we are doing

7 today.

8 Q So it is a choice that your client makes about what is most convenient for it in terms of

9 timing?

10 A At the end of life they won't have a choice in a couple of years' time so that we will have to

11 do, and it is something we will need to have some very tough conversations with them about

12 doing relatively quickly, but the idea is that we start in the next financial year to kick-off our

13 WES to the EAD migration programme.

14 Q In para. 25.5, really in the last three sentences, I think, you talk about new circuits, the fact

15 that there is going to have to be a switch to EAD?

16 A Yes, as there was with LES to WES in 2006/2007, yes.

17 Q And there is a complaint there in the last couple of sentences, is there not, Mr. Parker, about

18 the availability of special connection offers?

19 A Yes, my understanding comment.

20 Q Sorry? Your understanding?

21 A Yes, I mean this is ----

22 Q I got the impression from what you said earlier that special connection offers may well be

23 available to Cable & Wireless, would you agree?

24 A They are available to all the market places, the ability to consume them is the difficulty.

25 From the offer becoming available to mobilising resources, having client conversations,

26 building the sales story to win the argument to have them to migrate now rather than later is

27 the challenge we've found, hence the time for the offers being available to us. I mean the

28 offer is only available until March next year in terms of the one I am referring to. I am

29 working with the OTA to extend that at the moment, but I am sure we will.

30 Q You are aware, are you not, of the obligations upon BT to provide information equally to its

31 customers, including its downstream business?

32 A Yes, I think the Norman statement talks to that point. I think what I'm referring to here in

33 terms of my understanding comments is if we take a look at the RFS statements for the last

34 six, seven years, and we clocked the WES estate, and we look at 2009/2010 the BT lines of

1 business have descended quite rapidly in terms of their WES estate while the rest of the
2 industry haven't, and that's all I was talking to. I wasn't ----

3 Q That is all you are saying?

4 A That's the observation that we are making at that point.

5 Q And if you had a particular complaint you could raise this, could you not, with BT's people,
6 Equality of Access Board?

7 A I would describe that as a point of escalation. At the moment this particular point sits with
8 the OTA and the Ethernet commercial forums.

9 Q So you have not escalated any ----

10 A It hasn't escalated, it's been at the OTA which is the escalation, I would argue, from the
11 Ethernet commercial forum, and if we do not get traction at the OTA we might take it
12 further. That's, I think, a different conversation.

13 Q But you could, I think? You would agree with me that you can?

14 A There is a mechanism, I acknowledge that.

15 Q Can I look now at para. 25 of your statement, please? If you could read the first paragraph,
16 please?

17 A (After a pause): Yes.

18 Q You say there that it would be a problem for Cable & Wireless and the disputing CPs if BT
19 were able retrospectively to aggregate the economic meaning of connections and rentals.
20 That is the first part of what you say?

21 A Yes.

22 Q And then secondly that you have made decisions based on the assumption that they reflect
23 appropriate costs. Can I just deal with the first part for the moment? Cost allocations for
24 the RFS and questions of compliance are not going to change the prices that you paid, are
25 they, Mr. Parker?

26 A Sorry, could you ask that again?

27 Q The questions of cost allocation and whether or not you aggregate particular sums for
28 looking at the issue here of to what extent BT's prices are cost orientated will not actually
29 change the prices that you paid. You know what the connection charge was and you know
30 what the rental charge was but that will not change because the compliance exercise is at a
31 different level? I am sorry I am clearly not making myself clear.

32 A I am not sure whether I totally understand the question to be honest.

33 Q All I was going to say is if connections and rentals are aggregated, if BT's case on that
34 succeeded it would not actually change the prices that you have paid in any way in relation

1 to connections and rentals, you have paid those?

2 A I would argue yes, for particular clients. I mean a client on a longer term deal, if the rental
3 was to increase in the connection they would pay more than someone that is on a shorter
4 term contract would possibly pay, so I think there is a difference. I am not too sure I
5 understand your point here though.

6 Q Perhaps it is a better point for the experts than for you. The decision that you made was
7 made on the basis of whole life costing and you looked at a total price at that stage?

8 A In the initial decision and, as I've spoken to earlier, it's a decision of do we build or do we
9 use a third party. Yes, absolutely, we will look at the whole life costs for that particular
10 term.

11 Q If I can put it a different way, if a larger part of that whole life cost turns out to have been
12 properly cost orientated than has currently been assessed by Ofcom, that is not going to
13 change your appreciation of how cheap or expensive connections and rentals were?

14 A Yes, I think the point we are trying to make here is it is that second decision after the initial
15 term and where we go, I think is the challenge that we have that we are talking about when
16 you refer to this being highly problematic for us.

17 Q Can I look at para. 20 of your statement, please?

18 A Yes.

19 Q Here you talk about connections which are purchased separately to rentals?

20 A Yes.

21 Q You agree in these cases - you mention that you have three cases in your table - a
22 connection was paid in relation to each of them?

23 A No, I don't think so. If you take the transfers, there's a number under that figure that we
24 have in there that I will not read out, that were straight novations over from other clients that
25 have asked us to manage our estate. So we, in Cable & Wireless would not have paid a
26 connection for those, no.

27 Q Can I start with the migration from LES to WES which is your first figure?

28 A Yes.

29 Q As I understand it these took place in 2006/07 these migrations?

30 A The majority for us in 2007.

31 Q What was happening, you in effect kept the same circuit did you not, but there was a change
32 within BT from managing the circuit at the retail group and then it changed to go over to
33 Openreach and wholesale.

34 A I am not in touch with technical changes to the product but we started buying the WES

1 circuits inventory around 2007 and migrated them over from the LES estate.

2 Q And there was a connection charge paid in relation to the LES but it is outside the dispute
3 period?

4 A I imagine there would have been.

5 Q In relation to the changes in bandwidth ----

6 THE CHAIRMAN: Just interrupting for a second, that was before your time I think, 2007, was it
7 not, at Cable & Wireless?

8 A It was indeed.

9 Q You are not directly familiar with that ----

10 A Not directly, no.

11 MISS LEE: In relation to those changes in bandwidth that you have mentioned presumably the
12 original purchase was made - well, I do not now actually, the original purchase could have
13 been made within the period or it could have been a LES/WES migration?

14 A It could have been a LES/WES migration, yes.

15 Q If it was made within the period you would have paid the connection charge in relation to
16 that circuit then?

17 A If it was within the period, it did not fall into one of the other categories, if it was a brand
18 new circuit we would have paid a connection charge at the start of the life of the product.

19 Q When the change in bandwidth comes about we have discussed that there is a sort of
20 connection charge or an upgrade charge, there is something?

21 A There is an upgrade charge to the service, yes, to go from a WES10 to a WES100, let us
22 say, for example.

23 Q Similarly, in relation to moves and transfers there may well have been, depending on
24 precisely when the circuit was bought, an original connection charge in relation to those,
25 and then when you move and transfer you pay a further fee?

26 A Well, on the transfers we would not have paid a connection charge, and on the moves
27 outside the period we found no connection charge in the data.

28 MISS LEE: Thank you. I think those are my questions, Mr. Parker.

29 Re-examined by Ms. ROSE

30 Q You said that in relation to the new service, the EAD service, that there was an issue that
31 Cable & Wireless have with BT. Can you explain what that issue is?

32 A In terms of the WES to EAD migration?

33 Q That is right, yes.

34 A There is an offer outstanding in the market place which is for a certain subset of the WES at

1 the moment, that is a time bound offer. The unfortunate thing is that with the amount of
2 effort needed within our business we are not capable of taking advantage of that offer.

3 Q So that is the offer you said that was going to end in March?

4 A I believe it is ending in March, yes, but I would have to double check that, I am afraid.

5 Q You said that you had escalated that to the OTA?

6 A Yes.

7 Q Can you explain what the OTA is?

8 A Yes, it is the Office of Telecoms Adjudication. I would describe it as a facilitation group
9 between the CPs, and it is jointly funded by Ofcom and Openreach, and it is there to
10 facilitate conversation between the CPs and Openreach to try and find resolution around
11 concerns that we might have.

12 MISS ROSE: Thank you, I have no further questions.

13 PROFESSOR MAYER: If I may, I would just like to pursue the impact of the balance between
14 connection and rental on your decision to buy or build. As I understand it if you are
15 thinking about building yourself would the balance between connection and rental be
16 important?

17 A I think it would. Again, there are other factors outside of cost that are considered:
18 availability of resources, and the speed at which we need to deliver the service. It could be
19 that our resources are not there and Openreach is available to deliver that. But the upfront,
20 one-off charge I think will make an impact in terms of whether we look to do it. Our sales
21 would look at that connection cost, look at our ability to deliver it with our internal
22 resources and look at the distance that we have to dig; compare our internal costs versus the
23 costs of that third party to deliver that outcome.

24 Q I am just trying, would your decision to build yourself be more likely to take place if the
25 connection cost is high in relation to - if the rental is low but the connection is high, would
26 you be more likely to ----

27 A If the connection cost was high?

28 Q Yes.

29 THE CHAIRMAN: Connection charge.

30 PROFESSOR MAYER: The connection charge, sorry.

31 A The connection charge is high. If the connection cost is high but the dig distance is long
32 compared with the dig distance that let's say we've got, then we could well make that
33 decision on the connection charge to bill this out, but there's other factors that are involved
34 in this and each decision is a complicated decision, it has to be said. It's based on a number

1 of criteria, not just the commercials. There's also the ability to execute within the
2 timeframes that we've got, and it's also highly dependent on the term, which is a key
3 question of course as well, and the type of client that we've got, whether it's a one-off
4 purchaser who's going to go away in a year or two's time.

5 MR. HARRISON: Just picking that point up, presumably if an area you have a number of
6 customers, that is more likely to get you to do it yourself?

7 A Yes, it comes to the sophistication point. We could get better mapping, but yes, if there's a
8 pipeline of activity in a certain area then that would also be one of the criteria for the build
9 versus buy decision.

10 THE CHAIRMAN: I have no questions. Anything arising out of that? Thank you very much,
11 Mr. Parker, you are released.

12 A Thank you.

13 (The witness withdrew)

14 MS. ROSE: Sir, our next witness is Mr. Thomas.

15 Mr. DARRYL CRAIG THOMAS, Sworn

16 Examined by Ms. ROSE

17 Q Mr. Thomas, could you please take up bundle CW2 and core bundle C. Could you go right
18 to the back of CW2 you will see tab F. The final signature page is missing from mine. I do
19 not know if that is the same for the Tribunal.

20 A I have a signed page on my version here.

21 Q It may just be mine.

22 THE CHAIRMAN: We have the signed version.

23 MS. ROSE: I think it is just my bundle.

24 THE CHAIRMAN: Yes, signed on 26th June.

25 MS. ROSE: Yes. Is that your signature?

26 A That is my signature.

27 Q And you adopt that as your evidence?

28 A I adopt that as my evidence.

29 Q If you now take up core bundle C, and go to tab 20, there we see the same statement?

30 A Yes, indeed.

31 Q Thank you, if you would like to wait there.

32 Cross-examined by Ms. LEE

33 Q Good morning, Mr. Thomas, I am going to ask you some questions. Can you look at para.6
34 of your statement, where you set out the Verizon business model in this area?

1 A Yes.

2 Q Indeed you go on to describe a number of features about the business. In para.12 you make
3 the point that you purchased solely WES circuits, so you are not a BES purchaser?

4 A No. No, we're not.

5 Q Again, in paras.22 and 25 you set out further features about your customers?

6 A Yes.

7 Q These are sophisticated customers, are they not, Mr. Thomas?

8 A Yes, they are.

9 Q When you are looking at the decision as to how to provide the Ethernet capability and who
10 to purchase it from, you obviously a whole life costing exercise, as we have been
11 describing this morning, in order to work out the total cost of that to your customer?

12 A Our carrier management team would actually evaluate the costing, yes.

13 Q At para.16 you refer to a system that ----

14 A [X - CONFIDENTIAL].

15 Q I think that was confidential. I should have pointed out that para.16 has some confidential
16 material.

17 Q There is a system there?

18 A Yes, there is a pricing system.

19 Q When you say that the costs solution is primarily determined by the rental element, is that
20 because we are talking here about long term contracts. You are taking into account the
21 connection and the rental, but obviously you will have more rental payments the longer you
22 go on?

23 A Our pricing system splits out the installation and rental, because of installation being a one-
24 time cost. Traditionally, from my understanding, because this is all done within our carrier
25 management group, they price the service based on initially the minimum terms that BT
26 imposes for the Ethernet service.

27 Q Sorry, they price it based on the?

28 A The minimum terms. We have a minimum term with BT when we subscribe to a service.

29 Q Your own minimum term for your customers - I am sorry, I might be confusing you with an
30 earlier witness - do you mention anywhere the minimum term of your contract?

31 A No.

32 Q Your contracts with your customers?

33 A No.

34 Q In terms of duration, we see what you say in para.21 of your statement about average

1 duration.

2 A That's correct.

3 Q Again, because it is confidential I do not ask you to say what the figures say.

4 THE CHAIRMAN: There is a reference to a minimum term, it is confidential, the length of it, in
5 para.20, Can I take it that that is Verizon's minimum term? You are not referring to BT
6 there, you are referring to Verizon?

7 A Verizon's minimum term.

8 Q So there is a minimum term, but the length of it is confidential.

9 A Yes.

10 MS. LEE: I am not sure, because I think his answer there was Verizon's minimum term with BT?

11 A Yes.

12 THE CHAIRMAN: I think they said they price based on BT's minimum term. That was the
13 answer. There was an earlier question of whether anywhere he mentions whether Verizon
14 has a minimum term, and I was pointing out that he does.

15 MS. LEE: I am not sure that is right, because he just answered you, Sir, saying that is Verizon's
16 minimum term with BT. I am not sure that he has accepted that.

17 THE CHAIRMAN: Can you help us. In that case, it is not confidential. In para.20 you say:
18 "Nearly all of our Ethernet circuits are active for significantly longer than the
19 minimum rental term."
20 And you specify what the minimum term is?

21 A Yes.

22 Q That minimum term, are you referring to your minimum term with your customer ----

23 A No.

24 Q -- under your contract with the customer?

25 A No. When we purchase a service from BT they hold us to a 12 minimum term for that
26 service.

27 Q That is what you are referring to?

28 A That's what I'm referring to there.

29 Q So it is not actually confidential?

30 A No.

31 Q Although it is marked as such in my copy for some reason, but it is not, is it?

32 A No.

33 MS. LEE: You go on in para.20 to explain the average length of a circuit, and it does say at the
34 beginning that they are longer than the BT minimum term. When you are doing your

1 exercise under the system that we are referring to, you referred to it under para.16, you are
2 surely looking to see what the cost of purchase projecting forward for a number of years
3 would be? Are you looking at the connection and the whole package of rentals together?
4 A We look at connection at rental separately, but again that's to my understanding because
5 that's from our carrier management team who make that decision on that service.
6 Q So you do not really know they assess the total cost?
7 A I don't, no. I'm afraid I don't, no.
8 Q In para.13 at the beginning you say that WES circuits are purchased from BT Openreach
9 and they are charged on the basis of a connection service and a rental service?
10 A That's correct.
11 Q You are talking there primarily about charges, I think. The basis for this comment that it is
12 a connection and a rental service, again is that something your carrier team deals with?
13 A Yes, that is correct, yes.
14 Q You do not really know?
15 A I know we get billed connection and rental charges, because we receive that from our
16 invoicing from BT, so I do see that.
17 Q But whether the service is a connection or a rental, you do not know?
18 A I see that on the invoicing from BT.
19 Q You see the charge?
20 A We see the charges, yes.
21 Q But you do not know - it is a question in these proceedings and it is probably something that
22 we can all debate, but you have no reason to say that there is a separate connection service
23 and a rental service, other than that you are charged separately?
24 A We're charged separately, yes.
25 Q Were you here yesterday for the cross-examination of Mr. Morawetz?
26 A I was, yes.
27 Q And you have obviously heard Mr. Parker giving evidence this morning?
28 A This morning, yes.
29 Q I asked some questions about when you reconsider the decision that you have taken. In
30 conjunction with your customer you have taken the decision to purchase an Ethernet circuit?
31 A Yes.
32 Q You have taken a certain amount of information into account when you have made that
33 decision?
34 A Yes.

1 Q I was going to ask you: unless that information changes, you do not really re-evaluate that
2 decision, do you? You do not take another decision, you let the purchase from BT roll on
3 unless and until your customer wishes to do something different?

4 A Yes, the customer tends to trigger the action of if we need to reassess the service that's been
5 delivered. Again, as I say, unfortunately it's down to the carrier management team again
6 who perform that function for us.

7 Q Thank you. I was just going to ask you one question about the average circuit length data
8 that you give in para.20, and I am not going to ask you about the figures. Would you agree
9 that this is a snapshot in time?

10 A It is, yes, it is.

11 Q Have you looked at all at Mr. Coulson's evidence in his statement?

12 A I have not, no.

13 Q Thank you, I think those are all questions for Mr. Thomas.

14 THE CHAIRMAN: Ms. Rose?

15 MS. ROSE: Sir, that is the factual evidence for ----

16 THE CHAIRMAN: You have no re-examination for Mr. Thomas?

17 MS. ROSE: No, there is no re-examination.

18 THE CHAIRMAN: We have no questions. Mr. Thomas, you are released.

19 (The witness withdrew)

20 THE CHAIRMAN: Can I just ask, I assume para.13 of this statement, Ms. Rose, those figures are
21 also not confidential?

22 MS. ROSE: Yes, I think that must be right.

23 THE CHAIRMAN: They are also BT's.

24 MS. ROSE: Yes, they are indeed.

25 THE CHAIRMAN: That does cause some confusion.

26 MS. ROSE: That is the factual evidence for my disputing CPs.

27 THE CHAIRMAN: Mr. Pickford.

28 MR. PICKFORD: I am grateful, sir. The next witness is Mr. Higho.

29 MR. TOBY HIGHO, Affirmed
30 Examined by Mr. PICKFORD

31 Q Good morning, Mr. Higho.

32 A Good morning.

33 Q Could you take up, please, bundle ST1 volume 1 and turn to tab 1. We have there a witness
34 statement entitled "Witness statement of Toby Higho"?

1 A Yes.

2 Q Could you turn to p.10 please. Is that your signature?

3 A Yes, it is.

4 Q Do you adopt this as your evidence in these proceedings?

5 A I do.

6 Q Thank you. Could you please now take up bundle ST3 tab 3. Do you have there a
7 document entitled "Second witness statement of Toby Higho"?

8 A I do.

9 Q Could you turn to please to p.14. Is that your signature?

10 A It is.

11 Q Do you adopt this as your evidence in these proceedings?

12 A No, I don't.

13 Q Could you explain.

14 A Yes, para.50 on a subsequent review I feel is -

15 THE CHAIRMAN: Could you speak up a bit.

16 A Sorry, para.50 of my second witness statement on p.14 I feel creates a false impression. I
17 would like to make a clarification, if I may. Easynet raised the issue of contractual interest
18 in the event of a regulatory adjustment in 2008, and there is evidence in front of the
19 Tribunal to that effect. There is no evidence in front of the Tribunal that Easynet raised it in
20 2005, in the negotiations in 2005. There is evidence that industry generally raised the issue
21 of interest generally within clause 12.3. I hope that clarifies that point.

22 MR. PICKFORD: Subject to that qualification, do you adopt this statement as your evidence?

23 A Subject to that, yes.

24 Q Thank you. Finally, because it is the bundle to which you are most likely to be taken, could
25 you please pick up bundle CBC tabs 8 and 9. Can you confirm that those are the witness
26 statements that we have seen?

27 A They are.

28 Q I am grateful. If you could wait there for a moment there will be some questions for you.

29 Cross-examined by Mr. READ

30 Q Good morning, Mr. Higho. I want to ask you some questions on behalf of BT. Can I ask
31 you first, you are not a trained lawyer by background, I take it?

32 A No, I'm not.

33 Q May we perhaps just go straight away and look at the question of the contract negotiations
34 which you have just made your clarification on your second statement. At para.45 in that

1 second statement, which is probably best seen at bundle C tab 9 – do you have that?

2 A I assume this is the one I have got; it says tab 9.

3 Q We see there that you say that Easynet was not purchased by Sky in 2005.

4 A That is correct.

5 Q I think it was purchased in January 2006, is that right?

6 A That's approximately right, yes.

7 Q Approximately right. You were not at Easynet in 2005?

8 A That's correct.

9 Q If we go back to your first statement which is in the tab before at tab 8, and look at para.36,
10 at the end of that paragraph you set out what Easynet was forced to focus on, the issues of
11 immediate relevance, and it was against that backdrop that Easynet entered into the contract.
12 You cannot directly say anything at all about those negotiations, can you?

13 A I can only say I used evidence from discussions with my line manager and Mr. Simpson,
14 who was around in Easynet at the time. So not directly, no.

15 Q You do not mention anything about what Mr. Simpson told you in your statement, do you?
16 What I am asking you is what you can directly yourself say about the contract negotiation?

17 A In my statement I was quite clear that I wasn't there at the time, and I put forward Mr.
18 Simpson's email as evidence of his view of the rushed nature of the imposition of the
19 contract. I think there is another important point to note as well, that the BES contract, even
20 though Openreach may have considered it to be relatively uncontroversial, given that they
21 had already gone through the pain of the WES contract, if you note from Mr. Simpson's
22 email all the attendees that he listed weren't party to the WES negotiations, which I think is
23 an important point.

24 Q I think we have to go to CW1 for your exhibit.

25 THE CHAIRMAN: Just before you do that, just so I understand, the comments you make at the
26 end of para.36, is that your deduction from looking at the email, from what is said there?

27 A Well, I did work closely with Mr. Simpson when I joined Easynet, so obviously we had lots
28 of discussions about this issue. So I do have some knowledge. Another further thing to say
29 would be that Easynet, unlike some of the build/buy network operators here today, has very
30 little choice in a lot of circumstances about where it gets backhaul services from.

31 Q Because you are much smaller?

32 A We have a smaller network, we have a core network, but we're doing something else; we're
33 buying connectivity to local exchanges in order to provide residential broadband and
34 telephony services. That's very different from buying Ethernet connectivity to businesses

1 who are naturally congregated in different areas. So people like Colt, for example, can lay
2 their own network in the City and it makes it easier for them to connect to lots of financial
3 organisations, whereas we are buying backhaul connectivity, large, high bandwidth
4 backhaul connectivity to local exchanges in rural communities, or in residential suburban
5 areas of London or whatever, which serve a high population of residential subscribers. So
6 we have very little choice about where we purchase our services from, or whether we build
7 or buy. I think that's evident from my statement. I can't say the number, but we do have a
8 relatively small amount of directly connected exchanges where we don't buy backhaul from
9 another provider.

10 MR. READ: Can we take this in stages. Are you talking now about Easynet or the Sky roll out
11 of unbundling?

12 A Well, the Sky roll out used the Easynet organisation in order to do it. So once Sky
13 purchased Easynet departments within Easynet effectively became the networking division
14 of Sky, in order to fulfil the requirements for Sky Broadband and telephony customers, but
15 also for Easynet business customers as well.

16 Q Can I just ask you to look at exhibit TH1 which I think should be in volume ST1-1 tab 1 and
17 at the end of your statement. I think that is where it has ended up.

18 A I have a copy here, thank you.

19 Q Do you have TH1 in there?

20 A I do, yes.

21 THE CHAIRMAN: That is the email of 25th April 2005?

22 MR. READ: That is correct, sir. Mr. Higho, it is right to say, is it not, that at the time that this
23 email was composed in fact there had already been a draft contract circulated some time
24 before?

25 A As you know, this is about a year before I joined, so it may have been; I can't say.

26 Q If you then look at another bundle BT32 tab 5B1, this is the issues log that relates to the
27 negotiation that you have picked up in your witness statement?

28 A It is, yes.

29 Q As we can see from that document, the third column in has industry comments and we can
30 see there is quite a number of them -25.4, 11.5, 16.5, 20.5, 23.5, 3.6. Do you see those at
31 the top?

32 A Yes.

33 Q So there has been quite a lot of industry comment going into this, just from this document.
34 Mr. Ewbank, in his statement (I will give you the reference; I do not think we need to look it

1 up) at paras.17 and 18 makes it clear that this is his issues log from June 2005 and that there
2 were then meetings throughout June to August 2005 as well, the final contract having been
3 produced in August 2005. So when you say in your witness statement that in fact the CPs
4 were not given long to respond to the contract negotiations, that is not entirely a correct
5 picture, is it?

6 A No, I think it is a correct picture for two reasons. One is obviously Mr. Simpson, who was a
7 respected regulatory professional and still is in New Zealand these days, said it was and
8 thought it was, and I would agree with him from our discussions. But also, I have some
9 experience of industry negotiations with BT to implement changes to contracts and have
10 done so subsequently, and I would say that's a relatively short, concentrated time. I think
11 other witnesses here today and yesterday have attested to the same view. I wouldn't say that
12 it's wrong, or I'm not trying to cast aspersions on any party to try to say that they were trying
13 to pull the wool over people's eyes, I'm just saying it's a very short and concentrated period
14 of time for a new contract to come into effect. Again, I will reiterate the point that the
15 attendees on that contract group, as you can see from Mr. Simpson's email, none of them
16 were in the WES contract negotiation. They were all LLU operators and so they had a very
17 different approach to what they were trying to procure and use Ethernet services for, and
18 had a very different need. So it wouldn't necessarily mean that just because the WES
19 contract negotiations had been done that it would be an easier job to put in place the BES
20 contract negotiations.

21 Q I see. But as you say of course, you have got no direct experience of that at all.

22 A I have direct experience of negotiating contracts with Openreach in a hothouse environment,
23 and I would say that the timescale was tight – not impossible, but it was tight.

24 Q Did you have any direct involvement in the negotiations that took place in 2007 and 2008?

25 A No direct involvement. My line manager was the General Counsel of Easynet, Mr. Richard
26 Croft, and he would have commissioned Towerhouse Consulting to act on our behalf. Mr.
27 Croft was obviously fully aware of our concerns in relation to BES overcharging and the
28 potential for us raising a dispute in the future.

29 Q So the long and the short of it is that, for the two negotiation periods that are being
30 discussed in your witness statement – i.e. the original BES contract in 2005 and the
31 renegotiations that take place in 2007 and 2008 – you attended no meetings, you took no
32 part in any of the discussions yourself, is that right?

33 A My statement doesn't purport to say that I was directly involved, in no place does it.

34 THE CHAIRMAN: Whether it is a criticism or not, but is it right you did not attend any of the

1 meetings?

2 A I attended some of the Ethernet forum meetings; I didn't attend any of the direct contract
3 negotiations, no.

4 Q With BT?

5 A With BT.

6 MR. READ: You see, let us just go back to where we started on this, which is para.50 your
7 second statement.

8 A Okay.

9 Q You do say in that, because you are directly commenting on Mr. Cox and then subsequently
10 Mr. Ewbank's evidence, you do say that the two week period between meetings is -- You
11 say:

12 "The fact remains that notes from the meetings record Easynet "could not have known
13 the future importance of these products and business at the time and considered
14 interest to be of sufficient importance to raise concerns with the clauses. That the
15 parties were primarily focused in resolving operational issues within a short
16 timeframe and prioritised those discussions over cost recovery in the potential event
17 of BT overcharging CPs in direct breach of its regulatory operations, does not detract
18 from the fact that Easynet challenged Clause 12.3".

19 As I understand it, your only basis for making those suggestions is the documentary
20 evidence that you have actually exhibited to your statements?

21 A The documentary evidence and my knowledge of what was going on subsequently in 2006
22 when I did join Easynet.

23 Q But you cannot comment on these particular negotiations. When you say about Mr. Cox
24 and Mr. Ewbank's evidence, who were there at the negotiations, you cannot do it from
25 anything other than the documents that you are relying upon.

26 A I am not saying that Mr. Cox is wrong. I am not criticising anything he said. I am just
27 saying that I thought the negotiation period, on the evidence of Mr. Simpson's email and my
28 own experience, was relatively tight. I do not see that as controversial necessarily. All the
29 other CPs ... have said the same.

30 THE CHAIRMAN: Have I got this right, based on your subsequent experience, looking at what
31 you see about this, that is your opinion?

32 A Yes, so that is not really a direct factual statement. Just to make that clear.

33 Q Yes.

34 A That is helpful.

1 MR. READ: Can I just explore what you say in para.48 about Mr. Nasrella?
2 A Nasralla, is that right?
3 Q Nasralla, sorry.
4 A There are some "Nasrella" typos in your witness statements that I noticed.
5 Q I do not want to do a disservice to Mr. Nasralla.
6 A I am not in a position to be critical given that I have just not accepted my second witness
7 statement!
8 Q If you look at para.48 you say:
9 "I understand that Mr. Nasralla was a technical adviser at Ofcom at the time".
10 Did you ever meet him?
11 A Yes, I know Neil.
12 Q All right.
13 A I have been in the industry for quite some time and I have been attending industry and
14 Ofcom meetings for a period before joining Easynet, so I know Neil. He is one of my
15 LinkedIn connections just like many other people here.
16 Q Because one of the points about it though is that you are saying in there that he would only
17 have been an observer in relation to the technical aspects of the discussions. Again you
18 have got no direct knowledge of that?
19 A No, that is not correct. That is the role that Mr. Nasralla would play in industry forums, as
20 would any other Ofcom technical advisers. They were not there as lawyers and they were
21 not there to negotiate settlements to contract disputes.
22 Q But he was something a bit more than just a technical adviser on these things, was he not?
23 He was there as Ofcom's representative to see what was going on?
24 A Observer status, that is probably correct, yes.
25 Q Because on the Ethernet forum he did actually participate in quite a number of discussions,
26 for example about pricing.
27 A Yes, I do not think Mr. Nasralla is in a position to dictate what pricing should be in those
28 meetings. I think really Ofcom are better placed to say what Mr. Nasralla's role is, but from
29 my observation of technical advisers from Ofcom they are mainly there in an observer status
30 and potentially to provide some clarification sometimes.
31 Q This is in the whole context of the WES forum discussions?
32 A In the Ethernet forums or the WLR forums and the LLU forums, or all the other product
33 forums where Ofcom attend.
34 Q Could you take BT17 and turn to Tab 21? We can see that this is actually an Ofcom

1 presentation about WESA, WESB, Ethernet aggregation and DWDM.

2 A Yes.

3 Q We see that the presenter is Neil Nasralla.

4 A That is right.

5 Q He is doing this on behalf of Ofcom and particular industry forum.

6 A Yes.

7 Q If we look at the first line, for example ----

8 A Obviously it does not say that it is an industry forum but I do not doubt that he would

9 present a PowerPoint presentation of this type sometimes. I am trying to remember whether

10 I have actually seen this one myself.

11 Q If you just look at the second page, the first slide, the second page of the text:

12 "This is a short presentation discussing WESA, WESB, Ethernet aggregation and

13 DWDM.

14 Openreach are reassessing the costs and pricing of the WEES and WESA and trying

15 to ensure that they have a consistent approach to pricing of the WES portfolio.

16 There are some fundamental questions about what building blocks should be used for

17 backhaul".

18 Then, for example, if we go on to the conclusion at p.10 ----

19 THE CHAIRMAN: Perhaps the last bullet is worth reading in the introduction?

20 MR. READ: In the introduction, sorry, yes. Perhaps I should.

21 "This presentation discusses the issues with the relative costs of provision of backhaul

22 and the possible approaches to pricing given an assessment of the cost drivers".

23 So he is directly talking there about pricing, is he not?

24 A It does not sound like he was setting any policy though, does it?

25 Q No.

26 A I am sorry, I should not ask you any questions.

27 Q I do not suggest for a moment that Mr. Nasralla would be in a position to set Ofcom's

28 policy, but what I am putting to you, Mr. Higho, is that he was something more than a

29 simple technical adviser. He was somebody who was actually a core link between Ofcom

30 and the Ethernet, WES and BES portfolios.

31 A You may be reading something more into the term "technical adviser", that is somewhat

32 more lowly, than I am. I do not see this presentation or Mr. Nasralla's role discordant with

33 the term "technical adviser".

34 Q If we go on to p.10 ----

1 THE CHAIRMAN: I suppose what perhaps the misunderstanding is, by "technical adviser" do
2 you mean only concerned with the technological aspects of the product?

3 A I have thought about that and I think Mr. Nasralla, who is obviously very technically savvy
4 in the technology sense, but I do not necessarily see the technical adviser role as purely
5 limited to talk about technology. It may talk about the technicalities of industry processes
6 or regulations, so it might be broader than that.

7 MR. READ: Or pricing and possible recovery?

8 A It may talk about the issues of -- Obviously he is not an economist or an accountant, but he
9 may talk about the issues that arise. I do not think he sets policy. He may be able to
10 provide useful educational input into the participants to industry forum. I do not think that
11 is in doubt.

12 Q You understand, did you, the ----

13 THE CHAIRMAN: If it was put, if I can interrupt, sorry, Mr. Read, by one of the witnesses who
14 was at some of these meetings, that he was instructed by Ofcom to attend and attended
15 various sub-groups and it was partly a bit as a facilitator for some of the discussions.
16 Would that be a fair statement, do you think?

17 A Ofcom have an advantage of being central to other competing views and have obviously
18 information flowing through them and also have an influence themselves, so they can help
19 in facilitating discussions. That is a fair assumption.

20 MR. READ: The reason why you mentioned Mr. Nasralla in your statement, was it not, was
21 because you were responding to what Mr. Cox and Mr. Ewbank, who were at all these
22 meetings, had to say about his role? That was the purpose behind what you have said in
23 para.48.

24 A Yes, I read Mr. Cox's and Mr. Ewbank's evidence as some sort of -- and Mr. Nasralla's
25 presence -- as some sort of approval or Ofcom approval to clauses in contracts that were
26 agreed or were not agreed between the parties, and I do not consider that to be Mr.
27 Nasralla's role at all. Clearly as he is not a lawyer I suspect that would be rather difficult
28 and awkward for Ofcom to expect him to do that.

29 Q What they were actually suggesting, was it not, was that if BT had been autocratically trying
30 to impose terms on the CPs, then you might have expected Mr. Nasralla to have raised some
31 concern about it?

32 A In the meetings? Not necessarily. I think Ofcom are quite keen to encourage market
33 participants and BT to resolve their commercial contractual issues themselves. I think they
34 have historically shown a reluctance to get heavily involved in things that they feel are

1 better solved by negotiation.

2 Q Can you just go back to Tab 3 in Core Bundle C? Have you got it?

3 A I think so.

4 Q It is Mr. Cox's statement, the one you are responding to.

5 A Yes.

6 Q If you go to para.18, can you just see what he says:

7 "Mr. Nasralla, who had been appointed to oversee the contract negotiation, attended a

8 significant number of the meetings relating to the discussions concerning the WES

9 contract and was regularly copied in on email discussions. Parties can and did seek to

10 lobby the Ofcom representative at the meetings to try to get Ofcom to side with their

11 view in contract discussions about the terms. In any event, everyone was aware that if

12 a CP did not like a particular term they could use the dispute resolution procedure in

13 the Communications Act to appeal to Ofcom".

14 So he is saying something more than what you are suggesting, which is that Mr. Nasralla

15 was there solely as a technical representative. He was there as the representative of Ofcom

16 in the contract negotiations.

17 A I do not think that means he would be in a position to resolve disputes over terms and

18 contracts, and if CPs made pleadings to him my advice would be that they were wasting

19 their time because Mr. Nasralla is not in a position to resolve those issues.

20 Q He may not be in -- Let us find Core Bundle E, I think. Let us just have a look at that.

21 A E?

22 Q E, yes. It is a separate bundle. If we go to Tab 12, and go to p.43 in the manuscript at the

23 bottom, p.493 in the actual typed document -- I am sorry, 492. I should have said p.42 and

24 492.

25 A This is Part 2 of the Conditions?

26 Q Yes, Part 2 of the Conditions. If we look at HH1.2, it is an express requirement on BT that

27 the provision of network access in accordance with HH1.1 shall occur as soon as reasonably

28 practicable and shall be provided on fair and reasonable terms, conditions and charges".

29 You are not saying that Mr. Nasralla would not have been aware that that obligation was on

30 BT when it was negotiating contracts?

31 A No.

32 Q So if he thought that BT was behaving in an unfair and unreasonable way, he certainly

33 would have reported it back to those within Ofcom, would he not?

34 A He might have. He is not a lawyer so whether he knows whether it is unfair or unreasonable

1 is another question entirely, but he might well have reported the fact to Ofcom and I suspect
2 there was a lot of information that flowed from the industry groups, from the technical
3 advisers, back into Ofcom.

4 Q Can we move on? Can we look at para. 30 of your first statement? You say in para.30:

5 "It is now too late to turn back the clock. However, Sky has publicly committed
6 that, subject to the outcome of the appeal(s) of the Statement, Sky will ensure that
7 customers benefit from the money paid back by BT by spending the majority of
8 this money in customer-facing areas of its business."

9 A Yes.

10 Q I just want to explore how this actually works in practice, because Sky has had the money
11 since early January of this year, has it not?

12 A That's correct.

13 Q Has it put it into an escrow account?

14 A It has been ring-fenced. From an accounting point of view is it properly in an escrow
15 account? - I suspect not.

16 Q So it is actually somewhere in ----

17 A Somewhere ready to be spent, or rather it is more or less ready to be spent, when the case is
18 resolved.

19 Q Of course, it may be put in customer facing ways forward, but the problem of course is that
20 you cannot actually reimburse the customers who may have ultimately been overcharged?

21 A I think my statement talks about the fact - I have to tread carefully here about confidential
22 information - but we can compensate or spend money that would be beneficial to many of
23 the customers that were affected.

24 Q But they still have to be your customers, do they not?

25 A That's right, so some, as I openly say in, I think, my second witness statement would have
26 left - it would be a great organisation if we could hold on to everybody - but a big chunk of
27 our subscriber base affected at the time are still with us. I also make a point that future
28 customers beyond the date of overcharging may also have been adversely affected, and even
29 more of those are with us and they would also benefit from things that we spend in the
30 customer facing areas. I would like to be more precise about what we would spend it on but
31 until we see the colour of the money with some certainty, we cannot tell you what it would
32 be.

33 Q But perhaps it means you are less certain about the appeal than might be suggested?

34 A I preach prudence at all times.

1 Q Can we just look back through the earlier paragraphs?
2 A Of my statement - this particular statement?
3 Q Yes, this particular statement. Can I ask you first this question: Sky is, as a group,
4 significantly resourced. I think that probably goes without saying?
5 A Not quite as big as BT but it is a significant size of organisation.
6 Q Would you agree that it is a sophisticated market operator?
7 A Yes.
8 Q And so, therefore, when it carries out projects it presumably will have compiled quite a lot
9 of calculations as to likely projections of sales, quite a lot of information about pricing
10 effects and so on and so forth?
11 A Yes.
12 Q And that data would be quite comprehensive in terms of the information that you could
13 glean from it as to how Sky's business is likely to go ahead and go forward?
14 A It tries hard to work through business proposals and business cases, yes.
15 Q Because the question I want to ask you about is really paras. 24 to 29, because you say the
16 detrimental effect of BT's high prices on Sky has been manifold?
17 A Yes.
18 Q You say that it would have affected Sky's unbundling programme?
19 A Yes.
20 Q But you have provided no information at all about how you say that effect has actually taken
21 place? Surely some information must have been available that you could have used to say
22 what was likely to have happened had the prices been lower?
23 A I don't think people in our business would have been business casing against prices that
24 didn't exist, so they would have only done business cases against prices that were in play,
25 and also they would have taken a prudent approach about forecasting those costs forward as
26 well. But it is clear that when we look at a business case for unbundling, for example, that a
27 variety of factors are taken into account to whether we are going to unbundle a particular
28 exchange and the cost of the backhaul circuit is an important component.
29 A useful thing for the Tribunal might be to understand how important backhaul costs are
30 when you unbundle an exchange. So, let us say - and I'll not talk about confidential
31 numbers - we unbundle over 2000 BT local exchanges and that gives us an approximate
32 coverage in the UK of around about 90 per cent of premises.
33 The first few hundred of those exchanges are very big ones and so the cost of the backhaul
34 becomes less important in terms of the viability of that exchange compared to the more

1 marginal exchanges that have become very small. So for a few hundred or few thousand
2 exchanges then the cost of backhaul becomes quite a dominating fixed cost item and then
3 the business case for those particular more marginal exchanges becomes quite sensitive to
4 the price of backhaul. So for Sky, who has rolled out over a number of years to many, many
5 exchanges and done work in phases, one important component to the business case in that
6 decision was the price of the backhaul, particularly once you go through the larger densely
7 populated exchanges at the beginning of the roll-out.

8 Q Mr. Higho, the point I was putting to you is that you have made a series of broad assertions
9 in para. 25 to 29 but adduced absolutely no statistical or other information to back them up.
10 Why, if this is what has happened, do you not have that information?

11 A It seems to me rather uncontroversial that if there is a particular fixed cost to unbundle an
12 exchange at a particular level, which has proven to be too high, and the viability of business
13 cases and payback is dependent on the cost of that backhaul, then it becomes apparent that
14 the roll-out would have been affected.

15 Q Can you take core bundle B, and just before you are referred to it can I check to see that that
16 is the non-confidential version? Yes, I am grateful. You recognise this, do you, it is the
17 Decision, that forms the subject matter of this appeal, by Ofcom? You have read it before?

18 A Yes.

19 Q If you go to para. 10.46 there is an issue about economic harm and whether it is necessary or
20 not and I do not think we need to go into that, but just looking at the submissions that TTG
21 and Sky and TTG put together, you can see that most of what you are suggesting in your
22 statement was contained in your original submissions that were put to Ofcom, do you see
23 that?

24 A I'm sorry, I'm just reading it for a moment.

25 Q If you read it through to 10.50?

26 A All the way through, okay. (After a pause): Yes.

27 Q So that is what you are actually putting to Ofcom, and if we go to para. 10.77, p.146 we see
28 what Ofcom say about it. At 10.77 it discusses the economic harm, and at 10.80 it talks
29 about impact on retail demand. At 10.81 it indicates the disputing CPs charges to their own
30 customers are based on wholesale input costs.

31 "As higher wholesale charges represent an increase in marginal cost for the
32 Disputing CPs, it is possible that at least some of the higher charges for WES and
33 BES purchased from BT (compared to the counterfactual) may have been passed
34 on to the Disputing CPs' customers through higher retail prices. The exact extent

1 to which the increased WES and BES charges to the Disputing CPs were passed on
2 to end users depends on the demand and competitive conditions in the retail
3 market.

4 10.82 TTG claims that some of the higher WES/BES prices would have been
5 passed on in higher retail prices (see paragraph 10.46 above), although it does not
6 provide supporting evidence.

7 10.83 Regardless of the exact level, as long as some level of passing-on occurred,
8 economic harm may have been suffered as a result because end-users, such as
9 customers consuming LLU-based products, will have faced higher prices as a
10 consequence of BT's charges.

11 You can read on to the end of that if you want to, but at 10.86 Ofcom deals with distorted
12 investment decisions, and it says:

13 "Prices above DSAC may have distorted CPs' choice of wholesale input and their
14 build or buy decisions. For example, at the margin, higher BES prices could have
15 distorted investment decisions by deterring CPs from unbundling some local
16 exchanges that could have been unbundled under the counterfactual. There may
17 therefore have been less infrastructure investment than was optimal or desirable.
18 For example, Sky and TTG argue that the scale and pace of LLU roll-out were
19 constrained by BT's BES charges (see paragraph 10.47 above)."

20 - which is the passage I have already referred you to. My point is simply this, Mr. Higho,
21 that Ofcom, when it considered this material - and, of course, we know that Ofcom has a
22 very good oversight of what is happening in the market - Ofcom talking in terms of "may"
23 and "might", they do not talk in terms of it being "manifold", and that it did happen, which
24 is what your statement suggests?

25 A My statement does suggest it, and I can be quite clear about consumers paying higher prices
26 if the LLU roll-out programme was slowed down as I described earlier, because in off-net
27 areas, where we do not roll-out LLU, our broadband penetration is much lower, and the
28 prices for the services we offer in those areas are much higher, so ergo some consumers are
29 deprived of the benefits of competition and lower prices as a result.

30 Now, just because Ofcom say something does not mean that I have to agree with them,
31 otherwise we wouldn't be here appealing, would we?

32 Q I think that probably you have made your position clear on that. Can I then ask you to look
33 at para. 20 of your second statement, which is in tab 9 core bundle C.

34 A Thank you.

1 Q Here you are describing the point about how quickly or otherwise Sky would have referred
2 the dispute if effectively there was an incentive of no interest. That is what you are
3 responding to. You are responding to Dr. Maldoom's point. Do you see that?

4 A Sorry, I am quite a slow reader, so just bear with me a second. (After a pause): Right.

5 Q I do not want to spend a huge amount of time about the whole course of these negotiations
6 because it is quite a long, involved chapter that is involved.

7 A It is a very frustrating process.

8 Q Can we just stand back from it and agree on the fact that on 10th January 2008 the issue is
9 first raised, is it not?

10 A It is the first time we corresponded with Openreach on the matter, yes.

11 Q And the dispute is eventually referred in July 2010?

12 A That's correct.

13 Q It is fair to say and, if need be, I will take you to the letter, that when you raised the original
14 issue with BT you were talking not just about historic prices, you were also talking about
15 current prospective prices?

16 A Possibly, we should look at the letter maybe just to be sure?

17 Q Yes, okay, certainly. I think we can find that at ST3 and it should be tab 3A?

18 A Yes.

19 Q And it sets out the regulatory material, the regulatory accounts, goes through a series of
20 reasons why you say it is inappropriate, and then finally, at the bottom of p.2 it says:
21 "We ask you urgently to review these prices (historic, current and future)."

22 A Yes.

23 Q If, let us say, you have brought the dispute by December 2008, the answer or otherwise on
24 BT's prices would have been, assuming that the timeframe was the same, a year and a half
25 earlier than, in fact, it was resolved?

26 A I think it could have been, but obviously there were other parallel legal and regulatory
27 challenges over cost orientation going on at the time, and that may have meant that you
28 can't simply add on or take off 18 months if the dispute was brought earlier. One possible
29 outcome could be that it could be that way.

30 Q The result of it is that if the issue of BT's pricing had been adjudicated on and resolved a
31 year and a half earlier, then obviously there would be a year and a half less of a problem in
32 terms of overcharging in the market? That is a simple proposition, is it not?

33 A If forward looking prices were adjusted downwards as a result of the dispute then the
34 speedier the resolution to the dispute, the quicker the prices went down.

1 Q As I said, we could spend a lot of time going through this particular train of correspondence
2 that you describe. I do not want to take the Tribunal's time on that, but I just want to focus
3 on one period. Can you look at para.28 of your second statement, which is at tab 9 in
4 bundle C. Do you see that?

5 A Yes, "BT said that it would provide any further information by 20th November".

6 Q Yes, and on 20th November, as you say there, BT wrote to Sky and set out its position. You
7 do not actually exhibit that letter, or it is not exhibited in Sky and TalkTalk's material?

8 A We certainly concentrated on a few key letters in order to save the reading time for many
9 people. There was lots and lots of tortuous correspondence.

10 Q Can I just ask you to refresh your memory from that letter of 20th September, which we
11 have copies of here. (Same handed) Presumably you must have read that letter before ----

12 A I can't guarantee, let's have a look at it and I'll tell you. Obviously much of the
13 correspondence is with Delia Bushell, so I can't say I did see it necessarily.

14 Q This is a letter that goes both to you and to Mr. Heaney at Carphone Warehouse, which
15 subsequently became TalkTalk?

16 A That's correct.

17 Q It is quite a long letter, but as you can see from the second paragraph it says in terms:
18 "I understand your concern that you think historic payers' prices might not be
19 consistent with the relevant regulatory obligations. I undertook to review the
20 situation at our end and then to get back to you with any further or more detailed
21 comments we might have. Having reviewed our position I have to say that it
22 remains broadly unchanged and it would be probably inappropriate for me to give
23 you further specifics.
24 We understand that you may wish to raise this further with Ofcom and that is
25 indeed your prerogative."
26 Do you see that?

27 A I do.

28 Q So BT was making it pretty clear then that they were saying "Go away", were they not, "and
29 if you want to take it further raise it with Ofcom"?

30 A I think they offered that we could go to Ofcom. Obviously the subsequent part of the letter
31 is quite long, so they are obviously trying to persuade us that there's good things that they're
32 doing for us and maybe we shouldn't, but they certainly raised the issue of potentially taking
33 it to Ofcom at this stage, yes.

34 Q What they are not saying is, "Let us continue further negotiations on this", are they?

1 A They didn't say it, but funnily enough we did have further negotiations, so patience and
2 persistence was a virtue on our behalf. In fact, if we had gone at that stage we would have
3 lost the opportunity to have the without prejudice discussions that I can't talk about today.
4 So, in fact, our policy of not taking a dispute was probably a very good thing, because we
5 properly explored a commercial solution.

6 Q I just want, Mr. Higho, you to concentrate on one period which is between para.28 and 29
7 of your statement, because you are not suggesting at all, are you, that anything further
8 happened between 20th November 2008 and 1st July 2009?

9 A Obviously things did happen, and footnote 20 in my statement discusses the basis for the
10 hiatus and the reasons, and things that we were doing in the background.

11 Q It says, "During this time", and I am looking at your footnote, "BT continued not to show
12 any interest in progressing the discussion". The point I was putting to you is that nothing
13 happened in that period from 20th November 2008 until, when you pick it up in the next
14 paragraph, 1st July 2009?

15 A And so our patience and persistence was rewarded by a subsequent unlocking of BT later on
16 in the year. Given that Sky has a strong proclivity towards resolving disputes commercially
17 without recourse to the regulator, something that it doesn't do lightly, then I think that was
18 probably a good policy in hindsight.

19 Q Mr. Higho, I want you to focus on the question I am asking. I am asking you, you are told
20 in the letter of 20th November 2008 that BT is not going to negotiate further, its position
21 remains as it was, "and we understand you may wish to raise this issue further with Ofcom
22 and that is your prerogative"?

23 A Yes.

24 Q You do nothing further in any form of negotiations until 1st July 2009?

25 A Exactly, where we have the start of some negotiations which Openreach said they weren't
26 going to do. Therefore, our patience was rewarded. I don't understand what the problem is
27 here.

28 Q I am saying that you did nothing for a period of over seven months between 20th November
29 2008 and 1st July 2009?

30 A We did lots of preparatory work in the background. We didn't have discussions with
31 Openreach on that matter for nine months. We subsequently did. I still don't understand
32 what the problem is.

33 Q Let us just look at para.29, because you say:
34 "Sky raised the issues of overcharging again on 1st July 2009 following publication

1 of a review of BT's 2007/08 regulatory financial statements."

2 Do you see that?

3 A Yes.

4 Q Those regulatory financial statements can be found, if you just bear with me while I find the
5 reference, at BT bundle 8. If you go to tab 17, which I think is the last tab in that bundle -
6 do you have that?

7 A Tab 17, yes.

8 Q If we go on through the document to ----

9 A Do you want AISBO?

10 Q Sorry?

11 A Are you looking for AISBO?

12 Q Yes, one of which is AISBO.

13 A I think it is section 4, round about page ----

14 Q Page 40.

15 A No, that is access market. Yes, I see.

16 Q That is the information that you would be relying upon, is it not?

17 A One of the sources of information, yes. Our major source of information in it, obviously
18 that's the only real cost information we have from BT.

19 Q You have p.40 for WES, p.41 for BES, and you have p.42, which is the restatement for the
20 previous year?

21 A Yes.

22 Q That is all the additional information that you can really, as you say, get out of the RFS?

23 A Unless you want to try and dig deeper, but generally, for my purposes, I normally look at
24 these ones.

25 Q Although I cannot find the specific date in the document itself, and if I am wrong on this I
26 will be corrected, but the publication date was 16th September 2008 for this particular set of
27 RFS. If it was published on 16th September 2008, and if that is all the material that you
28 could get out of it, how can it possibly actually have been a problem for you, as you
29 suggest, to have taken seven months to consider it, because that is what you are suggesting,
30 is it not, following publication of review of BT's ----

31 A Well, maybe you can tell me where I'm suggesting that. I'm saying it's one of the things that
32 we did. I'm not saying that's the cause of the seven month delay, I don't think, but perhaps
33 you can tell me.

34 Q You would have, in fact, had these six weeks before you ever had your meeting on 6th

1 November 2008?

2 A They would have been published before then, yes.

3 Q And we see the information you would have had from it, so by the meeting of 6th November
4 2008 you would have been in a position to address them, would you not?

5 A I'm not saying here that this is the sole cause of any delay, and I am not saying here what we
6 did with it. We may have chosen to take some time to consider it. We may have considered
7 doing some modelling. We may have done all sorts of things in that time, but what I am not
8 saying is that it's the sole cause of the seven months delay. Also, I'm still saying that our
9 choice, or the fact that we continually persisted to engage with BT, or try to engage with
10 BT, to get them to discuss the substantive issues, something they completely failed to do for
11 the earlier part of the correspondence, actually proved to be a good thing because we did
12 finally get an opportunity to negotiate, even if the negotiation was unsatisfactory.

13 Q My point is simply this, Mr. Higho: if you had known that no interest would be recoverable
14 on any subsequent sums you recovered from BT, you would have pushed harder between
15 20th November 2008 and 1st July 2009, would you not?

16 A No, not at all, and I think my evidence says that it was fanciful, in my second witness
17 statement. It's not how we work in practice and it is not what we did.

18 Q Thank you, Mr. Higho, if you would just like to wait there?

19 MR. PICKFORD: I have no questions in re-examination.

20 THE CHAIRMAN: We have no questions. Thank you, Mr. Higho, you are released.

21 We will take a break until 11.40.

22 MR. READ: 11.40, Sir, I was going to say, can I have 15 minutes in order to take some
23 instructions, and I hope that that will ----

24 THE CHAIRMAN: That is 15 minutes, in fact I think it is 16 minutes!

25 (Short break)

26 THE CHAIRMAN: Yes, Mr. Pickford.

27 MR. PICKFORD: I call Mr. Heaney.

29 MR. ANDREW JOHN HEANEY, Affirmed

30 Examined by Mr. PICKFORD

31 Q Good morning, Mr. Heaney.

32 A Good morning.

33 Q Would you please take up bundle ST1 volume 1 tab 2. Do you have there the first witness
34 statement of Andrew John Heaney?

1 A I do.

2 Q Could you turn, please, to p.9. Is that your signature?

3 A That is my signature.

4 Q Do you adopt that evidence in these proceedings?

5 A Yes, I adopt this evidence.

6 Q Could we then please go to the core bundles, core bundle C tab 10. Albeit unsigned, is that
7 a copy of the same witness statement.

8 A Yes, it is.

9 Q Turn over, please, to tab 11. We have the second witness statement of Andrew John
10 Heaney. Turn, please, to p.8. Is that your signature?

11 A That is my signature.

12 Q Do you adopt this statement as your evidence in these proceedings?

13 A Yes, I do.

14 Q Thank you. Just wait there, there will be some questions.

15 Cross-examined by Mr. READ

16 Q Mr. Heaney, as you know I am asking questions on behalf of BT. Can I ask you first to turn
17 to your first witness statement which I think should be at tab 10 in core bundle C, if you
18 have it to hand.

19 A I have it, thank you.

20 Q May we go to para.21. You say:

21 "I understand TalkTalk had had little choice in 2007 (when it started rolling out its
22 LLU network) but to sign the contract in order to be able to buy BES services from
23 BT to support its LLU roll-out programme."

24 Can I just be clear about the dates, because if you go back to para.11 in your statement you
25 say about halfway down the page: "In 2006 we began rolling out our own network using
26 LLU."

27 A I think your comment is correct, it should read 2006 in para.21.

28 Q If we go back to para.21 you say that TalkTalk had little choice in 2006 but to sign the
29 contract?

30 A Correct.

31 Q There is a reason for that, is there not, because that is the very nature of BT having an SMP
32 condition imposed upon it?

33 A I don't think it's necessarily to do with them having an SMP condition; we wanted to buy the
34 product, we obviously needed a contract in place between ourselves and BT to allow the

1 supply of that product.

2 Q But it is a result of the SMP obligation not to unduly discriminate, is it not? They cannot
3 offer a different set of terms to TalkTalk different from the ones that they offer to any of the
4 other CPs. That is the nature of the SMP condition?

5 A That's correct. As a result of the SMP condition they effectively use a single contract for
6 all customers.

7 Q So there would not have been any opportunity for BT in 2006, when TalkTalk wanted to
8 take it up, to offer TalkTalk anything different than what it had already agreed with other
9 parties?

10 A That's correct, yes.

11 Q In essence, if you like, TalkTalk had come too late to the party. The contract had already
12 been negotiated?

13 A Yes, effectively.

14 Q In para.18 of your second witness statement (in the next tab in core bundle C) you say:

15 "I would like to make the following points in relation to the witness statements of
16 Mr Nicholas Cox and Mr John Ewbank. To the extent I have not commented on
17 those witness statements, this should not be taken to mean that I agree with them."

18 The statements of Mr. Cox and Mr. Ewbank are dealing with effectively two sets of
19 negotiation, or three potentially. The first set is the WES contract negotiations in
20 2004/2005; the second set is the BES contract negotiations that take place between April
21 and August 2005; and the third set is the negotiations that go on in 2007 and 2008?

22 A Yes.

23 Q So if we just look at the first two of those negotiations, you were not at either of those, were
24 you?

25 A No, I wasn't, and at that stage Carphone Warehouse (which is the predecessor of TalkTalk)
26 wasn't actually purchasing those products.

27 Q As regards the third set of those negotiations, the 2007/2008 negotiations, you were not
28 involved in those either?

29 A No, we did not participate in that review.

30 Q So what I am a little mystified about, Mr. Heaney, is how you can go on and criticise Mr.
31 Cox's and Mr. Ewbank's evidence over a number of paragraphs when you had no input at all
32 into the contract negotiations.

33 A My comments, obviously it was clear in my statements that I was not specifically involved
34 in those negotiations. However, I have been involved in negotiations with BT on a number

1 of other aspects and the behaviour of BT that was reported to me in those contract
2 negotiations is very similar to the behaviour that I've seen in other negotiations. Therefore,
3 that's what reinforced my view in addition to the comments that I've been fed by other
4 people.

5 Q It is like this, is it not, that you are doubting the evidence that Mr. Cox and Mr. Ewbank
6 give about those three sets of negotiations without any direct knowledge of it, but at the
7 same time just basing it on completely different sets of negotiations?

8 A No, I based it on two things. First of all was the comments I received from other people
9 who actually were participating in those negotiations, and the second one is I have my own
10 knowledge and direct knowledge of how BT behaves in negotiations, and I felt that what I
11 was told about those negotiations in 2005 and 2007/2008 was consistent with that. So I
12 don't think I ever have claimed to have had any direct knowledge of what happened, but the
13 reports I had were consistent with my understanding of the way BT behaved.

14 THE CHAIRMAN: I do not quite understand. The first two sets of negotiations – when did
15 Carphone Warehouse become TalkTalk?

16 A Good question. About 2011. Sorry, I should be clear, actually we demerged as a separate
17 company in April 2011. We were known as TalkTalk prior to that period but certainly
18 when we were first rolling out our network in 2006/2007 and I am pretty sure 2008, we
19 were effectively a part of Carphone Warehouse and referred to as Carphone Warehouse.

20 Q As Carphone Warehouse was not involved in the first two sets of negotiations, who is it that
21 is giving you the information about them that you are relying on?

22 A Sir, some of the comments that were mentioned, indeed, by Mr. Higho, Sir, Mr. Simpson
23 had made some commentary; I had seen some documents as well from Towerhouse
24 Consulting and Mr. Dods, so ----

25 Q So it was from other witnesses?

26 A Some of it was from others. Obviously Mr. Simpson is not a witness in this hearing.

27 Q No, or looking at documents?

28 A But it is some people who were witnesses and some other people who have made comments
29 as well.

30 Q So it is your analysis of the conclusions and based on that?

31 A I took in their views and I added that to my own experience of negotiations with BT.

32 Q Subsequently?

33 A Absolutely. Subsequently.

34 Q It is really opinion evidence, it seems to me.

1 MR. READ: Can I just explore two further questions out of that, Sir? The first is, if you look at
2 para.18 of your second statement you talk about relying on your colleagues, and the one
3 person you actually name is Mr. Rickard Granberg. Yes?
4 A Correct.
5 Q Is he a TalkTalk employee?
6 A He is a TalkTalk employee. He has been employed at TalkTalk and previously Carphone
7 Warehouse for longer than myself.
8 Q So he would have had no direct experience of the 2005 negotiations or the 2008
9 negotiations?
10 A No.
11 Q Because if we look at para.26 of your first witness statement, which is in the tab before at
12 Tab 10, you accept there that TalkTalk was not involved in those negotiations.
13 A Yes, I have been very clear that we were not directly involved in any of those negotiations.
14 Q Going back to your second statement and para.21, you deal specifically, halfway down that
15 paragraph, with the role of Mr. Nasralla at these meetings. And you say:
16 "My understanding of the role of Mr. Nasralla at these meetings was merely to
17 observe the discussions between BT and other operators and Mr. Nasralla did not
18 oversee the contract negotiations or participate in the discussions or offer any views".
19 Do you see that?
20 A Yes.
21 Q But you cannot possibly say that, can you, because you were not at those meetings and
22 those negotiations?
23 A As I said, I was not at those negotiations. However, during that period of time I was
24 employed by Ofcom and I know for a fact that when Ofcom was involved in those types of
25 meetings it was purely in an observer status. I had ----
26 THE CHAIRMAN: Was Mr. Nasralla reporting to you at Ofcom?
27 A No, although I worked with Mr. Nasralla on a number of projects so I knew him quite well.
28 He was, as Mr. Higho has said, he is a technical adviser. He was also relatively junior. But
29 even myself, I was a director of broadband policy at the time, even when I went into
30 discussions with BT and other operators I was not empowered to make commitments or tell
31 BT what they should or they should not do. Indeed I would report back and we would make
32 a decision as Ofcom as to what to do, but I think ----
33 Q I am sorry, please help me on that. Because Mr. Nasralla was obviously, you are effectively
34 giving evidence now based on your time at Ofcom, which is where you were when these

1 negotiations took place -- nothing to do with TalkTalk -- Mr. Nasralla was obviously asked
2 by or told by Ofcom to attend these meetings, that included the contracts sub-group ----

3 A Correct.

4 Q -- which was concerned, as the name suggests, with the contract, although he is not a
5 lawyer, but nor was anybody else there. Is it right that he would then report back to others
6 in Ofcom ----

7 A Correct.

8 Q -- as to what was going on?

9 A I think it was to ensure that Ofcom was sighted about what was going on. The particular
10 piece in Mr. Cox's and Mr. Ewbank's witness statements that I disagree with is where they
11 say he oversaw the contract negotiation. That in a sense suggests that he took an opinion
12 and told people whether he considered certain aspects of the BT offer to be acceptable or
13 not acceptable, and I just cannot believe he did that.

14 MR. READ: I think we can all accept that Ofcom would, of course, as a regulator, not want to
15 commit itself to any particular stance without having thought it all through, but he would
16 have been there and seen what was going on and, as you say, he would have reported back.
17 That is right, is it not?

18 A Yes, his role would have been one of observing and reporting back.

19 Q He would have been fully aware about the market conditions, the SMP conditions, that had
20 been imposed on BT?

21 A Yes.

22 Q And one of those was to offer the contract on fair and reasonable terms.

23 A Yes.

24 Q If Mr. Nasralla had thought that BT was bullying parties or was autocratically trying to
25 impose things, he would have picked that up and reported it back, would he not?

26 A He would have given an opinion back to Ofcom, yes, although I do not think it would be
27 highly transparent. It is not a binary issue about if somebody is properly negotiating and
28 acting fairly and reasonably. It is a matter of judgement so I think it is very difficult for him
29 to say, "They were definitely acting badly", but he would have reported back what was
30 going on.

31 Q Take the example, if he is sitting in a meeting and BT is saying, as has been suggested by
32 some of the witnesses, "No" to any clause that they really did not like, and the other CPs
33 were saying, "You are not negotiating properly", that is something that he would have
34 picked up upon and taken back with him?

1 A I do not think that I am suggesting that BT would have said, "No, no, no" to everything.
2 What they would have done is they would have listened to other people's points; they
3 would probably have then taken them away and said, "We will consider it", and then said
4 they will maybe come back at another meeting. BT, I think, is wise enough to make sure
5 that it at least appears to be negotiating but at the end of the day what is important is
6 whether actually it was making concessions in the sense of coming to a fairly bargained
7 outcome.

8 Q Sorry, they were? They would have wanted to create that impression?

9 A BT would want to be seen to be acting reasonably. I think there can be a difference between
10 being seen to be acting reasonably and actually acting reasonably.

11 Q In any event, all parties know that they have the power to refer a dispute to Ofcom if they
12 really feel aggrieved about it.

13 A Absolutely. We all have the potential to refer things to Ofcom, but we only generally take
14 things to Ofcom when it is a large issue and it is relevant. This issue about the interest was
15 only relevant if an overcharge occurred and we were hoping that BT would not overcharge
16 us and therefore that this actually would not be such a relevant clause.

17 Q But parties do take issues about contract terms to Ofcom, do they not?

18 A But they do as a last resort and when that term is particularly relevant. TalkTalk has
19 recently taken something around a service performance, a dispute, to Ofcom and that is
20 because -- around the compensation for poor service performance -- and that was because
21 BT's service performance was very poor and we felt we should be owed compensation and
22 so we took it. But we would not have necessarily taken that dispute if their performance
23 was reasonable because obviously the amount of compensation payable would be irrelevant.

24 Q But the question I asked you was that parties do take disputes to Ofcom about specific
25 contract terms that have been negotiated that they do not like.

26 A They do but it is not a costless exercise. It takes a lot of time and I think if we ended up
27 taking a dispute on every single contract term and condition we disliked to Ofcom we would
28 swamp Ofcom and I do not think Ofcom would be grateful for that sort of behaviour from
29 us. So we very much select the ones that are most important and most relevant.

30 Q It is up to Ofcom whether it accepts a dispute or not and there are a number of disputes
31 which it has not accepted, are there not, over the years?

32 A There are rules about what they can and they cannot accept, but in terms of dispute they
33 have fairly limited discretion to decline a dispute.

34 Q Unicom, for example, they lodged -- do you know anything about the Unicom dispute?

1 A I am not familiar with that one, no.

2 Q I will not take that further.

3 A Having said that, we have a number of disputes that we have lodged and the vast majority
4 have been accepted by Ofcom.

5 Q The point about all of this is that ultimately it comes down to the question of what a CP
6 thinks is important or not important, does it not, as to whether they take a dispute?

7 A Evidently we all have a limited amount of resource. In our case we are less well-resourced
8 than either BT or Sky. We have myself and, during this period, a half of another person
9 working, so we absolutely do prioritise those issues which are commercially most
10 important.

11 Q Although I accept that it is going to take some time, for example your time and other
12 people's time within the organisation, it is not quite the same, for example, as bringing a
13 commercial litigation.

14 A I am personally not familiar with commercial litigation.

15 Q Maybe that is a matter for comment. Can I then ask you about the particular dispute
16 resolution process or the negotiations before the dispute started here, because in para.10, I
17 think, of your second statement you talk in broad terms about the period between when
18 TalkTalk first, jointly with Sky, wrote in January 2008 and then the referral on 27th July
19 2010. I do not know, were you here when I was cross-examining Mr. Higo?

20 A I was, yes.

21 Q So you appreciate the particular point that I was identifying, namely the period between
22 when BT wrote the letter of 20th November 2008 and the period to 1st July 2009 when, I
23 think it was Sky, wrote back?

24 A Could you recap for me the point you were actually making about that period?

25 Q I do not know whether a copy of that letter is still in the witness box up there.

26 A I have 20th November 2008.

27 Q That is the one, yes. This letter, which is addressed to both you and Toby Higo, is
28 basically BT's response to the meeting on 6th November and you see that BT are saying that
29 its views have remained broadly unchanged. "Probably inappropriate for me to give you
30 further specifics. We understand you may wish", and I think it should be "to raise this
31 further with Ofcom and that indeed is your prerogative". Then they go on setting out, over
32 the course of the next three pages, what their approach is to it, but the one thing in the letter
33 they do not suggest at all is that they are going to negotiate any further. You can see that?

34 A Yes. I ----

1 Q If you want time to read the letter, say you would like time.

2 A I will just. Will you give me half a minute to scan the letter? (After a pause): Yes, thank
3 you.

4 Q The point I am putting to you is that that letter almost tells you to go and get lost, BT are not
5 going to negotiate any further, they say their prices are cost orientated.

6 A Yes.

7 Q Then nothing happens until 1st July 2009 when Delia Bushell writes. Do you want to see
8 this letter as well?

9 A Yes, please.

10 Q You will have to take ST3 and it is at Tab F. That is the reply. So the point I am putting to
11 you is that between 20th November 2008 and 1st July 2009 nothing further happens. You do
12 not refer the dispute to Ofcom. It is left for a period of over seven months.

13 A There was no external activity, obvious external activity, going on in that period.

14 Q Because if we look at para.10 in your second statement, you say in the second half of that
15 paragraph:

16 "In contrast, in my view BT showed no urgency to resolve the matter. For instance,
17 meetings were at TalkTalk or Sky's instigation, and BT was not forthcoming with
18 clear or relevant explanations for their pricing and indeed continued with non-
19 compliant pricing."

20 The point I am putting to you, Mr. Heaney, is that given there is a seven month delay in this
21 process after BT have effectively said "Go away" do you think it is entirely fair to suggest
22 that BT showed no urgency to resolve the matter?

23 A It is absolutely fair to say that BT showed no urgency. During this seven month period BT
24 were not coming back to us saying: "Let's negotiate", although ultimately after we did go
25 back to them, they did negotiate with us again; although, as Mr. Higho mentioned,
26 unfortunately that was not fruitful.

27 Q But they have said in that letter, have they not, effectively "go away", and "if you want to
28 take it further take it to Ofcom."?

29 A They did say "Go away". We tried to negotiate, we did ultimately negotiate further and we
30 did take it to dispute with Ofcom. They did say "Go away" but we tried again. I think it's
31 also relevant to note that in this period, it was in the run-up to the LLU charge control
32 which, for our company, is an extremely important decision, in May 2009, so certainly the
33 vast majority of my time, and Mr. Granberg, who worked with me, was focused on the LLU
34 charge control. So the reason there was little progress during this period was not, for

1 instance, as has been suggested, because we thought: "let's delay it because we'll get more
2 interest", the very simple reason for the delay was the fact we had other priorities.

3 Q No, but if you knew you were not going to get interest on any amounts you recovered, you
4 might be a lot quicker in taking the matter to Ofcom?

5 A We felt we were going to get interest actually in 2009, so in the run up to the letter from
6 Amy Chalfen on 20th November, we had made very clear to Openreach that we expected
7 interest to be paid. We thought that was a perfectly reasonable request, so our expectation
8 was that interest was going to be paid and, indeed, when Ofcom came out in its provisional
9 Determination, that interest was not going to be paid, we were extraordinarily surprised by
10 that.

11 Q No, but if, on 20th November 2008, you had known that no interest was going to be paid,
12 then you would have got on with it a lot quicker?

13 A That's a hypothetical case because actually on 20th November 2008 we actually felt that
14 interest was going to be paid, and we behaved in the way we behaved on the basis that we
15 thought interest was going to be paid. I don't think there is any evidence there to suggest
16 that we delayed because we might get more interest at all. I think it just does not make
17 sense, not the way that we operate as a business.

18 MR. READ: Thank you, Mr. Heaney.

19 MR. PICKFORD: Just one question.

20 Re-examined by Mr. PICKFORD

21 Q Just one question. Mr. Heaney, you said that the LLU charge control was important to you,
22 TalkTalk. Were there any other companies that it would be important to, or just TalkTalk?

23 A The LLU charge control which sets what are referred to as MPF and SMPF prices, that
24 charge control was probably certainly similarly important to ourselves and Sky, and it was a
25 lot less important to other companies. It had a bit of importance to Cable & Wireless, for
26 instance.

27 MR. PICKFORD: Thank you.

28 THE CHAIRMAN: You were asked about interest, and you said you felt interest would be paid,
29 and you were very surprised I think you said when the provisional determination had come
30 out. You knew, of course, about clause 12.3 in the contract. I am just trying to understand
31 this: can you help us. Were you so confident that Ofcom would not pay regard to 12.3?

32 A Part of the scope of the dispute was because BT had overcharged us because of DSAC and
33 FAC and all these other measures, and we said also the term in clause 12.3 was not a fair
34 and reasonable term because we felt that for us it was obvious that actually it was

1 appropriate that in the case of an overcharge interest should be paid, so we felt that it was
2 the correct decision for interest to be awarded, even though 12.3 said something different.
3 That is the nature of taking the disputes to Ofcom if you disagree with something that's in
4 the contract.

5 Q I understand your feeling, and your case, and your argument, but were you confident that
6 this was bound to win on 12.3, could you be sure of that?

7 A We couldn't be 100 per cent sure, but in terms of our behaviour, of what we were doing, in
8 the back of my mind I had: "Well, we are going to get the overcharge repaid and the interest
9 repaid." I think this pertains to the question of our behaviour and did, in some way, we delay
10 doing something because we felt we would get more interest, and that was just in the back
11 of my mind, what I believed would happen.

12 Q Yes, I am not asking really whether you delayed because you felt interest would be paid -
13 there may be all sorts of reasons why you do not take a dispute, and you indicated the kind
14 of approach to the taking of a dispute, it is not something that you do lightly, but it is just on
15 the particular point that you were saying that you would not be so confident that Ofcom
16 would rule in your favour on interest?

17 A I wouldn't say I was 100 per cent confident, but my natural instinct would say we are more
18 likely to get interest than not. Obviously, the question of interest being paid or not is the
19 subject of much of this appeal, but in the back of my mind, as we were going through the
20 negotiations, I felt that the likely outcome is we would get interest. Indeed, as I say in 2009
21 we laid out to Openreach that we would claim interest on the overcharge. They did not
22 respond to that at the time.

23 THE CHAIRMAN: Thank you very much, Mr. Heaney, you are released as a witness.

24 (The witness withdrew)

25 THE CHAIRMAN: Mr. Pickford, I think that concludes your factual evidence?

26 MR. PICKFORD: It does, Sir, yes, thank you.

27 THE CHAIRMAN: And concludes all the factual evidence, as I understand it in this case, which
28 means we have finished in good time. Can I just ask, have you taken instructions on the
29 point about confidentiality I raised at the outset on that table, the annual totals, when the
30 proceedings started, you may recall? (After a pause): If you do not have an immediate
31 answer perhaps you can do that this afternoon and notify the Registry here, or tell us on
32 Monday morning. We will then resume on Monday at 10.30, and I think Dr. Maldoom will
33 be the first expert to be called, and he will be the whole day. We will therefore adjourn
34 until 10.30 on Monday.

1 |

(Adjourned until 10.30 am on Monday, 4th November 2013)