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4 record.

5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No.: 1330/3/3/19

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9 Victoria House,
10 Bloomsbury Place,
11 London WC1A 2EB

12 10 October 2019

13
14 Before:
15 Peter Freeman CBE QC (Hon) (Chairman)
16 Professor John Cubbin
17 Professor Anthony Neuberger
18 (Sitting as a Tribunal in England and Wales)

19
20
21 **BETWEEN:**

22
23 TalkTalk Telecom Group plc and Vodafone Limited

24
25 **Appellants**

26 v

27
28 Office of Communications (BCMR 2019)

29 **Respondent**

30 And

31
32 British Telecommunications plc
33 CityFibre Infrastructure Holdings Limited

34 **Potential Interveners**

35
36
37 **A P P E A R A N C E S**

38
39 Mr Alan Bates and Ms Imogen Proud (appeared on behalf of TalkTalk/Vodafone)

40 Mr Josh Holmes and Ms Julianne Kerr Morrison (appeared on behalf of Ofcom)

41 Mr Robert Palmer QC (appeared on behalf of BT)

42 Ms Sarah Love (appeared on behalf of CityFibre)

43 Ms Emily Neill (appeared for the CMA)

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Thursday, 10 October 2019

(2.00 pm)

Submissions by MR BATES

THE CHAIRMAN: Good afternoon, Mr Bates. Nice to see you again.

MR BATES: Good afternoon, sir. I think the cast present here will all be well-known to you, Mr Chairman, but perhaps not to other members of the Tribunal, so I will observe the tradition of introducing everyone. So my name is Bates and I appear with Ms Proud for the appellants. For Ofcom appears Mr Holmes QC and Ms Kerr Morrison. For BT, just to my left, there is Mr Palmer QC. For CityFibre is Ms Love, sitting next to Mr Holmes, and last but not least sitting to the left of Mr Palmer is Ms Neill who represents the Competition & Markets Authority.

THE CHAIRMAN: Last but not least indeed.

MR BATES: Indeed since they will be doing half of the work at least.

THE CHAIRMAN: It could well be more than that.

MR BATES: May I begin by sketching out what matters are likely to take up time this afternoon because there has been yet further progress overnight and this morning as a result of the --

THE CHAIRMAN: That's wonderful news. I like to hear about progress. Could I perhaps just put an interjection in before we start?

MR BATES: Please.

THE CHAIRMAN: Which is to just ask, is it clear that this case is being brought under the revised standard of review, following the 2017 amendment, and that therefore we should be planning how we arrange for witnesses, disclosure,

1 length of trial, et cetera with that in mind? Is that commonly understood?

2 I must say I didn't actually sort of glean that impression from all of the papers
3 so I just wanted to be reassured about that. I don't know whether Mr Holmes
4 wants to say anything.

5 **MR HOLMES:** Sir, I believe that's common ground.

6 **THE CHAIRMAN:** You believe that's common ground?

7 **MR HOLMES:** Yes.

8 **THE CHAIRMAN:** Shouldn't be a matter of belief, should it?

9 **MR HOLMES:** Certainly Ofcom's submission is that the new standard of review is
10 the applicable one and that the amendments apply. I don't understand that to
11 be in issue. I don't think any of the other parties have argued differently.

12 **THE CHAIRMAN:** Okay, well we will bear that in mind as we go through the
13 planning. Mr Bates, I am so sorry, I have done a terrible thing of stopping you
14 in mid breath.

15 **MR BATES:** Not at all, sir, and that's certainly the position of the appellants as well.
16 Of course we will all be feeling our way through in terms of how that impacts on
17 the operation of the proceedings in this Tribunal within its own procedural rules.
18 Just to sketch out what matters are likely to take up time, there is really no
19 disagreement any more between the appellants, Ofcom and BT, as
20 I understand it in relation to CMC agenda items. Can I just tell the Tribunal
21 about what has been agreed between the appellants and Ofcom this morning in
22 relation to disclosure and also the deadline for Ofcom's defence?

23 **THE CHAIRMAN:** Yes please.

24 **MR BATES:** In relation to disclosure, Ofcom will have discussions with the
25 appellants over the course of the next week about what material Ofcom is or
26 isn't able to provide out of that which the appellants have asked for and seek to

1 agree certain narrowings of the disclosure request.

2 Secondly, the disclosure to the extent that it's agreed will be provided as soon as
3 reasonably possible, for example where it's immediately to hand and in any
4 event alongside the defence. Third, that insofar as disclosure is not agreed,
5 the appellant will apply to the Tribunal promptly so there is no need for us to
6 wait until the date for the defence in order to do that. Fourthly, that on that
7 basis Ofcom's deadline for the defence should be extended to 1 November,
8 and all of what I said is without prejudice to what has already been agreed
9 between the appellants and Ofcom about the disclosure of confidential versions
10 of sections of the unredacted statements which can be provided by Ofcom
11 promptly once the appellants' relevant external lawyers have signed on to the
12 confidentiality undertaking.

13 Now, that of course is all subject to the Tribunal's views about those matters but
14 that's what's agreed as between Ofcom and the appellants.

15 **THE CHAIRMAN:** This would be disclosure into the confidentiality ring which has
16 yet to be established?

17 **MR BATES:** Indeed, sir, yes. With of course so far as non-confidential versions are
18 needed, in accordance with the confidentiality ring order seven days after that
19 redacted versions would be made available.

20 **THE CHAIRMAN:** That all sounds very sensible. Is there any other good news you
21 have for us?

22 **MR BATES:** Well, that's the end of the good news in that there is one matter that
23 appears to remain in dispute, which is CityFibre's intervention. I don't know
24 whether the Tribunal would like, despite what I have said about the areas of
25 agreement, to go through for the sake of good order the agenda items or
26 whether the Tribunal would like to move directly to intervention, and that of

1 course is CityFibre's application, so I'm in the Tribunal's hands as to whether
2 they want to hear Ms Love first in relation to that.

3 **THE CHAIRMAN:** It's fairly near the beginning, isn't it?

4 **MR BATES:** Yes.

5 **THE CHAIRMAN:** Why don't you say what you have to say, and presumably you're
6 going to argue about the forum are you or not?

7 **MR BATES:** Nothing about the forum so the interventions will be the next item if that
8 would be convenient.

9 **THE CHAIRMAN:** In that case I will like to hear Ms Love.

10

11

Submissions by MS LOVE

12 **MS LOVE:** Sir, I appear for CityFibre, which is a competitor of BT, and we applied to
13 intervene on 1 October. You should have three documents from us. The first
14 is our request for permission itself. I don't invite you to turn to it now but that
15 should be behind tab 7 of the bundle, after the BT request that also begins at
16 page 103. The document you will see at tab 5 is the observations that we were
17 in a position to make on Monday on the agenda and behind that are
18 non-confidential submissions of 18 January to Ofcom and the consultation.

19 The third document, which was sent over late yesterday afternoon, is a short
20 skeleton argument from me with two attachments and I would like to apologise
21 at the outset for the lateness of the hour which that was received and to
22 express hope that it has reached you.

23 **THE CHAIRMAN:** I think it has. Reassure me. What number should that be?

24 **MS LOVE:** In the amended bundle index --

25 **THE CHAIRMAN:** I think you can rest assured we have it, don't worry.

26 **MS LOVE:** 11.

1 **THE CHAIRMAN:** Yes, certainly, have that, yes. I can also say that we have read it
2 if that's any comfort.

3 **MS LOVE:** It may well be, sir, depending on what you made of it. I'd like to start by
4 explaining CityFibre's interest in these appeals and then explain why it would
5 be appropriate for the Tribunal to let us in and I'm mindful, sir, about your
6 comment about the standard of review.

7 I propose just to make the application then hear what Mr Bates has to say in
8 response as he has obviously had the opportunity this morning to consider our
9 response to his objections.

10 Our interest is a point that we addressed in paragraphs 5 to 14 of the request and 6
11 to 17 of my skeleton argument, and just to put it very simply, we compete with
12 BT at the wholesale level to provide leased line services and I believe we are
13 the leading competitor to provide full fibre services. We have to price below
14 BT's regulated prices for the provision of those services to non-residential
15 customers. That is a matter on which there is no realistic choice, and just to
16 make that good, if I give you the reference now, I don't know whether we need
17 to turn it up, at tab 5, page 53, behind our previous letter were submissions we
18 made before, and on page 66, starting at paragraph, I think, 9.1.11 -- actually it
19 may be helpful to go to that, page 66. One sees at the bottom of page 66 that
20 CityFibre explains that it had actually commissioned an independent
21 consultancy to undertake a study looking at how likely it is that a business
22 buyer of telecom services will even consider using someone other than BT, and
23 the answer is perhaps most starkly illustrated in the graph opposite, which is
24 that to get to the point where over half say it's likely, very likely they would even
25 consider it, you would have to be offering discounts relevant to BT of about
26 20 per cent.

1 Now, there is more detail but the very basic point is that if you are a new entrant
2 trying to compete at the network and productivity level you have to offer
3 discounts relative to BT.

4 Now, the price related decisions in this appeal are about whether Ofcom was right to
5 relax the downwards price pressure on BT's services. Vodafone and TalkTalk
6 say that was wrong. If they are right, so if this appeal succeeds, the
7 downwards pressure is back on BT and it is inevitably back on us. So we are
8 in the exact same market and there is a direct unmediated effect on us and in
9 my submission that is very clearly --

10 **THE CHAIRMAN:** Let's get this clearly, you are a competitor of BT and you want
11 prices to stay high.

12 **MS LOVE:** I wouldn't put it in exactly those terms, sir. We would like headroom in
13 which to be able to develop competition to be able to go forward with the
14 planned programme of investment that we have, but our interests in that regard
15 are opposed to those of Mr Bates' and his clients. As well as that I also say we
16 have an interest in the outcome in another respect, which is our situation as
17 an investor in fibre networks. Now, in paragraphs 10 to 13 of my skeleton we
18 address the implications of the appeal on our ability to deploy full fibre network
19 infrastructure, so, 10 to 13 of our request at page 105.

20 Now, Mr Bates says that what you can take from that is that it shows that we are
21 more interested in network investments and this is all some separate long-term
22 thing, and he's wrong about that and I will go through that if I need to in reply
23 but it does, I would say, raise a very pertinent question which is what Ofcom
24 was interested in when it made Decisions 2 and 3, and whose interests Ofcom
25 had in mind.

26 If I could ask you to turn very briefly to the second attachment behind my skeleton

1 argument. That is a media release that accompanied the draft statement of
2 publication. I apologise for having a source of this nature but it's rather more
3 convenient for me than the several hundred pages of the BCMR itself, and
4 I think it encapsulates very neatly where our interests fit into Ofcom's thinking.
5 The headline is obviously that Ofcom wants to support fibre investment. You
6 will note that towards the bottom of the page we and TalkTalk and Virgin are
7 singled out among the firms already using --

8 **PROFESSOR CUBBIN:** Excuse me I'm not sure where we are looking at now and
9 what we're supposed to be looking at now. 10 and 11.

10 **THE CHAIRMAN:** Tab 11.

11 **PROFESSOR CUBBIN:** Tab 11, right.

12 **MS LOVE:** I have extra copies if that would assist.

13 **PROFESSOR CUBBIN:** I have it.

14 **THE CHAIRMAN:** If you go on there is an Ofcom press release.

15 **PROFESSOR CUBBIN:** Okay, thank you.

16 **MS LOVE:** Over the page, one sees the heading "Supporting competition and
17 investment certainty in business markets". So the link in Ofcom lies between
18 supporting the competition and the investment and there is a comment there
19 about Ofcom:

20 "Areas of the country where ...(reading to the words)... other leased line networks."

21 We are one of them. And lower down:

22 "Where there is strongly a network competition or prospective competition, regulation
23 would be lighter than existing rules to allow this competition to flourish."

24 So there is an explicit link being drawn by Ofcom between the lighter regulation and
25 the reduction in the pressure, and competition flourishing, and further down
26 a quote from Mr Oxley about the investment certainty for continued competitive

1 investment in fibre. So Ofcom is saying it is relaxing the rules so competition
2 can flourish and the aim is to encourage investments in fibre, and we are one of
3 the very few, very few leased line network competitors building at the network
4 level.

5 Now my point isn't as crude as that every time in that press release you see
6 competition or investment you should read CityFibre. It is a bit more nuanced
7 than that. But if I can put it this way: we are clearly a party that Ofcom had in
8 mind and our interest in incentives are one that Ofcom is hoping will be
9 influenced by this decision.

10 If I could turn then to the question of the exercise of discretion, because I appreciate
11 this Tribunal does have a discretion even where interest is made out. This is
12 something that we addressed in paragraphs 15 to 19 of our request and also
13 paragraph 18 onwards of my skeleton argument.

14 **THE CHAIRMAN:** Yes.

15 **MS LOVE:** Now, the approach that this Tribunal used to take in the dim distant past
16 in cases, such as *Bettercare*, where an intervener was allowed in who had no
17 direct interest in the outcome, it was basically that once your interest was made
18 out you were in and it was then a question of case management. That was
19 some time ago, I appreciate that decisional practice has evolved but I do
20 respectfully say that here we not only have a direct interest in the outcome of
21 this appeal but our interest is different to that of any of the other parties that are
22 before you today, sir, and when you're considering whether to allow us in that is
23 an important factor. Mr Bates has said in his submissions, well, Ofcom will be
24 there. Ofcom can tell the CMA what we told them and that is -- that's very well
25 and good but our interests are not identical to Ofcom's. Ofcom is here to
26 defend the decisions. Ofcom is not here to ensure that our interests are

1 protected adequately, including possibly, depending on what is disclosed, our
2 confidential data, which may well be at stake in some of the items that Mr Bates
3 is discussing.

4 It is difficult for me to tell you now exactly what we're going to say in submissions and
5 evidence because I am simply going on the grounds of appeal on the Tribunal
6 website. It would be very premature for you to conclude, sir, that there is
7 nothing we could usefully add and also to make that conclusion on behalf of the
8 CMA and I say that effectively putting the onus on us in these circumstances to
9 say exactly what we bring to the party is not a fair way to go. What I can say is
10 that everything you will have seen suggests we can say something useful.

11 Vodafone and TalkTalk are saying that these decisions to relax the price
12 pressure on BT were manifestly unsound and there was no basis for them. It
13 would appear from the disclosure table that Mr Bates has produced that they
14 actually want to dig in quite a lot of detail into the evidence base on
15 infrastructure and on the ability of rivals to compete and we are the only
16 competitor at the infrastructure level to BT who is actually in front of you and we
17 are therefore able to explain as it were from the horse's mouth what the
18 competitive position is and what the incentives are and what the real world
19 experience we have is right up to now. And I expect that more or less every
20 party in front of you has said "we won't duplicate". We are not just paying lip
21 service to that we have actually given it a great deal of thought and we have set
22 out in paragraph 24 of our skeleton what our proposals are.

23 We are intending to be proactive in liaising. If there is nothing that I can usefully say
24 here or to the CMA then we won't be saying anything and we anticipate that we
25 will be putting things in as far as possible and as far as the CMA considers
26 appropriate in writing, and we will work with the main parties' timetable. We

1 very much doubt that there will be any material additional to the length and
2 complexity of the hearing.

3 Unless I can assist further.

4 **THE CHAIRMAN:** Thank you.

5 Mr Bates.

6

7

Submissions by MR BATES

8 **MR BATES:** Sir, there is a very good reason why this Tribunal has taken

9 an increasingly strict approach to applications to intervene. First of all that
10 there is a risk of proliferation of parties and evidence in proceedings of this
11 kind. Ms Love says “whose interest did Ofcom have in mind when Ofcom was
12 taking the decision?”, and they say it was CityFibre's interest. Well, the reality
13 is that Ofcom had in mind the interests of the entire industry when it was taking
14 its decisions and those decisions affect all the different parties in the industry
15 differently and they affect many different markets, as we set out in our
16 submissions.

17 **THE CHAIRMAN:** I'm sure they had your clients in mind too.

18 **MR BATES:** And had our clients in mind too. And as an appellant we have set out
19 the arguments that we wish to pursue on an appeal from the decision. It
20 doesn't follow that everyone else in the industry who is affected should
21 therefore be permitted to intervene.

22 **THE CHAIRMAN:** To be fair, it's not everyone else who is applying.

23 **MR BATES:** Not everyone else has applied but the issue is what distinguishes
24 CityFibre from everybody else such that they have a particular interest, a direct
25 interest as they put it, that means that they should be allowed to have a special
26 place beyond the CMA looking at the material that was already submitted by

1 CityFibre and everybody else in the industry during the consultation. And we
2 have a further reason why a strict approach is appropriate now that we're in the
3 section 194A regime because the regulators have lobbied for judicial review
4 principles to apply in proceedings like this and that's what the position now is
5 and they have to accept, you know, the rough with the smooth, frankly, in terms
6 of that because they have to accept that they need to support their decisions on
7 the basis of the reasoning in the decision and the evidence that was before
8 them and the consultation submissions that they reviewed on in taking the
9 decision. So the Tribunal should be particularly cautious about allowing
10 interventions from an industry party who say they want to put in new evidence
11 in support of Ofcom to supplement the reasons and the material that Ofcom
12 relied on in the statement.

13 It's also relevant that under section 194A the remedy that this Tribunal could now
14 grant will only be a remittal to Ofcom so if there is a remittal to Ofcom then
15 CityFibre and everybody else will be able to submit their views as to what any
16 replacement price control should be. So we're in a very different regime from
17 one in which the Tribunal might itself be setting down what a new replacement
18 decision might be for Ofcom, where one can see why perhaps it's appropriate
19 to allow affected parties to participate in that process.

20 And it's for all those reasons that the Tribunal's approach is to look to see whether
21 there is a direct interest of the proposed intervener and to apply that as
22 a threshold criterion as in paragraph 8 of the *Verizon* judgment. Now although
23 CityFibre say that their interest is not the same as the -- it's not the same
24 nature as the interest that was at issue in the Verizon intervention application --

25 **THE CHAIRMAN:** I think I sat on that, didn't I? I think I was sitting on that.

26 **MR BATES:** You may well -- yes, I think you were, sir.

1 **THE CHAIRMAN:** It does sort of ring a bell.

2 **MR BATES:** Yes, so nobody's suggesting that the interests are identical but the
3 principle is, I respectfully submit, the correct one. So does CityFibre have
4 a direct interest here in the outcome? Well, in substance the only point that is
5 being made by CityFibre is that BT's prices affect CityFibre's prices because it
6 has to price competitively to BT. Well, that will obviously be true in relation to
7 a whole range of services in the telecoms industry where BT is the largest
8 player and sets the tone for prices that other people can charge in the market.

9 But it's curious to describe that as a direct effect. It is on the contrary an indirect
10 effect in that BT's prices have that market price framing impact generally and,
11 of course, that will have an effect on the investment incentives for everybody
12 else in the industry. That is the reasoning for Ofcom's decision. We don't deny
13 that. But Ofcom can support that reasoning by reference to what's in the
14 statement and the consultation submissions and evidence that was submitted
15 by CityFibre in that process.

16 But even if CityFibre clears the threshold criterion, it's accepted by CityFibre that this
17 Tribunal would then have a discretion and the appropriate way to exercise that
18 discretion, we say, is to ask whether additional evidence is needed and why it
19 would be needed, given that CityFibre has put its evidence to Ofcom and that
20 was part of what Ofcom relied on. What need is there of further evidence?
21 And the CMA being itself a regulator is particularly well placed to examine in
22 detail all the material that's put before it by Ofcom that was generated from the
23 Ofcom consultation process. That's a sort of exercise that the CMA itself
24 performs fairly regularly when consulting on decisions that it is contemplating
25 taking.

26 Of course there is no difficulty in Ofcom submitting evidence from CityFibre in the

1 course of these proceedings. One can see why it might be slightly
2 embarrassing for Ofcom to do that because it would be more obviously
3 supplementing the reasoning and the evidence that it relied on in the
4 statement, but that isn't, in my submission, a good reason why CityFibre should
5 be allowed to put in additional evidence.

6 So that's what I say about the intervention itself. If the intervention were granted
7 then clearly everything I have said would also be relevant to the form of that
8 intervention and the specific limits that should be placed on it, but I think that
9 perhaps the appropriate approach is to allow the Tribunal to decide as a matter
10 of principle whether the intervention should be permitted and in my submission
11 it should not be for all the reasons that I have set out.

12 **THE CHAIRMAN:** Right, I think we need, before you come back, I think I would
13 quite like to hear what the CMA thinks about this. Is there any way that could
14 be conveyed.

15 **MS NEILL:** Sir, could I have a few moments just to take instructions?

16 **THE CHAIRMAN:** Can I just help you by saying that my understanding is that
17 CityFibre see their main focus of assistance as being in relation to Decisions 2
18 and 3, which I think we're going to get on to, are probably going to be heading
19 towards the CMA. We haven't decided that yet, but that's what it sounds like.
20 So really the question is: can CityFibre assist the CMA's process. I know we
21 would have to take the decision but I think that's, being practical, what we need
22 to know.

23 **MS NEILL:** The CMA is grateful for the request, we didn't address this in our
24 representations to the Tribunal, so if you would excuse me one moment I will
25 just take instructions.

26 **THE CHAIRMAN:** A fairly obvious question but please do, yes.

1 **MR PALMER:** Is perhaps an opportune time now or after you have heard from the
2 CMA?

3 **THE CHAIRMAN:** We have a sort of formal objection, you haven't been allowed to
4 intervene.

5 **MR PALMER:** I will have to beg your indulgence but if we are dealing with
6 interventions now, now might be a good time to decide if BT are going to be,
7 that's my first point to which there is no objection from any quarter. But our
8 second point would be that we do have some observations on what we have
9 heard in response.

10 **THE CHAIRMAN:** So I gather. We do have to decide.

11 **MR PALMER:** Observations on what we --

12 **THE CHAIRMAN:** We do have to decide that, yes. Can I please hear from the CMA
13 first.

14 **MS NEILL:** The CMA doesn't object to the intervention.

15 **THE CHAIRMAN:** Does not object?

16 **MS NEILL:** Does not object to the interventions.

17 **THE CHAIRMAN:** Okay. I think we're going to adjourn briefly and decide. We will
18 come back to you.

19 **(2.26 pm)**

20 **(A short break)**

21 **(2.35 pm)**

22 **THE CHAIRMAN:** Well, the Tribunal's decision is to allow the intervention. We want
23 to be clear how far this will go. One of your earlier papers, Ms Love, was
24 confined to Decisions 2 and 3. Does that remain the position?

25 **MS LOVE:** I can confirm that that remains the case, sir.

26 **THE CHAIRMAN:** Right, that means we won't have the benefit of your contribution

1 in relation to Decision 1 but that does limit the scope of the intervention. It
2 really does put the onus then on the CMA to decide how and to what extent it
3 wants CityFibre's assistance.

4 Unless, Mr Bates, you have any further objection I think we're going to leave that
5 there and impose no further restrictions ourselves. I think it's fully understood
6 that the intervention is limited to the price control matters and it should be
7 efficient and lean and coordinated with Ofcom and not leading to unnecessary
8 duplication.

9 **MR BATES:** Yes, I think that's sensible for the time being, obviously we reserve the
10 right to revert to the Tribunal if we feel --

11 **THE CHAIRMAN:** I'm sure you will remain vigilant.

12 Right. I think on that basis we can now hear BT and I apologise for shutting you up
13 earlier.

14

15 **Submissions by MR PALMER**

16 **MR PALMER:** No, I am grateful to have the opportunity now to make my
17 application. Sir, the position is the application has been made on paper, also
18 pleading at tab 7 of the bundle. There is nothing further because that was met
19 with agreement both from the appellants and from Ofcom.

20 **THE CHAIRMAN:** Is there any objection from anybody? No? Well in that case
21 I think we can allow that intervention.

22 **MR PALMER:** I'm grateful, sir.

23 **THE CHAIRMAN:** I don't think you need to do anything more at this stage.

24 **MR PALMER:** No.

25 **THE CHAIRMAN:** Right. Mr Bates, you're back on your agenda.

26

1 **Submissions by MR BATES**

2 **MR BATES:** So the next item is confidentiality. There is an agreed draft now of the
3 confidentiality ring order. So if the Tribunal is happy to make that order and
4 there are no objections I suggest that the parties supply a clean copy of it to
5 the Tribunal immediately after the CMC.

6 **THE CHAIRMAN:** Yes. This is on the basis that presumably it now applies to the
7 two interveners?

8 **MR BATES:** Indeed, sir, yes.

9 **THE CHAIRMAN:** Am I right that two in-house BT lawyers are included subject to
10 even greater stringent conditions of confidentiality than the others, or not?

11 **MR PALMER:** Sir, subject to the obligations which are set out in the draft order
12 which are now agreed --

13 **THE CHAIRMAN:** But they are slightly greater being in-house counsel?

14 **MR PALMER:** I beg your pardon?

15 **THE CHAIRMAN:** They're slightly greater being in-house counsel.

16 **MR PALMER:** Their specific obligation is in that regard and there are specific
17 processes that BT has developed over many years to protect that
18 confidentiality.

19 **THE CHAIRMAN:** Thank you. And CityFibre's company secretary in-house counsel
20 is no longer to be in the ring, is that right?

21 **MS LOVE:** No.

22 **THE CHAIRMAN:** That has saved us an argument, thank you for that.

23 Right. Sounds sensible.

24 **MR BATES:** Then in relation to disclosure, the confidentiality ring order includes
25 provisions that reflect the agreement about the disclosure of confidential parts
26 of the statement. So that's agreed. As I set out at the beginning of this hearing

1 there has been agreement between Ofcom and the appellants about further
2 disclosure and how that will be taken forwards. It may be that a formal
3 direction about those matters is not required. The Tribunal can record -- will be
4 aware and it will be on the transcript what has been agreed. I'm sure
5 Mr Holmes will jump up if what I said at the beginning is not fully -- he's
6 nodding.

7 **THE CHAIRMAN:** Okay, I think I'm happy to go with that, if that's acceptable to
8 everybody.

9 **MR BATES:** So the next matter is specified price control matters. It's agreed at
10 least between Ofcom and the appellants that Decisions 2 and 3 raise specified
11 price control matters. I understand that BT is no longer wishing to make
12 submissions to the contrary. I'm not sure whether CityFibre wish to make any
13 submissions in relation to that.

14 **MS LOVE:** No, sir.

15 **THE CHAIRMAN:** So we're agreed that Decisions 2 and 3 are specified price
16 control matters. Okay, that makes things easier.

17 We had one concern in relation to Decision 3 which is there did appear to be some
18 overlap with Decision 1. We don't like overlap, we don't like duplication. Our
19 feeling is it can be dealt with by the ordering, the sequencing of the
20 consideration of the issues, so maybe we should get on to that if you're going
21 to go on to that next.

22 **MR BATES:** Yes, sir.

23 **THE CHAIRMAN:** We're happy to otherwise take Decisions 2 and 3 as specified
24 price control matters. Obviously we will need to put that into a suitable form.

25 **MR BATES:** Indeed, sir, yes and I think it's agreed that perhaps the best time to
26 formalise the drafting of the questions to be referred will be after written

1 pleadings have been fully exchanged.

2 It's also agreed that there should be sequential handling of Decision 1 and then
3 Decisions 2 and 3, although Ofcom have raised a possibility it could perhaps be
4 the other way round, although as I understand it they're ambivalent to precisely
5 which goes first.

6 In the appellants' submission it will plainly be sensible for Decision 1 to be dealt with
7 by this Tribunal first and one can see that if one considers the nature of the
8 Tribunal's process involved in determining Decision 1. Decision 1 is about the
9 finding of no SMP in the Central London Area. That would involve the Tribunal
10 considering legal submissions about the strength of the presumption of
11 dominance, particularly where certain market share thresholds are exceeded,
12 and also looking at factual evidence by way of cross-examination of factual
13 witnesses and experts, and the material generated from that will be recorded in
14 transcripts from this Tribunal. All of that material and the Tribunal's analysis of
15 the legal issue will all be of great assistance, we suggest, to the CMA when
16 they come to examining Decision 3 given the overlap which you, sir, have
17 already noted.

18 If one does it the other way round then one has the difficulty that because of the
19 nature of the CMA process proceeding substantially by bilateral meetings, one
20 isn't going to have the same sort of product from it that's going to inform
21 the Tribunal's determination of Decision 1 in the same way. So I don't
22 understand all of that to be strongly disputed but perhaps I will sit down and
23 see if anyone else wants to comment on it.

24 **THE CHAIRMAN:** Mr Holmes, I think you're on.

25

26

Submissions by MR HOLMES

1 **MR HOLMES:** Yes, sir. So as Mr Bates correctly says, we don't feel strongly as to
2 the order between the CAT and the CMA in determining issues 1 and then
3 issues 2 and 3. Our main concern is that this is done promptly and so this may
4 depend on the Tribunal's availability to sit and whether it can do so early in the
5 Hilary term -- early in 2020.

6 **THE CHAIRMAN:** When does the Hilary term start?

7 **MR HOLMES:** In January.

8 **THE CHAIRMAN:** January 13th?

9 **MR HOLMES:** I believe so, yes.

10 **THE CHAIRMAN:** Would you be there then?

11 **MR HOLMES:** It won't be ready, I doubt the case can be brought on as early as that
12 but it won't -- possibly.

13 **THE CHAIRMAN:** I don't think -- I know we have our difficulties but I don't think in
14 this case the Tribunal's availability is going to hold you up.

15 **MR HOLMES:** No. Well I'm grateful for that.

16 **THE CHAIRMAN:** We may not have anywhere to sit but we will be available.

17 **MR HOLMES:** Very good. The only other consideration which could conceivably
18 weigh in favour of the CMA going first and the Tribunal following would be that
19 provision that is made for the possibility of a judicial review of the CMA's
20 determination of the price control matters following the publication of its report
21 and one could see a certain procedural economy in having any judicial review
22 grounds determined together with ground 1, but we don't press that as
23 a significant factor. We don't think there is any particular reason why either
24 arrangement couldn't in principle work. Ground 1 doesn't have any -- the
25 outcome of ground 1 doesn't have any direct consequences for grounds 2 or 3
26 in the sense that grounds 2 or 3 wouldn't arise if ground 1 were determined one

1 way or the other. They all relate to different markets. It's simply that
2 arguments about the extent of competitive constraints overlap in relation to
3 both ground 1 and ground 3.

4 **THE CHAIRMAN:** Indeed.

5 **MR HOLMES:** But, you know, as I say it's not a matter that Ofcom has strong views
6 upon provided that the Tribunal is able to sit early in the coming year.

7 **THE CHAIRMAN:** So in your note you listed three options.

8 **MR HOLMES:** Yes.

9 **THE CHAIRMAN:** You seem to be homing in on option 2. What about option 3?
10 References in parallel and delayed CMA consideration?

11 **MR HOLMES:** That doesn't appear to have any particular advantage in terms of
12 time saving because it, I think it's common ground that even if a reference were
13 made to the CMA while the CAT's process was ongoing, the CMA couldn't get
14 very far along in its consideration of the questions and so the period that it
15 would require would need to be extended accordingly, and I think for that
16 reason it's not an option which commends itself to the CMA, although their
17 counsel will correct me if I am wrong.

18 **THE CHAIRMAN:** I will hear the CMA in a moment. So Mr Bates is effectively
19 suggesting option 2. You are saying you would go with that?

20 **MR HOLMES:** We would be content with option 2.

21 **THE CHAIRMAN:** Content. Right. Anybody else got any views? CMA perhaps,
22 I think we should ask first as you are intimately involved.

23 **MS NEILL:** The CMA wholeheartedly supports Mr Bates' decision that Decision 1 be
24 addressed first by this Tribunal.

25 **THE CHAIRMAN:** Excellent, right, that's very helpful. Thank you.

26 BT. Yes.

1 **MR PALMER:** Well, sir, BT's position is that certainly we support the suggestion that
2 it be sequential, either option 1 or option 2 but not simultaneously, so not
3 Mr Holmes' option 3. We're slightly surprised by the way the advantages of
4 option 2 have been promoted over those of option 1. The CMA has just
5 indicated it strongly supports option 2. It's not quite clear, though, for what
6 reason that is because in its written representations at paragraphs 6, which is
7 behind tab 6, paragraph 6, the point there is said to be that this will avoid the
8 risk that the parties incur unnecessary costs in the event that the applicants'
9 claim as regards non-specified matters is successful.

10 That, with respect to Mr Holmes, is a non-point because ground 2 and 3 will have to
11 be determined whatever happens in ground 1. Each ground relates to
12 a different decision and as Mr Holmes said the outcome one way or the other
13 on Decision 1 doesn't affect Decisions 2 or 3. So we are not in one of those
14 cases where grounds 2 and 3 might suddenly vanish or become academic.

15 **THE CHAIRMAN:** If we were to decide ground 1 on a particular intellectual basis,
16 that would be relevant to the CMA. They wouldn't be obliged to adopt the
17 same approach but it would be relevant.

18 **MR PALMER:** It would be relevant.

19 **THE CHAIRMAN:** Insofar as they adopt a different approach there might then be
20 an argument, that might lead to judicial review, it might lead to increased costs
21 so it's not wholly wrong, Mr Palmer.

22 **MR PALMER:** Well, it is wrong insofar as it is suggested that the applicants' claim
23 succeeding would be of particular significance. Whichever way round it goes,
24 as indeed the following paragraph recognises, there are overlapping issues and
25 the choice for this Tribunal is whether or not it wishes its consideration of
26 ground 1 to be informed by the CMA's conclusions on grounds 2 and 3; or

1 whether it would prefer that the CMA's conclusions on grounds 2 and 3 should
2 be informed by the CAT's prior conclusions on ground 1. That point works both
3 ways. There are advantages to each. It was suggested there would be some
4 advantage to having cross-examination, in this Tribunal with a transcript, but of
5 course although the CMA doesn't have cross-examination, it does have
6 multilateral and bilateral meetings which are transcribed and within the
7 confidentiality ring shared and so forth and so this Tribunal could, if it
8 sequenced matters the other way round, have the benefit of the CMA's
9 consideration of the extent, nature and operation of competitive constraints and
10 take that into account in deciding ground 1. It would then also have the benefit
11 of being able to exercise its own judicial review jurisdiction over the CMA under
12 section 193(7) at one and the same time, thus ultimately ensuring
13 a consistency of result. Whereas in the scenario that you have just outlined to
14 me, sir, the difficulty would be if the CAT goes first on ground 1 and the CMA
15 goes second on ground 2 and 3, you have just indicated that we would be
16 bound by what the CAT said on ground 1, you then might have a conflict but
17 then that conflict can only be resolved if in arriving at those conclusions the
18 CMA had made an error which was susceptible to being quashed on judicial
19 review. Our practical suggestion is that actually if you get the reference going
20 now, followed by this Tribunal's determination of ground 1 at the same time as
21 any application for judicial review of the CMA's conclusions, we're likely to get
22 to the end of the road that much more quickly, that much more efficiently
23 without the need for two separate hearings before this Tribunal. That's the
24 point.

25 **THE CHAIRMAN:** How strongly do you feel that?

26 **MR PALMER:** Not overwhelmingly --

1 **THE CHAIRMAN:** As an intervener?

2 **MR PALMER:** Our strongest suggestion is that these entire proceedings should be
3 dealt with as effectively and efficiently and speedily as possible. We think it's
4 marginal either way, but for the reasons I have just given we think that that will
5 actually resolve all matters that much sooner if it's done that way round.

6 **THE CHAIRMAN:** Anybody else want to offer any other assistance to the Tribunal
7 on this point?

8 **MS LOVE:** Sir, we prefer option 2.

9 **THE CHAIRMAN:** Thank you.

10 **MS NEILL:** Sir, I am conscious that I made quite a short statement saying that we
11 did agree with Vodafone's and TalkTalk's position. I didn't give detailed
12 reasons for that and we have heard from BT quite detailed submissions as to
13 why they prefer a different option. If you would like me to address you further
14 on why we support Vodafone and TalkTalk's position I'm very happy to do so.
15 In short we would say that it's efficiently more economical and avoids the risk of
16 lack of consistency to have the Tribunal go first on ground 1, Decision 1, rather
17 than trying to correct any lack of consistency by way of judicial review, which as
18 you pointed out, sir, could induce costs. There is also the difficulty that the
19 CMA would have to unpick from what is a broader, clearly non-price control
20 matter, the elements which are cross-referred into the Decision 3 price control
21 matter, so that is also a fairly complicated process for the CMA to address.
22 Obviously it could be overcome but it's another reason why we would support
23 the appellants.

24 **THE CHAIRMAN:** I think we're pretty clear that we will go for option 2 if that's okay.
25 It clears the air.

26 Right, where does that leave us?

1 **MR BATES:** I think we're then into the future conduct of the appeals and in
2 particular setting the timetable for the next stages in the proceedings. At
3 paragraph 9 of Ofcom's note, so that's behind tab 10 of the bundle,
4 paragraph 9 there sets out some dates which as I understand it are all agreed
5 between the parties, so Ofcom's defence by 1 November, statement of
6 interventions by 15 November and reply by 13 December.

7 **THE CHAIRMAN:** Right.

8 **MR BATES:** If the Tribunal is happy with that.

9 **THE CHAIRMAN:** We're happy with that.

10 **MR PALMER:** Sir, that wasn't in fact agreed by BT. The reason is, again, we are
11 concerned that what should not happen if at all possible is to have a further
12 round after that timetable of amended pleadings. Now, you have heard about
13 the application that has been made for confidential material, and what is
14 anticipated in Mr Bates' submissions is that following disclosure of confidential
15 material he may wish to amend his notice of appeal. So the question is when is
16 that most efficiently and effectively done and our submission would be at
17 an early stage. If the amended notice of appeal followed disclosure of the
18 confidential material, then Ofcom's defence and statement of intervention could
19 follow in a single round of pleadings. If, on the other hand, Ofcom filed their
20 defence at the same time as providing confidential materials and then that
21 leads the appellants to wish to amend their notice of appeal, then you have to
22 allow time for a further amended defence and further amended statements of
23 intervention.

24 It wouldn't be open, and this is the real danger we wish to raise, for the appellants to
25 respond with new points arising from the confidential material for the first time
26 in their reply. The reply should be restricted to points of genuine reply to

1 matters arising in the defence to the points originally raised. If there are new
2 points arising they need to be raised by an amended a notice of appeal and my
3 suggestion on behalf of BT is that be done sooner rather than later so we have
4 just a single round of pleadings thereon. If that course recommends itself to
5 the Tribunal the effect of that is only to knock pleadings on by about two weeks,
6 just to allow for those amendments to be made if so advised and then for
7 Ofcom's defence and then as I say intervention, this can still all be done by
8 Christmas. What we're anxious to avoid is a further round of pleadings going
9 on into the new year.

10 **THE CHAIRMAN:** The final date for disclosure is the date of Ofcom's defence.

11 **MR BATES:** Yes, sir.

12 **THE CHAIRMAN:** I hate to use the word backstop, you hope to get it done before,
13 is that right?

14 **MR BATES:** That is right, sir, yes.

15 **THE CHAIRMAN:** Any observations on Mr Palmer's concern?

16 **MR BATES:** Yes. At the moment, we don't have any reason to anticipate that the
17 disclosure of the material we have asked for would require amendments to our
18 notice of appeal or evidence but the reason we have asked for it as soon as
19 possible is so that if we identify having reviewed that material that there is
20 a need for it, we will apply promptly to the Tribunal and it may be that what we
21 would be asking to put in is a very short supplement to our material to make
22 sure that we had raised all the points we wanted to raise. So I don't think at
23 this point in time it's appropriate to proceed on the basis that there will be
24 amendments or there are likely to be amendments and to put out the timetable
25 on the basis of that. Of course, to some extent how this point is dealt with
26 depends on the overall timetable of the proceedings and when the Tribunal

1 thinks it will be able to have the hearing on Decision 1.

2 **THE CHAIRMAN:** Right.

3 Any other observations on Mr Palmer's concerns? I mean I think we can deal with
4 this by vigilant case management. I don't think we're going to allow large
5 amendments of pleadings on 13 December. And I think Mr Bates' pleadings
6 already attack Ofcom's decisions root and branch as far as I can see. I'm not
7 sure there is much left they can amend to, so they may attack with greater
8 granularity.

9 **MR PALMER:** There are points in Mr Duckworth's expert report where he indicates
10 he needs further material and Mr Bates has said he envisages putting in
11 a supplement. Now whether that's in the form of an amended pleading or
12 a further round of evidence there will still need to be the opportunity to respond
13 to that, so the timetable needs to take that into account one way or the other so
14 there is a fair opportunity to respond.

15 **THE CHAIRMAN:** We can flex the timetable as needed and I'm willing to accept
16 Mr Bates' undertaking, which I'm sure he's happy to give, to be as efficient and
17 as timely as possible.

18 **MR BATES:** Always, sir, yes.

19 **THE CHAIRMAN:** Not to put a torpedo into this delicate vessel.

20 Does that bring us to the date of the hearing on Decision 1? I hesitate to fix dates of
21 hearings in a discussion involving so many important people but we are looking
22 at early February.

23 **MR BATES:** Yes, sir. I think the next item on the agenda before that would have
24 been whether a further case management conference might be necessary but
25 we can certainly work back from the February date.

26 **THE CHAIRMAN:** Work back from the trial date.

1 **MR BATES:** Yes.

2 **THE CHAIRMAN:** And then this raises the question of how long you want which in
3 turn raises the question of what form is the trial going to take, are we going to
4 have witnesses, are we going to have cross-examination? I thought that was
5 all gone with this amendment. No?

6 **MR PALMER:** No.

7 **THE CHAIRMAN:** How very strange. Can we talk about that, perhaps?

8 **MR BATES:** Yes, who would you like to hear from?

9 **THE CHAIRMAN:** Perhaps Ofcom could first of all tell us how they see this hearing
10 actually being managed, please.

11 **MR HOLMES:** Well, sir, as you will know, although we have a judicial review
12 standard, it is still a judicial review which must, for so long as we remain subject
13 to European Union law, be conducted in a way which takes due account of the
14 merits. It's also an unusual jurisdiction in that new evidence is, as matters
15 stand, permitted and must be taken into account by the Tribunal when
16 considering the correctness of the decision that Ofcom has arrived at, and in
17 those circumstances, I don't, in my submission, one can't assume that the rarity
18 with which cross-examination occurs in ordinary High Court judicial review
19 proceedings can be read across to this Tribunal's jurisdiction and my
20 expectation would be, although we can't give a confirmed view at this stage,
21 that some cross-examination will be appropriate of the new evidence which has
22 been brought forward. The Tribunal will have seen the table at the front of the
23 first appeal bundle, which acknowledges that all of the factual evidence which
24 is provided is new evidence that was not before Ofcom at the time of its
25 decision, and a new expert report which was also not submitted to Ofcom
26 during the administrative procedure, and those will need to be tested. So with

1 that in mind we do expect that cross-examination will be required
2 notwithstanding the amendment to the standard of review.

3 **THE CHAIRMAN:** Right, so it's not a question of reading across the Tribunal's
4 practice in judicial review in merger control decisions.

5 **MR HOLMES:** No for the two reasons I have indicated. Firstly, new evidence and
6 secondly, the need to take account of the merits.

7 **THE CHAIRMAN:** I'm tempted to say what's changed, then, what was all the fuss
8 about?

9 **MR HOLMES:** Well, matters will clearly have changed as and when
10 European Union law ceases to apply and so we will need to keep this under
11 review.

12 **THE CHAIRMAN:** Ah. Yes.

13 **MR HOLMES:** But you have my submission on the specific features of the judicial
14 review jurisdiction as matters stand.

15 **THE CHAIRMAN:** Right, so you will keep us posted as to whether European Union
16 law is still applying.

17 **MR HOLMES:** I'm sure the Tribunal will have no need of updates from me in that
18 regard but it may be a matter that will require submission.

19 **THE CHAIRMAN:** I see, right.

20 Anybody else got any observations on this? Or is this generally --

21 **MR PALMER:** We agree.

22 **THE CHAIRMAN:** -- agreed. Very good. Well then how long a trial are we talking
23 about?

24 **MR BATES:** Well, the suggestion from Ofcom had been that potentially as short as
25 three days and we think that that is too short. We suggested that provision be
26 made for seven days on the basis that that's the maximum that could possibly

1 be required because obviously it's much harder to find additional days than to
2 cut back days that have already been provided for.

3 **THE CHAIRMAN:** Yes.

4 **MR BATES:** We don't know at the moment precisely the number of witnesses but
5 given the indications from the two interveners that they will both be filing
6 witness evidence, and given the fact that the appellants have a number of
7 witnesses who may wish -- who other parties may wish to cross-examine, and
8 also our experts, we suggest that five or six days seems like a reasonable
9 amount of time to allow on a prudential basis.

10 **THE CHAIRMAN:** Yes.

11 Are you in discussion with each other about possible dates?

12 **MR HOLMES:** We haven't, I think, yet canvassed that. We, subject to the Tribunal's
13 availability, we were discussing, the Ofcom counsel team were looking at our
14 own availability, and given the need for skeleton arguments and so forth
15 following close of pleadings we did wonder if a date perhaps around
16 17 February might be convenient to the Tribunal but I haven't yet canvassed
17 that with other counsel.

18 **THE CHAIRMAN:** I think that won't work with us. I can tell you that now. The
19 previous week.

20 **MR HOLMES:** That's very helpful.

21 **THE CHAIRMAN:** The week before might work but we might not be able to sit
22 anywhere.

23 **MR BATES:** Can I just mention, sir, that so far as counsel availability is concerned
24 for the appellants that those dates are fine. There is a slight difficulty in that
25 Mr Pillsbury, who is one of our witnesses, is not available between 5 and
26 20 February, so --

1 **THE CHAIRMAN:** That is a slight difficulty.

2 **MR BATES:** So there is a slight difficulty. Obviously we don't know at this stage
3 whether there is going to be any applications to cross-examine him but it may
4 be that in the first period starting the 17th that was mentioned it would be
5 possible to accommodate him within that one.

6 **THE CHAIRMAN:** I think I can say now we cannot do the 17th week.

7 **MR BATES:** Sorry, I misunderstood.

8 **THE CHAIRMAN:** We can do the previous week, the 10th and we could conceivably
9 do the 3rd but we are in difficulty about accommodation.

10 **MR BATES:** Yes, well, if it were possible to do the 3rd clearly that would help in
11 relation to Mr Pillsbury's availability.

12 **THE CHAIRMAN:** I'm not going to decide this now but we're just putting down
13 markers.

14 **MS LOVE:** Sir, I rise to put down a marker of my own which is I heard a reference to
15 our witness evidence. We had intended to intervene only in respect of grounds
16 2 and 3. If it were the case that it was considered appropriate to cross-examine
17 our witness in relation to matters felt to go to ground 1, it would obviously, in my
18 submission, be inappropriate for that to happen.

19 **THE CHAIRMAN:** I don't quite see how that works, do you?

20 **MR BATES:** I'm so sorry, sir. I said interveners, plural, I only should have referred
21 to BT.

22 **THE CHAIRMAN:** Good.

23 **MR HOLMES:** Sir, just to assist in discussion, can I just clarify, do the
24 accommodation difficulties extend to weeks subsequent to 17th --

25 **THE CHAIRMAN:** No, the accommodation issue is quite specific, which is by that
26 time we hope to be in a new building but also we have this other litigation going

1 on which involves some sort of vehicular transport and the hearings, case
2 management conferences, tend to involve hundreds of people, multiple
3 courtrooms, streaming, everything else and all the rest of the Tribunal's work is
4 blotted out and I think there is something like that scheduled for 6 and
5 7 February, which is why we have some difficulty. But I'm not saying we
6 couldn't manage to sit in a barn somewhere, a tent or shed or something.

7 **MR HOLMES:** That's very helpful, sir, so do I take it then --

8 **THE CHAIRMAN:** First fortnight in February is where you should be homing in on.

9 **MR HOLMES:** If there were difficulties with counsel's availability would the final
10 week in February be a possibility or is that --

11 **THE CHAIRMAN:** I don't think I have information on that at the moment. It's not
12 brilliant for me.

13 **MR HOLMES:** That's very helpful.

14 **THE CHAIRMAN:** We are keen to crack on with this because I think we don't want
15 this lingering.

16 **MR HOLMES:** Yes.

17 **THE CHAIRMAN:** We are willing to sit on 13 January. I gather you're not.

18 **MR HOLMES:** Well, sir, it's not that I'm not keen to sit on 13 January I just think it
19 would be difficult to accommodate all of the steps that are required in bringing
20 the case to trial in a convenient manner.

21 **THE CHAIRMAN:** Just so it's really understood that the Tribunal is ready, willing
22 and prepared.

23 **MR BATES:** I will take instructions from my clients, sir, as to whether that date is
24 something that would be possible for us. It may be.

25 **THE CHAIRMAN:** Okay. I think we will leave that there.

26 Now, that means ...

1 **(Pause)**

2 If we need another CMC that ought to be before Christmas and what is your thinking
3 on that? Close of pleadings is 13 December. We had actually considered the
4 week before would be convenient.

5 **MR HOLMES:** Yes, sir. It may not be necessary.

6 **THE CHAIRMAN:** It may not be necessary anyway.

7 **MR HOLMES:** Well indeed or indeed for pleadings to have been --

8 **THE CHAIRMAN:** You seem to be agreeing everything.

9 **MR HOLMES:** By then we will have a sense of the trial and it may be the preceding
10 week if the Tribunal were available we could schedule it for then.

11 **THE CHAIRMAN:** Shall we not try and make things complicated for ourselves then?
12 Okay, fine.

13 Right, where does that leave us? Technical primer or was there anything else on
14 dates?

15 **MR BATES:** I don't think there is anything else on dates. On technical primer --

16 **THE CHAIRMAN:** Actually we haven't settled. On witnesses you're presumably
17 going to talk amongst yourselves and come to some sensible view and I think
18 I should say that in deference to the change of standard of review we will not
19 be encouraging large amounts of witness evidence, but if there is a necessary
20 element of cross-examination we won't want to miss that, because as you say
21 we do have to take due account of the merits, whatever that means.

22 **(Pause)**

23 There is one little point, yes. When it comes to Ofcom's witness.

24 **MR HOLMES:** Yes.

25 **THE CHAIRMAN:** There was some issue the last time round, I think, about whether
26 Ofcom's witness was a witness of fact or a witness of expertise. Are we going

1 to go round that buoy again?

2 **MR HOLMES:** My recollection, sir, is that there was some concern or that -- about
3 the ability of an Ofcom internal witness to provide independent expert evidence
4 in the particular circumstances.

5 **THE CHAIRMAN:** That wasn't the issue, Mr Holmes, I'm sorry. I thought the issue
6 was the Tribunal found difficulty from time to time to know whether the
7 evidence being advanced was by way of fact or by way of expert opinion
8 because it came from the same person.

9 **MR HOLMES:** Well, sir, we will certainly review the previous BCMR judgment and
10 we will take that into account in settling our evidence.

11 **THE CHAIRMAN:** And also in deciding which witness you put forward.

12 **MR HOLMES:** Yes, sir. It is our intention to put forward a single witness but we can
13 discuss any issues that that gives rise to in due course.

14 **THE CHAIRMAN:** Thank you.

15 **(Pause)**

16 I am being told you should look at paragraph 111 --

17 **MR HOLMES:** I'm grateful.

18 **THE CHAIRMAN:** -- and some earlier paragraphs. I'm sure you can find them.
19 Right. Technical assistance, yes?

20 **MR BATES:** Sir, I think we're all agreed that we're happy to provide a written
21 technical primer. If the Tribunal would find it of assistance then we could also
22 have a teach-in session. If there is to be a teach-in session that raises the
23 issue of the involvement of the CMA in that in circumstances where a formal
24 reference hasn't been made. The CMA's guidance on how they deal with price
25 control references suggests that they are willing to do some work internally
26 before the formal reference has been made, so if it were a teach-in session it

1 may be possible for at least CMA staff to participate in that but it's really
2 a question for the Tribunal as to what would be helpful to you.

3 **THE CHAIRMAN:** Is there a costs element to that?

4 **MR BATES:** Cost of the CMA?

5 **THE CHAIRMAN:** Of the CMA recovering its costs?

6 **MR BATES:** There may be an issue in relation to that. Perhaps something could be
7 agreed about that if there is a concern that the CMA has. Obviously it depends
8 on whether they're able to allocate individuals at all to this matter when they're
9 not sure what the timing will be of when they will have to do their task and who
10 will be available.

11 **THE CHAIRMAN:** On the timetable we are now working towards agreeing, when
12 would the references to the CMA be made?

13 **MR BATES:** Well, that would depend on when the Tribunal is able to give its
14 judgment following the February hearing.

15 **THE CHAIRMAN:** It would be after judgment.

16 **MR BATES:** It would be after judgment, yes.

17 **THE CHAIRMAN:** I think our position is we would be very grateful for written
18 technical assistance. I think we have an open mind as to whether we need
19 a briefing at the moment. We have various degrees of expertise in these
20 matters and I think we should be better able to take a view on that when we
21 have seen the pleadings and the evidence.

22 **MR BATES:** So I suppose the next question then is the timing of that technical
23 briefing. I would respectfully suggest that it should be after written pleadings
24 have closed so as not to be a distraction.

25 **THE CHAIRMAN:** A technical briefing on which we have an open mind and that will
26 be into January not fairly long before the hearing.

1 **MR BATES:** I'm grateful, sir.

2 **THE CHAIRMAN:** But as I say I think concentrate on the written guide --

3 **MR BATES:** Yes.

4 **THE CHAIRMAN:** -- for the moment.

5 Is there anything else?

6 **MR BATES:** Not that I have, sir, no.

7 **THE CHAIRMAN:** Well I think that's commendable. I thought we would be here at

8 quarter past 5, but not. Okay, thank you very much for -- if there is no further

9 CMC we won't meet again until February but I look forward to it. Thank you.

10 **(3.15 pm)**

11

(The hearing concluded)