

1 Tuesday, 11 October 2016

2 (10.30 am)

3 THE CHAIRMAN: Mr Holmes, just before you start, I want to
4 say something about the incident yesterday, reported
5 yesterday.

6 We have reflected on the incident reported to us by
7 Mr Beard. This involved the sending of materials by
8 email from BT's external solicitors to a BT expert
9 witness during the weekend break in his giving of
10 evidence to the tribunal, accompanied by a reference to
11 a particular relevant document.

12 The reference to the document was explained by
13 Mr Beard as a genuine mistake by a junior lawyer, which
14 was quickly corrected, insofar as it was possible to do
15 so. Mr Beard apologised on behalf of BT.

16 Mr Pickford, on behalf of Sky, raised some further
17 queries, which Mr Beard answered. Mr Holmes said Ofcom
18 regarded the incident as trivial.

19 No-one suggested the witness had actually been
20 influenced in any material way and he continued with his
21 evidence.

22 It is obviously very important, if the tribunal is
23 to give weight to their evidence, any weight to their
24 evidence, that witnesses who are in the course of giving
25 evidence should remain free from influence of any kind.

1 I hope that is understood. We would therefore remind
2 all parties in proceedings before the tribunal that they
3 should keep that key principle clearly in mind if
4 further consequences are to be avoided.

5 In this case, we accept BT's apology and we regard
6 the incident as closed.

7 MR BEARD: I'm most grateful to the tribunal. Thank you,
8 sir.

9 MR HOLMES: I'm grateful, sir.

10 MR GREG HARMAN (continued)

11 Cross-examination by MR HOLMES (continued)

12 MR HOLMES: Mr Harman, we now come to the cost-stack
13 analysis. Now, for the purposes of this evidence, we
14 will be considering BT's analysis of its retail costs.
15 Accordingly, we will be covering material that is
16 confidential to BT and which Sky's representatives will
17 not be able to hear, so I think I am right that the
18 courtroom currently contains only BT's representatives
19 and those within the confidentiality ring, but no-one
20 from the Sky team.

21 MR WISKING: That's correct.

22 THE CHAIRMAN: Mr Wisking, I should have welcomed you to the
23 front bench.

24 So that is clear. In that case, please proceed.

(In camera session)

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MR DAVID HAMISH CURRY MATTHEW (sworn)

Examination-in-chief by MR HOLMES

MR HOLMES: Mr Matthew, do you have a bundle entitled DF1 available to you?

A. Yes.

Q. Could you turn within that bundle to tab 2, please. Do you see there a document entitled "The witness statement of David Hamish Curry Matthew"?

A. Yes.

Q. If you turn within that document to page 26 -- is the document that you have signed?

A. No. The document I have is not signed.

Q. But is this your witness evidence in these proceedings?

A. Yes, it is.

Q. Just for the tribunal's assistance, to identify two uncontroversial points, you are an economic director in Ofcom's competition group?

A. Correct.

Q. You were responsible for the economics analysis that informed Ofcom's decision in the WMO statement, the decision under appeal?

A. Correct.

1 MR HOLMES: I don't have anything further by way of
2 examination-in-chief. If you stay there, I think
3 Mr Facenna may have some questions for you. Before he
4 begins, shall we just clarify the confidentiality?
5 MR FACENNA: I think we are in open court at the moment.
6 THE CHAIRMAN: Good afternoon, Mr Facenna.
7 MR FACENNA: Good afternoon, just. Yes, sir, we are in open
8 court, so Sky are back in the room.
9 THE CHAIRMAN: That is satisfactory, is it?
10 MR FACENNA: It is satisfactory for the moment, yes.
11 (Public session)
12 Cross-examination by MR FACENNA
13 MR FACENNA: Mr Matthew, Mr Holmes has asked my first two
14 questions for me, which is helpful. You are a director
15 of economics at Ofcom, as you have said just, and
16 I think you just confirmed that you had overall
17 responsibility for the economics analysis in the WMO
18 review statement.
19 A. Yes, that's correct.
20 Q. In that capacity, you were essentially responsible for
21 analysing any economic input that was provided by
22 industry parties; is that right?
23 A. Yes, that's correct.
24 Q. So that would include the cost stack material that was
25 provided by BT?

1 A. That's correct.

2 Q. Does it also include the Dryden Padilla modelling that
3 was the subject of Dr Padilla's evidence?

4 A. Yes, that's correct.

5 Q. Your evidence is divided into four parts. Do you still
6 have your witness statement open?

7 A. Yes, I do.

8 Q. There is a helpful summary of the evidence that you
9 give, and it is in paragraph 10 of your witness
10 statement at page 4, if you have a look at that.

11 Just to set the scene -- do you have paragraph 10
12 there, Mr Matthew?

13 A. Yes, I do.

14 Q. At section A of your evidence, which you describe there
15 in paragraph 10(a), is it right to say that the first
16 part of your evidence deals with what you say was
17 a different context between the 2010 decision to impose
18 the WMO remedy and the 2015 decision to remove that
19 remedy?

20 A. Yes.

21 Q. Particularly, I think we see about two-thirds of the way
22 down that paragraph one of the things you mention is the
23 terms of deals that Sky has with Virgin and TalkTalk?

24 A. Yes.

25 Q. We will come on to that in a moment. Then section B of

1 your evidence is where you set out your criticisms of
2 the cost stack modelling that BT provided during the
3 consultation?

4 A. Yes, that's correct.

5 Q. Then in section C you respond to certain points that
6 Mr Harman raises in his first report, essentially, as
7 you know, Mr Harman's evidence is that BT's modelling
8 did provide a reasonable basis for evaluating whether
9 there was a margin squeeze and should have caused Ofcom
10 to undertake some further analysis?

11 A. Yes, that's where I consider that.

12 Q. Then in section D, you essentially rerun BT's modelling
13 with some different assumptions which cause you to show
14 that

15 [redacted]#####

16 A. Yes, correct.

17 Q. If we jump to "Context", section A, then, it is the
18 first part of your evidence, and it starts over the page
19 at paragraph 11.

20 As I understand, at paragraph 11 you set out
21 a conclusion which you have taken from the text of
22 the WMO review statement; is that right?

23 A. That's right.

24 Q. Then at 12 you say:

25 "BT's argument is that Ofcom ought to have examined

1 Sky's wholesale pricing in the same way as it did in
2 2010."

3 A. Yes.

4 Q. Then 13 and 14 is really your evidence as to why the
5 context was different. So you say, looking at
6 paragraph 13, that in the 2010 statement, Ofcom
7 concluded, based on evidence from negotiations, that
8 there was a strong reluctance on Sky's part to negotiate
9 a wholesale deal. Then you go on to say that was the
10 central finding of the review, it provided the principal
11 basis for the introduction of ex ante regulation.

12 A. Yes.

13 Q. In the following sentence, you go on to say:

14 "Ofcom also considered that if Sky was merely
15 obliged to offer wholesale supply under the remedy with
16 no pricing obligations attached, commercially negotiated
17 prices would ultimately default to levels that would not
18 ensure fair and effective competition."

19 A. In paragraph 14?

20 Q. Sorry, I'm still in 13.

21 A. Yes.

22 Q. So the final sentence of 13 is:

23 "Having concluded that a remedy was necessary to
24 address the lack of supply, Ofcom considered that it
25 also needed to ensure that the prices which were set for

1 that supply would not act to unwind the effectiveness of
2 the remedy."

3 A. Yes.

4 Q. As you say, you do go on immediately afterwards in
5 paragraph 14 --

6 THE CHAIRMAN: Can you just read the footnote into the
7 transcript?

8 MR FACENNA: I can. Footnote 7 is a reference to the
9 2010 --

10 THE CHAIRMAN: It was footnote 6 I was thinking of.

11 MR FACENNA: Yes. Would you like me to read the text from
12 the footnote?

13 THE CHAIRMAN: If you would just mention that the CAT found
14 that the central finding of the 2010 statement was
15 incorrect.

16 MR FACENNA: The footnote actually reads:

17 "In August 2012, the CAT upholding Sky's appeal
18 against the Ofcom's decision to impose the WMO
19 obligation, found that Ofcom's core competition concern
20 in the 2010 pay TV statement was that Sky had
21 deliberately withheld wholesale supply of premium
22 channels from other retailers."

23 There is a reference to the CAT's decision.

24 You go on in 14 to say that Ofcom also made
25 a finding that, on the basis of the evidence before it,

1 Sky's wholesale prices set out in the cable rate card
2 were at a level that didn't enable either Virgin or new
3 entrants to compete effectively.

4 A. Yes.

5 Q. Is your evidence there -- the evidence you seem to be
6 giving at 13 and 14 was that it follows that because in
7 this instance, in 2015, you have determined that there's
8 no longer a need for a remedy, there was no need for
9 Ofcom to go on to do any detailed pricing work. Is that
10 a fair summary of what you are saying in 13 and 14?

11 A. Well, we would need to go on to the rest of
12 paragraph 14, which goes into broader considerations.
13 We were not doing a comparison with 2010, if that is
14 what you are asking.

15 Q. No, I'm not asking that. I am asking whether your
16 evidence is that, in 2010, Ofcom concerned itself with
17 pricing after it had already calculated or concluded
18 that there needed to be a WMO remedy. That is how
19 I read 13 and 14.

20 A. Yes. So that was the context for the pricing analysis
21 done in 2010.

22 Q. Conversely, in 2015, since Ofcom has concluded that
23 there is no prima facie concern about Sky engaging in
24 practices prejudicial to fair and effective competition,
25 no regulation is required and it wasn't necessary for

1 Ofcom to conduct a detailed pricing analysis?

2 A. Yes, that's broadly right.

3 Q. That, you say in these paragraphs, is the key difference
4 between 2010 and 2015?

5 A. Well, I think I'm just drawing attention to the
6 difference. As I say, we didn't conduct this review
7 with 2010 in our minds and how we should change analysis
8 in relation to it. We conducted a new analysis of
9 things as we found them today.

10 Q. It is a slightly odd thing to say, isn't it? Because
11 the decision you were considering was whether you were
12 going to remove the regulation that had been imposed in
13 2010?

14 A. I don't think it is odd. I mean, firstly, it is several
15 years later, and, secondly, we had a CAT finding that
16 substantially removed the main pillar of the 2010
17 decision. So we started again.

18 Q. Let's consider that. Actually, isn't the true position
19 that, in 2010, Ofcom had an independent concern as to
20 whether pay TV retailers could compete effectively at
21 the rate card prices that Sky was offering?

22 A. Well, I understand that that's what's been argued in the
23 Court of Appeal, et cetera. I really didn't go back to
24 2010 --

25 Q. It's not just argued. That's what the Court of Appeal

1 decided, isn't it?

2 A. I understand that's the case.

3 Q. So the Court of Appeal's decision was that that formed

4 an independent basis for the imposition of the WMO

5 remedy?

6 A. It may have been, but we started in 2015 -- or 2014

7 looking at the market afresh.

8 Q. Can I hand up -- just to be clear, when you say you're

9 looking at the market afresh, what we are concerned with

10 at the moment is the evidence that you have given in 13

11 and 14 as to why there was a detailed pricing analysis

12 in 2010, and you didn't do one in 2015. As I have

13 understood what you have said in 13 and 14, it is that

14 in 2010 Ofcom decided there was this core competition

15 concern about refusal to supply. You then went on to

16 look at pricing. You say that is the difference between

17 2010 and 2015?

18 A. It is not "the difference" between 2010 and 2015. It is

19 a difference. But in 2015, we did not go back to what

20 we did in 2010 --

21 Q. I understand that.

22 A. -- and think, "Well, in which detailed respects should

23 we change our position there?". We started again in

24 2015.

25 Q. I understand that. The question is, why, in 2015,

1 didn't you do any detailed pricing analysis? The reason
2 you seem to give here is that because you decided there
3 was no problem with refusal to supply?

4 A. We didn't do a detailed pricing analysis in 2015 because
5 the evidence before us didn't suggest it was necessary
6 to do one.

7 Q. That is the point. Just looking at your paragraph 14,
8 you say:

9 "Ofcom went on to assess whether the evidence showed
10 that Sky was acting on those incentives and, given the
11 evidence of wide supply, Ofcom no longer considered that
12 there was evidence to demonstrate that Sky was acting on
13 those incentives."

14 That's the difference in context.

15 A. Yes. So in 2015, we find wide supply and we find
16 commercial agreements that are not being complained
17 about.

18 Q. Can I hand up a document to go in the bundles? This is
19 confidentiality ring only, because it is a document
20 from -- it is Ofcom's skeleton argument in the Court of
21 Appeal. It does have some confidentiality markings on
22 it. But it is not marked consistently with the papers
23 in these proceedings.

24 THE CHAIRMAN: Are you going to read those out?

25 MR FACENNA: I'm not going to read the confidential

1 information, no.

2 Have you been given a copy of that, Mr Matthew? No.
3 Someone needs to give you a copy. Sorry about that.
4 You are the crucial person in these circumstances.

5 Can I just ask you first to look at paragraph 30 of
6 this document. These were Ofcom's own submissions to
7 the Court of Appeal. Page 11.

8 A. Can I just ask what I'm looking at?

9 Q. This is Ofcom's document. It is Ofcom's skeleton
10 argument in the Court of Appeal proceedings in 2013.

11 A. Okay.

12 Q. You will see Mr Holmes' name is at the back, together
13 with leading counsel at the time and Ms Boyd's name. Do
14 you see there that in paragraph 30 what Ofcom was saying
15 was that the competition concern as to whether pay TV
16 retailers could compete effectively at rate card prices
17 formed an independent basis for the imposition of
18 the WMO remedy. It was a key issue in the appeal, there
19 was extensive expert economic evidence before the
20 tribunal as to whether or not that concern was justified
21 by reference to Ofcom's pricing analysis in the
22 statement.

23 So it is not -- it wouldn't be right to say, or at
24 least Ofcom certainly was saying the opposite in this
25 document, that the conclusion reached on pricing in 2010

1 was somehow contingent on the finding that Sky was
2 refusing to supply. That's not what Ofcom is saying in
3 this document, is it? It was an independent concern and
4 that was a freestanding basis for imposing the remedy?

5 A. That's what it's saying in this document.

6 Q. If you have a look at paragraph 11, if you turn earlier
7 on, on page 4, if you look at 11(b) -- again, this is
8 Ofcom's own summary of its decision in 2010. You will
9 see at 11(b) what is said there is that there was
10 a further concern -- so it describes what we have just
11 referred to as the core concern as the first concern, in
12 subparagraph (a). Then it goes on to say there was
13 a further concern relating to price. Then it quotes
14 paragraph 7.5 from the statement. Do you see that?

15 A. Yes. So it states that there is an independent concern
16 linked to price. So the issues are not limited to
17 whether people supply or not, it is also whether it's
18 supplied at reasonable prices. Then it goes on to
19 explain that the concerns in 2010 -- if I'm reading this
20 right -- were linked to the fact that Sky wasn't
21 offering prices below the rate card which Ofcom had
22 taken the view was -- did not allow for fair and
23 effective competition.

24 Q. Yes, but do you accept, looking at (b), and then (c)
25 goes on to describe the detailed economic analysis that

1 was carried out in relation to pricing issues, and you
2 will see it describes the adjusted margin squeeze test,
3 but you accept -- I mean, this is Ofcom's own document
4 to the Court of Appeal, which ultimately Ofcom and BT
5 were successful in the Court of Appeal. It wouldn't be
6 right to say that the pricing concerns and the work that
7 was done on pricing in 2010 was contingent on the
8 primary finding that Sky was refusing to supply, because
9 here Ofcom itself was saying, "This was an independent
10 concern that we had about pricing, it was a freestanding
11 basis for the remedy, and we did the work to support
12 it"?

13 A. That's correct. Although I think I'd just make one
14 observation now. I'm not sure -- I can't really speak
15 to this, because I was not involved in either these
16 appeal proceedings or the 2010 decision. I'm not sure
17 it would be right to say that the pricing analysis that
18 was done was contingent solely on the parts of
19 the decision that -- sorry, the parts of the CAT 2012
20 decision that the Court of Appeal subsequently
21 overruled. So I think -- my point is, if you went -- if
22 you time travelled back to 2010 and asked yourself, what
23 would the pricing analysis we would have done then have
24 been in a world where the only concern related to
25 a stand-alone, new entrant pay TV retailer, I'm not sure

1 we would have ended up in the same place. But that's
2 a hypothetical scenario, as far as I can see.

3 Q. You say it only related to that because -- what you say
4 is, that's the result of the CAT's judgment in 2012?

5 A. I don't say anything. I'm not really that well informed
6 about this particular period of Ofcom's decision.
7 I wasn't part of it.

8 Q. Essentially, the purpose of this was just to really --
9 looking at the way you put it in 13 and 14, it seemed to
10 me that you were suggesting that the pricing work and
11 analysis that had been done was contingent on a primary
12 finding about refusal to supply. All I am putting to
13 you is that, it is fair to say, isn't it, that's not the
14 way Ofcom itself presented its decision in its skeleton
15 argument to the Court of Appeal? It has described it
16 somewhat differently?

17 A. I just can't comment on what the full skeleton says.
18 I think what I am saying here is broadly as I understood
19 it -- understand it still.

20 THE CHAIRMAN: To be fair to the witness, the first sentence
21 of paragraph 14 of his statement does refer to
22 a separate finding by Ofcom in 2010.

23 MR FACENNA: Of the WMO review statement that's under
24 appeal, are you talking about, or the skeleton argument?

25 THE CHAIRMAN: No, I'm talking about the 2010 statement. He

1 says:

2 "Ofcom also made a finding, on the basis of
3 the evidence before it, Sky's wholesale prices as set
4 out in the cable rate card were set at a level that did
5 not enable either Virgin or new entrants to compete
6 effectively with Sky."

7 So he has recited the 2010 separate finding which
8 you --

9 MR FACENNA: He said that. There did seem to me to be
10 a slight ambiguity between the end of paragraph 13 and
11 the beginning of paragraph 14.

12 THE CHAIRMAN: I think he's also made clear that he wasn't
13 involved.

14 MR FACENNA: He has made that clear, which I wasn't aware
15 of.

16 Let's come on to deal -- leave 2010 aside and we
17 will move on to deal with the 2015 process.

18 Do you have the first consultation document that
19 Ofcom published? It is in file DF1, tab 5.

20 A. Yes.

21 Q. If you can turn to paragraph 7.3 in the consultation
22 document, at page 64, at least on my version, you will
23 see -- this is a consultation document that Ofcom put
24 out in December 2014, the opening gambit in this review.
25 I think this is a paragraph the tribunal was taken to in

1 opening submissions, actually. This is the paragraph
2 where pricing is mentioned, Mr Matthew. Have you seen
3 this paragraph before? Have you looked at this?

4 A. Yes.

5 Q. It is right, isn't it, that in 7.3, you say -- Ofcom
6 says in the consultation document it's identified two
7 types of practice that may result in limited
8 distribution of key content, and then the two bullet
9 points are, first of all, a failure to supply, and,
10 secondly, a supply on terms that did not allow fair and
11 effective competition. Then there are two subforms of
12 supplying on unfair terms, so there is a sort of hollow
13 bullet point and in the middle -- the hollow bullet
14 point says:

15 "Supply of the channels on a wholesale basis but on
16 terms that do not allow the rival retailer to compete
17 effectively."

18 Do you see the reference to the footnote 185?

19 A. 185?

20 Q. Yes. There is a reference there, do you see it, to
21 setting wholesale prices that do not allow a sufficient
22 retail margin to enable a rival retailer to compete
23 effectively?

24 A. Yes.

25 Q. Is it right that that is the only reference anywhere in

1 this document to a concern about Sky's wholesale
2 pricing?

3 A. I don't know. I would need to go through the document.
4 I don't maintain a photographic picture of it in my
5 head.

6 Q. I understand that. But you have given evidence that
7 this consultation document asks about pricing. So are
8 you aware whether there is -- let me say this: there
9 isn't any other reference. But you're not in a position
10 to say otherwise, are you?

11 A. Sorry. So the question is, is footnote 185 the only
12 place where we talk about concerns regarding pricing?

13 Q. Yes. Are you aware of any other references to pricing?

14 A. There's the main text, which refers to supply of
15 the channels on a wholesale basis but on terms that do
16 not allow --

17 Q. I understand that. But explicitly a reference to
18 wholesale pricing or to margin squeeze or anything of
19 that nature, that explicit reference? Are you aware of
20 any other references to that in this document?

21 A. As I have said, I haven't checked, but I'll take your
22 word for it. That seems to me -- the bullet point seems
23 to me to be plainly getting at pricing as a concern.

24 Q. I understand that. This is the reference, the bullet
25 point and the footnote. I was just asking if there were

1 any others you were aware of.

2 If we follow this section through, if you skip
3 ahead, there is various commentary about trade-offs that
4 providers have to make when making decisions. At 7.8,
5 there is a section that starts on Sky. Then we get to
6 a section on BT at 7.22 and I think we finally get to
7 the questions that are asked in the section at the very
8 end -- page 75.

9 A. Yes, I have it.

10 Q. You see the two questions there. So it is right, isn't
11 it, that none of those -- as far as you're aware -- and
12 I appreciate you may not know this document
13 photographically, but as far as you're aware, none of
14 those paragraphs, and certainly those questions don't
15 ask specifically about pricing concerns, do they?

16 A. Can I just read them? Well, this is talking about
17 incentives to limit distribution of key sports content,
18 both Sky and BT.

19 Q. Yes. It refers --

20 A. I believe we made clear earlier that there are two forms
21 of limited distribution. One is not supplying and the
22 other is supplying on terms that don't allow rivals to
23 compete. So, in that sense, it would cover pricing.

24 Q. So you say these questions are seeking evidence from
25 consultees in relation to wholesale pricing?

1 A. Yeah, I think the -- the document does state clearly
2 that limiting distribution by the terms of supply is one
3 of the concerns we have --

4 Q. It does.

5 A. -- and it has invited comments on it.

6 Q. Although the question's asked whether you agree with our
7 assessment of Sky's incentives and our assessment of
8 BT's incentives, and those are covered from 7.8 onwards.
9 Take it from me, there is no reference to pricing in any
10 of those paragraphs.

11 A. Okay.

12 Q. But you accept that there is no specific question
13 anywhere asking about Sky's wholesale pricing or its
14 impact on the ability of its competitors to compete
15 fairly and effectively?

16 A. Well, I don't -- I haven't got the specific questions.
17 I'm sure you will tell me if there were. So I'll take
18 it as read that they don't.

19 Q. Those are the only two which could be potentially
20 relevant. The full list, if you want to see them, is at
21 page 86.

22 A. I think the general message that one of the two concerns
23 is the terms of supply, by which I think most people
24 would include pricing, is clearly part of this
25 consultation.

1 Q. Ofcom's position, as you know, and as is set out in your
2 document, is that, apart from BT, effectively no-one
3 complained about pricing. We will come on to see what
4 Virgin and TalkTalk said. But that is basically Ofcom's
5 position in relation to consultation, isn't it: "No-one
6 told us there was a problem with Sky's wholesale
7 pricing"?

8 A. Correct.

9 Q. Isn't it likely that the reason no-one did that is
10 because Ofcom didn't ask a question about pricing in the
11 consultation process?

12 A. No. I think it is unlikely.

13 Q. Why do you say that?

14 A. Well, in our sector, people complain when they find
15 problems, regulatory problems, routinely, including the
16 main people who commented on this consultation.

17 Q. So, essentially, having published this consultation
18 document in these terms, you say Virgin and TalkTalk,
19 BT, others, had they thought there was a problem with
20 Sky's wholesale pricing, they would have told us then in
21 response to this?

22 A. Yes.

23 Q. [redacted]#####
24 #####
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1 #####
2 A. Firstly, just to make plain, I don't handle our
3 stakeholder liaison. So I'm not the person who is
4 phoning up the BT regulatory staff on a day-to-day
5 basis. So I can't comment on what they were or weren't
6 told from a position of knowledge, myself.[redacted]

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21 You will have seen, sir, in the defence bundle there
22 are various notes of meetings with Virgin and TalkTalk,
23 [redacted]#####
24 #####

25 Mr Matthew, you did attend some meetings with BT.

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15 A. But to be clear, I think the consultation paper does
16 cover
17 pricing.#####
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24 So, as you will have seen from the other evidence,
25 Mr Matthew, Mr Williams in particular gives evidence in

1 his witness statement that BT assumed that there would
2 be a further consultation that would cover pricing and
3 that BT thought that that consultation would seek its
4 views and the views of other stakeholders on whether the
5 price they were paying Sky was such as to prevent them
6 from being able to compete effectively. You have seen
7 that in Mr Williams' evidence?

8 [redacted]#####
9 #####
10 #####

11 Q. You do. So you would accept that that was a reasonable
12 assumption on the part of BT

13 [redacted]#####

14 A. Yes, at this time.

15 Q. Now, the supplementary consultation did come along
16 in July. I don't think we need to turn it up. But for
17 the tribunal's reference, it is in bundle N2 at tab R,
18 the supplementary consultation. It is right,
19 Mr Matthew, that it didn't cover pricing at all, did it?
20 It had nothing to say about pricing?

21 A. No, it focused on reciprocity.[redacted]
22 #####
23 #####
24 #####
25 #####then we decided not to include pricing,

1 and BT then, as I understand it, made a submission on
2 pricing in any case.

3 Q. Yes. Let's just come on to that, because I think you do
4 start to get involved at one point.

5 If someone could hand you bundle N2, and I would
6 like you to go to tab T in that bundle. [Redacted]

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8 MR HOLMES: Could you finish the sentence?

9 MR FACENNA: The last part of the sentence is BT
10 confidential, so I can't finish it. The tribunal can
11 read the rest of the sentence.

12 We have just seen the meeting note. We didn't see
13 the meeting note until last week. Would you accept,
14 Mr Matthew, this is an accurate description, it matches
15 essentially with what we have now seen in Ofcom's own
16 internal meeting note?

17 A. BT -- sorry, this passage in the BT letter is making
18 a number of argumentative points.

19 [redacted]#####
20 #####
21 ##### What additional points are we trying to draw
22 from this?

23 [redacted]#####
24 #####
25 #####

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14 A. This is my point. I mean, I'm really not able to
15 comment on the complaint about the process.
16 [redacted]#####
17 #####
18 #####

19 Q. First of all, I don't want to put you in a position to
20 give evidence on something you're not in a position to
21 give evidence on. If we had another witness who was
22 able to comment, of course I would certainly be putting
23 the questions to them. But you do give evidence, in
24 fact it is a fairly important part of your evidence,
25 that there was a consultation process here and no-one

1 told you that there was any problem with wholesale
2 pricing. The point I think we have established is that,
3 at least in BT's case, they were told,
4 [redacted]#####
5 #####

6 A. Well, in BT's case,
7 [redacted]#####
8 ##### We decided not to include it.

9 [redacted]#####
10 #####
11 #####
12 #####
13 ##### and I think that's the germ
14 of the submission that then emerges which has the
15 modelling work which I cover in my report.

16 Q. Let's come on to the modelling work, or, sorry, let's
17 come on to the submissions that were made.

18 Just before I do that, I'm just checking what I'm
19 about to say is not -- it's BT/Sky confidential. There
20 is no-one in the room who isn't BT or Sky.

21 [redacted]#####
22 #####
23 #####
24 #####
25 #####

1 #####

2 #####

3 #####

4 Q. I think at this point, sir, we probably need to go into
5 BT confidential only, so I'm afraid I might have to ask
6 Sky to leave.

7 (In camera session)[Redacted Pages 85-215]

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(The witness withdrew)

(4.52 pm)

(The hearing was adjourned until
Thursday, 13 October 2016 at 11.30 am)

I N D E X

MR GREG HARMAN (continued)2

Cross-examination by MR HOLMES (continued)2

1 Re-examination by MR BEARD52
2
3 MR DAVID HAMISH CURRY MATTHEW54
4 (sworn)
5
6 Examination-in-chief by MR HOLMES54
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8 Cross-examination by MR FACENNA55
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