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

Case No. 1111/3/3/09

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

27 November 2009

Before:

VIVIEN ROSE  
(Chairman)

THE HONOURABLE ANTONY LEWIS  
DR. ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

**THE CARPHONE WAREHOUSE GROUP PLC**

Appellant

Supported by

**BRITISH SKY BROADCASTING LIMITED**

Intervener

– v –

**OFFICE OF COMMUNICATION**

Respondent

Supported by

**BRITISH TELECOMMUNICATIONS PLC**

Intervener

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Jon Turner QC and Mr. Meredith Pickford (instructed by Osborne Clarke) appeared for the Appellant

Mr. Josh Holmes (instructed by the Office of Communications) appeared for the Respondent.

Mr. Rob Williams (instructed by BT Legal) appeared for British telecommunications PLC.

Mr. Stephen Wisking and Mr. John McInnes (of Herbert Smith LLP) appeared for British Sky Broadcasting Limited.

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1 THE CHAIRMAN: Good morning everybody. We have as the working documents for this  
2 morning a document which I understand is a draft of the reference which we were given this  
3 morning, which I think is a Carphone Warehouse draft, and we have the Tribunal's letter to  
4 the parties of yesterday's date. We also have a note on behalf of the Competition  
5 Commission and Mr. Beal is here representing them?

6 MR. BEAL: Yes, madam.

7 THE CHAIRMAN: We see from the letter from Osborne Clarke of yesterday's date that some of  
8 the points that the Tribunal raised have been taken on board and some not for reasons set  
9 out in that letter, but perhaps, Mr. Turner, is the best way for us to proceed for you to take  
10 us through the draft and explain where we are on the various points?

11 MR. TURNER: Certainly, madam. The documents I am looking at are the draft reference  
12 questions that were attached to Osborne Clarke's letter of yesterday in conjunction with the  
13 points made in the Tribunal's letter also of yesterday.  
14 The first question that arises on the Tribunal's letter is whether there should be a definition  
15 of ancillary services which is linked to the sets of services which are listed in Ofcom's  
16 decision or not. We have no strong view about that. To be frank the main objection is that  
17 you will have seen that one of the arguments in the appeal is precisely that ancillary services  
18 should have included further elements as well. Therefore, it seems to us that the neatest  
19 solution is to leave the definition of ancillary services as it is because it is tied back into the  
20 paragraphs in the pleading in the same way as the other terms that you find there - MPF and  
21 SMPF, and so forth. Alternatively, to have a reference to the definition which you find in  
22 the LLU statement, but to have a carve-out for the argument in para. 117.3 of the notice of  
23 appeal. It seemed to us - although not much turns on it - that it is neatest simply to leave it  
24 as it is as there is no confusion in the parties, or, we trust, on the part of the Competition  
25 Commission. That was our reason for recommending that we stay where we are on that  
26 point.

27 THE CHAIRMAN: So, you are saying that to limit it to the ancillary services for which a price  
28 control is currently set would be too narrow because of the point that you say is made in the  
29 notice of appeal, that actually some other ancillary services should be included ----

30 MR. TURNER: Included in the basket to avoid gaming.

31 THE CHAIRMAN: Then the alternative would be the definition of the ancillary services in the  
32 LLU statement which is a non-technical definition, from what I seem to remember, would  
33 not necessarily take us much further than what you say the parties' understanding is from  
34 the term generally.

1 MR. TURNER: There is in the LLU statement, in two places - the Tribunal referred to one; we  
2 referred to the other - a list of the content of each of the three baskets of ancillary services.  
3 Our concern, as you say, madam, is that if we limit the questions to what is in those baskets,  
4 you therefore are intentioned with one of the arguments in the appeal.

5 THE CHAIRMAN: Thank you.

6 MR. TURNER: The second point that the Tribunal raised we have taken on board and think that  
7 the simplest way of dealing with it is by the use of a footnote - a footnote which makes clear  
8 that all references to the pleadings should be understood as references to the pleadings as  
9 amended insofar as appropriate.

10 THE CHAIRMAN: You would take out those words in square brackets in para. (c)?

11 MR. TURNER: Yes. Thank you. That should have been done.

12 The third point - whether the wording should be 'inappropriate' or 'too high' -- We made  
13 our position clear about that in a letter previous to the one sent yesterday. Again, we take  
14 the view on the law that a price control should not be capable of moving in a direction  
15 adverse to an appellant on an appeal. Nonetheless, the Tribunal has left that open and we  
16 share the Tribunal's view that one should not decide this issue if it is not necessary to  
17 decide it now - not least because that could lead to further complications and consequential  
18 applications. So, we are content with leaving that in the way that the Tribunal and Ofcom  
19 have suggested.

20 The fourth point was a request for clarification from Carphone Warehouse which we trust  
21 we have answered in our letter, which is to say that we are not dropping anything in the  
22 pleadings, and that the reference to paragraphs surrounding perhaps the paragraphs which  
23 are dispositive is there merely for convenience, to try to capture all the relevant paragraphs  
24 in a particular case.

25 The fifth paragraph of the Tribunal's letter takes issue with the phrase 'in its approach to'.  
26 We understand the Tribunal's position on that. We accept it. We have sought to deal with  
27 that in going through the terms of the draft. I have not heard from any of my friends that  
28 there is any problem with any of that, but they will say if there is.

29 The sixth point was, if I may say so, a good spot by the Tribunal, because the claim relates  
30 to efficiency gains which might reasonably have been expected to have been achieved in  
31 respect of Openreach's costs. That is either Openreach itself achieving those gains in its  
32 direct costs or costs being achieved elsewhere in the BT Group being costs which are  
33 allocated to Openreach. Indeed, the annex to the LLU statement to which the Tribunal  
34 referred and the paragraph concerned A9.1 make that point clear. That is the position in the

1 appeal and we are grateful for the Tribunal having pointed it out. For that reason we have  
2 suggested in question 1(i), referring to the level of efficiency improvements that BT Group  
3 and/or Openreach may reasonably be expected to achieve for the reasons set out in the  
4 notice of appeal we think that the reference to the relevant paragraphs make that point  
5 crystal clear and if it is not these remarks on the transcript will do so.

6 The seventh paragraph of the Tribunal's letter is somewhat more involved. We sought to  
7 set out the position in the Osborne Clarke letter sent yesterday. Essentially, whereas the  
8 previous paragraph in the reference questions, that is question 1(iii) was a complaint about  
9 the way in which costs had been allocated as between Openreach and other parts of the  
10 business, this complaint focuses on the way in which costs have been allocated as between  
11 the core rental services, that is NPF, SMPF and WLR. So it is a complaint about allocation  
12 of costs and Carphone Warehouse is not running the sort of case, for example, that H3G ran  
13 in the calls to mobile termination rate appeals, where there was a suggestion that regardless  
14 of the position on costs prices needed to be set out of line with costs to achieve a particular  
15 desirable result. Here the question is one about the way in which the total costs of these  
16 core rental services should be allocated as between the three core services in question on  
17 efficiency grounds.

18 The first point is that although Ofcom refers to long run incremental costs (LRIC) as the  
19 proper measure of cost allocation to start with, that is not how it has approached it, we say,  
20 in its statement, we say it has approached it on the basis of an FAC fully allocated cost  
21 CCA approach, and then had a cross check which, in our view, was an *ex post facto*  
22 rationalisation. That is the first complaint.

23 Secondly, we say that even if LRIC is the correct way of approaching what should be the  
24 correct differential in the costs between the different services there are other factors which  
25 should have been taken into account. We have referred to "allocative efficiency" and the  
26 consideration that for one of these services, the NPF, there is a higher elasticity of demand  
27 faced than in relation to the other service. That should mean that a higher proportion of the  
28 costs should be allocated to the service which faces that different demand elasticity.

29 The third consideration, which is referred also in para. 95 of our pleading, relates to  
30 dynamic efficiency, and there we say that for reasons of stimulating effective competition in  
31 the longer term, again a higher proportion of costs should be allocated to the other service.  
32 So those are our arguments, and they do not track easily on to the three tabulations that the  
33 Tribunal had set out in A to C in question 7. We therefore felt that if there is not confusion  
34 between the parties about what is intended to be attacked in the relevant paragraphs of the

1 notice of appeal and if the Competition Commission is also happy that it understands the  
2 points made in those paragraphs, that this reference question is perhaps best left as it is with  
3 its reference across to the relevant paragraphs in the notice.

4 THE CHAIRMAN: Yes, I see the force of that to an extent, Mr. Turner, but our aim in sending  
5 these questions is, first of all, to flush out whether actually everybody does understand what  
6 they mean and to recognise that although people may all be happily in agreement now we  
7 need to try and forestall, if possible, any disagreements arising later in the day. I think what  
8 you are saying is that it is all to do with cost allocation and the question is whether these  
9 allocative efficiency ideas affect how costs are allocated amongst the three services but they  
10 are not arguments against or on top of cost allocation arguments ----

11 MR. TURNER: That is right.

12 THE CHAIRMAN: -- pointing in a direction that says that "The prices should be this", whatever  
13 the costs are, I think that is basically what you are saying.

14 MR. TURNER: That is the important point. Mr. Pickford adds that we are also concerned here  
15 with an argument about the allocation of those costs based on dynamic considerations, that  
16 is para.95.3 of the notice. That is the essential point.

17 Question 8 is a fair question about whether there should be something to reflect the new  
18 para.118(a) in the draft amended notice. Our position on that, as the Tribunal is aware, is  
19 that we are seeking further information about it. We are actively considering whether there  
20 is a point there that we wished to pursue or not. I am afraid that we are not quite at that  
21 point and therefore it would be premature to include something in the terms of reference  
22 which reflected it.

23 THE CHAIRMAN: So when that is sorted out we may or may not need to amend the questions  
24 that have been sent by that time?

25 MR. TURNER: That is so, madam. I cannot give you a precise answer as to how long that will  
26 take ----

27 THE CHAIRMAN: I do not think I asked you to give a precise answer, so there we are; good.

28 MR. TURNER: Question 3 and the Tribunal's para. 9, the second bullet raised a point about  
29 para.126 of the notice. We take on board the Tribunal's point, which is to say that that is a  
30 matter going to the remedy, that particular paragraph and that logically that does belong in  
31 question 4 which deals with that issue; we have sought to reflect that in the draft again by  
32 making a change to exclude that paragraph from question 3 and implicitly it now comes  
33 within question 4.

1 The next issue arises from the Tribunal's question in para. 10 looking back at para. 129,  
2 subparagraphs 1, 2, 3 and 4. In relation to each of those the Tribunal has asked us to clarify  
3 what our position is first, as to whether each of the three ancillary services in question is  
4 meant to be addressed or only one or two of them; and secondly, whether the gist of the  
5 allegation is, first, that the cost estimate was wrong (the Tribunal's first point in para. 10),  
6 or, secondly, even if that is not correct, nonetheless that there should not have been a one-  
7 off adjustment in respect of the services or services in question.

8 THE CHAIRMAN: My concern is that in a question which is said to relate to glidepath, that  
9 there might be a mixture of points being made which attack the final target figure, and  
10 hence the glidepath, and points which say, "Well, even if the target figure is fine, still the  
11 glidepath was wrong", and we might get into difficulties if there are what I might call  
12 substantive target figure complaints mixed up with what I would think of as real glidepath  
13 complaints which is, "Yes, what you say it should be in 2012/2013 is fine, but how we get  
14 there in the intervening years is wrong. We need to be clear where we are as to those two  
15 different kinds of complaints.

16 MR. TURNER: Yes. I hope that the explanation that we have given is helpful.

17 THE CHAIRMAN: Perhaps it would help if we had para. 129 in front of us.

18 MR. TURNER: It is at p.60 in the draft amended notice. Madam, as you say, it really begins at  
19 para. 127 with a complaint that Ofcom has departed particularly starkly from a smooth and  
20 real glidepath approach in its decision by making one-off adjustments to three ancillary  
21 services. Those are then listed in para. 127. Then, at para. 129 we attack the making of the  
22 one-off adjustments. To run through them, our position is as follows: in para. 129.1 we say  
23 that the costs which were relied on for the adjustments are costs which elsewhere Ofcom  
24 had found not to be sufficiently robust to justify the imposition of a price cap and that  
25 therefore if they rely on them as sufficiently robust in one context but not the other, there is  
26 an inconsistency. Broadly speaking, therefore, we are saying that your approach in doing  
27 that was wrong; you were wrong to treat these costs as sufficiently reliable to allow you to  
28 make that adjustment.

29 THE CHAIRMAN: But the costs are not really relied on to make the adjustment. Perhaps I have  
30 got this wrong. I thought how it worked was that -- I think you say that MPF transfer -- The  
31 target charge is £50; is that right? I think you say that in para. 129.3. Similarly, the cost of  
32 SMPF connection is £50. The cost of MPF new provide - what do they decide that is?

33 MR. TURNER: It is not clear from this. We will have to search that out.

1 THE CHAIRMAN: Suppose that is also £50. So, they have come up with those as the figures as  
2 to what it should be in 2012. Then they look at what the current price is, which is £34.86,  
3 £34.86 and £99.95. As I understand it, what they say is that because there is such a big  
4 difference between the current price and what the price ought to be when we get to  
5 2012/2013, we are going to make a one-off adjustment.

6 MR. TURNER: Yes.

7 THE CHAIRMAN: And then have a glidepath up. So, is what you are attacking in para. 129.1 in  
8 fact a £50 figure. By that you are then saying that because that £50 figure was wrong there  
9 was no need to have an initial big jump because actually the gap between the £50 and what  
10 they are now charging is not so big as you thought, and therefore there is no reason for a  
11 one-off adjustment; you should just have a smooth glidepath going up.

12 MR. TURNER: What we are saying is that the costs which were taken as meaning that there was  
13 a big jump in the target year are unreliable for the reasons that we state in para. 129.1.

14 THE CHAIRMAN: But that seems to me a complaint which is attacking the target figure and  
15 hence the glidepath, rather than saying, “Yes, we are happy with the £50 but, nonetheless,  
16 there should not have been a one-off adjustment. It should have just been smooth up from  
17 now to 2012/2013”.

18 MR. TURNER: Madam, you are absolutely right to analyse it in that way.

19 THE CHAIRMAN: What I am trying to say is that within these glidepath complaints there are,  
20 therefore, some complaints which relate to the ultimate target price - in this case the £50 -  
21 and some which say, “Well, even if the £50 --“ You might be saying both. You might be  
22 saying, “The £50 is wrong. Therefore there should not have been a one-off adjustment  
23 because the differential between now and then is not so great”, but you also might be  
24 saying, “But, if we are wrong about that, then the £50 is right. We still stay that there was  
25 no justification for a one-off adjustment. It should have just been smooth up to the £50”.

26 MR. TURNER: Yes. Two points arise. The first is that obviously the two questions are  
27 analytically separate, but they are linked. That is why they have been presented in this way.  
28 Secondly, in relation to that analysis, I believe it is the case that in three out of the four  
29 points which are then set out, we are attacking the end point, and thereby the impact on the  
30 glidepath that leads to that end point. One of those points - 129.2 - focuses on the one-off  
31 adjustment and the glidepath itself. That says that there is no need to make that kind of  
32 adjustment regardless of where you find the end point because in terms of achieving  
33 economic efficiency, it does not help. There is no need to correct an incorrect economic

1 signal that is sent out through the price being out of line. But, the other three paragraphs, I  
2 believe, are all tilting at the final figure.

3 THE CHAIRMAN: So, would this be right to say -- What the Competition Commission need to  
4 know is, if they look at your three points as to why you say the target figure is wrong --  
5 Suppose they disagree with you about that. Suppose they say, "No, we think the target  
6 figure was right". Is there then a further step for them to take to say, "But that's not the end  
7 of the story, because we still have to decide, even though the target figure we think is right,  
8 CPW are saying, 'Well, it should still have been a smooth glidepath'". Is your para. 129.2,  
9 in a sense, an argument in the alternative to the other three that says, "Even if we are wrong  
10 about the target point -- even if the target point is fine, still there was no economic  
11 efficiency argument for making a one-off adjustment?"

12 MR. TURNER: Broadly speaking, that is correct. I am not sure whether it is in the alternative  
13 because even if you accept our points on the other issues about the target, we say that there  
14 is still no reason to have departed from what would be the natural assumption that you  
15 would have a smooth glidepath.

16 THE CHAIRMAN: Yes. But, it is another step that they need to go through, to consider and  
17 determine, even if they uphold the final target figures for all these ancillary services.

18 MR. TURNER: Yes, it is, yes. Madam, if I may say so, that does capture the way in which the  
19 argument is intended to be developed in para. 129.

20 THE CHAIRMAN: Sorry, final question: is that the case for all three of these ancillary services?

21 MR. TURNER: Yes, it is.

22 THE CHAIRMAN: So with all three ancillary services there are points both as to target and  
23 hence glidepath, and a point about glidepath even if your arguments on the target are not  
24 accepted?

25 MR. TURNER: That is correct. Beyond that, madam, you will also have noticed from our letter  
26 that the word processor appears to have gone somewhat haywire in para. 129. Thankfully,  
27 having checked across with Ofcom's defence they correctly appreciated that the gist of the  
28 arguments are contained in paras. 129.1 to 129.4 and that in relation to 129.3 what counts  
29 are paras. (a),(b) and (c) because the second sentence is slightly misleading. It is slightly  
30 misleading because it appears to relate only to MPF transfer at SMPF connection, whereas  
31 if you turn the page you will see from (c) that new provide is also covered. Moreover,  
32 terminologically MPF transfer had accidentally slipped into a description as MPF  
33 connection and SMPF connection had slipped into SMPF transfer. So we have sought to  
34 clarify that. It appears it is purely terminological and has resulted in no confusion.

1 THE CHAIRMAN: Well it may be that when you come to amend your notice of appeal which  
2 we have on the stocks, as it were, an application to amend that, it might be useful to tidy this  
3 up as well.

4 MR. TURNER: That was our intention, madam, and I can only apologise that we saw it only last  
5 night.

6 That takes us to question 4 which, so far as we are concerned, is the thorniest and most  
7 important question for the appellant. May I begin by focusing on what appears to be the  
8 uncontentious content of question 4? It appears to be uncontentious that the Commission  
9 should be asked to include in its determination clear and precise guidance as to how any  
10 error, if it finds one should be corrected and, insofar as is reasonably practicable a  
11 determination as to any consequential adjustments to the level of the price controls. That is  
12 in tune with points made in the Tribunal's previous jurisprudence, that the aim of the  
13 legislation is to achieve maximum finality so far as is possible before the matter comes  
14 back. One can see why that would be the case in an appeal of this kind. An identical  
15 formulation to that was, of course, made in the calls to mobile reference to the Commission  
16 in March last year.

17 Now, the Competition Commission is therefore being asked to consider explicitly what  
18 steps should be taken with respect to the price control if it finds that Ofcom has made an  
19 error. The only real question that arises therefore is whether its deliberation should take into  
20 account the possibility of a future adjusted price control as an option or not.

21 THE CHAIRMAN: To be clear what terminology we are using, "future adjusted price control" –  
22 just explain what you mean by that?

23 MR. TURNER: Thank you, madam. I am using the term in the way that it was used by the  
24 Tribunal in its previous judgments in the calls to mobile litigation which is to say that the  
25 future remaining period of the price control covered by the regulator's decision, in this case,  
26 let us say a remaining period of one year, should be adjusted to take into account the criteria  
27 in s.88 of the Communications Act 2003, and that that would mean looking to see whether  
28 over the entirety of the period the aims of the legislation were met. If it turned out in the  
29 first period, the past – by the time it comes to be dealt with – customers such as the  
30 appellant have been overcharged, a way of dealing with that, the future adjustment, would  
31 be to correspondingly decrease prices in the remaining unelapsed period so that, overall the  
32 efficient solution is arrived at. That is what, as I understand it, was meant before as the  
33 future adjusted price control approach. That is a solution which the Tribunal left open in its  
34 two previous judgments on this point. In the second of those judgments there was, as the

1 Tribunal knows a dissenting opinion by Professor Bain who not only said that it was  
2 something that should be done, and could in fact readily be done, but also expressed his  
3 opinion that the Competition Commission was the right body to do it.

4 Carphone Warehouse takes that position as well, but for present purposes the point is  
5 simply that the matter has been left open and there is a practical question for everybody  
6 about what to do, not a legal question. It may be that the Tribunal's concern, and I would  
7 be grateful for guidance about this, was simply that the formal language in the terms of  
8 reference should not make express reference to something which is regarded as not settled  
9 law, or whether, on the other hand, there was concern about the underlying point being  
10 considered by the Commission.

11 THE CHAIRMAN: Let me try and explain where we are with our thinking on this point. There  
12 are three things that we can ask the Competition Commission to do. One is just to identify  
13 the mistakes that have been made, if any, in the decision. We can then go on to ask them to  
14 say what would have been the price control had these mistakes not been made, and  
15 determine that, and that in effect is what happened at the end of the MCT case – they said  
16 that if they had not made these mistakes all four years of the price control would have  
17 looked like this, and therefore the remaining two years are the remaining two years of that  
18 four years. That is what has gone to the Court of Appeal, the question of whether the  
19 determination should have covered all four years.

20 The final step is, looking at the last year, the unexpired period, is there a further step to be  
21 taken to adjust that to take account of what has occurred in the expired period. Now,  
22 whether you say you are doing that because of the application of the s.88 criteria does not  
23 seem to me particularly relevant at the moment, the question is: do we ask the Competition  
24 Commission to take that extra step? Do we send a question that says: "As well as just  
25 saying what the two years would have looked like if no mistakes had been made, can you  
26 also tell us what would be the best way of reflecting in the unexpired period the  
27 overpayments or underpayments that you find have been made in the expired period".

28 Now, there are all sorts of unresolved legal issues about that, whether it is useful to ask the  
29 Competition Commission to take that step, the most important perhaps being whether we  
30 have power to do anything about it, even in the event that they say, "Well, if we were to do  
31 that third step, this is what we would do". The Court of Appeal's judgment in the mobile  
32 call termination case may rule out the possibility of that being a useful question if it decides  
33 that we went too far even in that case and we should not have asked Ofcom to determine all  
34 four years, and that the only thing you can look at is the last two years. There is also the

1 question as to whether, if we do ask them to take that third step, to make the future  
2 adjustment, or to say what the future adjustment would be, whether that is something for  
3 them as a price control matter, whether it is something for us as part of the remedy.  
4 What I am not clear about are, first of all, how s.88 fits in with this; secondly, what are the  
5 practical advantages or disadvantages of asking the Competition Commission to answer that  
6 question when it may turn out that that question is not something that is useful; and, thirdly,  
7 if we are to ask that question, whether we should do it now or wait until things have been  
8 clarified in some way, if there is some event likely to happen soon which might clarify the  
9 matter. But, I think what we are talking about is whether we are going to ask them to tell us  
10 not only what the price control would have been over the whole of its period if the mistakes  
11 had not been made, but also, given that the mistakes were made and time has elapsed, what  
12 should the final period now be. I do not think we would want to only ask them the third and  
13 not ask them for the whole period determination, because that is what we said in the MCT  
14 case was what we needed in order to dispose of the case. But, if we are going to ask them  
15 that question I want it to be expressed much more clearly than I think Question 4(ii)  
16 expresses it. I am not sure that it needs to be clouded by this introduction of s.88, which, it  
17 seems to me, that s.88 certainly applies to the first stages of the Competition Commission's  
18 investigation in the sense that your appeal could be described as saying that Ofcom mis-  
19 applied s.88 and if it properly applied it, then things would have been as we say they should  
20 have been. That is always going to be in the background. I am not sure it is helpful just to  
21 refer to it in this particular point.

22 MR. TURNER: I understand. If I may try to respond to those points in turn -- First of all, what is  
23 meant by a s.88 criteria adjustment. I am using that a shorthand for the way that the term  
24 was explained in the previous judgment. It may be that one way of making that clear, if the  
25 Tribunal decides that it is something that should be a point to be considered would be by  
26 reference back to either paragraphs in the disposal on powers judgment or definition of the  
27 point in that judgment. Does the Tribunal have that to hand? There should have been a  
28 little bundle supplied to the Tribunal for the purpose of the hearing. (After a pause): If you  
29 have that bundle, at Tab 3 -- I am searching at the moment for where the Tribunal explains  
30 the logic of the point. Certainly the Tribunal sets out its analysis of it beginning at para. 64  
31 on p.22. ---

32 MR. HOLMES: Madam, I hesitate to interrupt. Paragraph 56 supplies the definition of the s.88  
33 criteria adjustment, I think.

1 MR. TURNER: I am grateful to Mr. Holmes. I was actually thinking of a part of this judgment  
2 where the Tribunal explains why it comes in as a matter of the legislation rather than merely  
3 a description of the BT argument in that case. We will find that for you in a moment.  
4 Essentially, beginning at para. 64 there is a discussion of what the point involves. First, the  
5 Tribunal considered whether there was a duty to make an adjustment to the future remaining  
6 periods of the price control if Ofcom was found to have made an error or not. The  
7 conclusions of the majority of the Tribunal were that there was not a duty. Then, at para. 73  
8 and following the Tribunal considers whether there is a power. At para. 75 the majority  
9 says they are not prepared to rule it out, although in this paragraph, as BT mentioned in  
10 their letter yesterday, the majority said they saw serious difficulties in the exercise of such a  
11 power because they thought it would take things off in a completely different direction from  
12 the appeal potentially, and thereby lead to prolongation and additional complication.  
13 The conclusion at para. 88 was that the majority did not need to come to a landing on this  
14 question of the allocation of the responsibilities between the Tribunal, the Competition  
15 Commission and Ofcom as to who should deal with it in any event.  
16 We have focused particularly on Professor Bain's dissent which, with appropriate  
17 hesitation, we would recommend to the Tribunal as a powerful dissent. What Professor Bain  
18 begins by explaining, starting at para. 92, is that he disagrees with the majority on the first  
19 question about whether it would lead to extensive further complication with a retort that,  
20 "No, it will only relate to points that have been raised in the parameters of the appeal, and  
21 therefore will not involve either the Competition Commission, Ofcom or the Tribunal going  
22 into any other areas" which appears to have been one of the concerns raised by the majority  
23 in the earlier paragraphs. He says at para. 95 that the appropriate expert body, at least in his  
24 opinion, in the case of a price control appeal, will be the Competition Commission to look  
25 at this. (That is the last sentence.) He goes on to say that there is a very simple way in  
26 which this result can be achieved. In that case it was called the 'proposed pence per minute  
27 method'. If one was to transpose that to this case I suppose it would be a 'pounds per line  
28 method'. So, if Carphone Warehouse has been overcharged, let us say, for MPF - say it  
29 takes a year before a result comes out, but what one does is to make a corresponding under  
30 charge for the remaining year so that overall things balance out, and that is a simple –  
31 perhaps approximate – method which Professor Bain thought would serve the purpose of  
32 s.88 within the parameters of the appeal without leading to excess work.  
33 We do not come to a landing on that and we do not ask the Tribunal to do so either. It  
34 would plainly not be right at the moment. What we do say is that it is a live point, it is

1 potentially a very important point. It is potentially important for any appellant in the  
2 position of Carphone Warehouse for this reason: part of the issue that is now before the  
3 Court of Appeal is that to set a price control for a period in the past is all very well but from  
4 a commercial perspective it is water under the bridge, what matters is what happens in the  
5 future unelapsed period. The Tribunal in the previous case rightly said “We leave out of  
6 account questions of contractual compensation between the parties, we are looking at it  
7 from a public interest perspective.”

8 For the future unelapsed period it matters very much to an appellant whether the prices it is  
9 going to be charged are reduced by this means or not. We say that that is in fact the right  
10 way to approach this sort of case for the Tribunal and for the other decision makers  
11 involved in the process. At the very least it is an open question and a live question and  
12 therefore it is right that the Competition Commission should be allowed to consider it –  
13 should be asked to consider it.

14 Taking on board, madam, what you said about the formulation of the question at present, we  
15 certainly did not mean to bring that in as though it was now settled law and that is what  
16 should be done. What we do say is that, as a matter of practicality, it is very important that  
17 they should undertake this exercise, then if the point comes to a head later on just as in  
18 relation to question 1, the debate between inappropriate and too high, it can be dealt with  
19 and you, the Tribunal, will have the tools available to be able to deal with it rapidly and  
20 effectively. The concern is that if you accede to the position adopted in BT’s letter of  
21 yesterday the point will go by default. It will either go by default because it will all be too  
22 late to be dealt with, or at the very least it may require – because this is really something  
23 very difficult for us to keep in one’s head entirely at the moment – it may require sending  
24 back to the Competition Commission so that they can consider it further. Now, at that point  
25 they will not have factored it into their work plan going forwards. It may well, therefore,  
26 require them to undertake further protracted work. It may therefore wreak injustice from  
27 the point of view of an appellant as well as inefficient and disorderly conduct of the appeal.  
28 So for pure practical reasons we strongly urge the Tribunal to consider directing the  
29 Competition Commission to consider it without saying necessarily that this is the right  
30 approach; we take that on board.

31 Finally, madam, your third question, you raised the issue that BT had canvassed about the  
32 timing of any such issue being introduced for the Competition Commission and you  
33 mentioned the pending Court of Appeal proceedings. The first point is that, as BT itself  
34 recognises in its letter, this issue is not explicitly raised before the Court of Appeal. It arises

1 in the margins. The main point raised by each of the appellants in that case is whether it is  
2 possible and appropriate to arrive at a remedy which sets a price control for a period in the  
3 past because it requires people to meet a condition that they cannot meet because it is past.  
4 That is the main point.

5 It may or may not be that the Court of Appeal goes on to address this issue and we cannot  
6 rely on it, therefore the Tribunal should not do so on that ground alone. But also in terms of  
7 timing, that hearing is now set down to take place between 10<sup>th</sup> and 12<sup>th</sup> March next year. It  
8 is entirely unrealistic to expect that a result will be forthcoming much before we would say  
9 two months after that. In the previous appeal from this Tribunal in the telecommunications'  
10 field, the hearing took place I believe it was 10<sup>th</sup> March again in that case and a judgment  
11 was not delivered until 16<sup>th</sup> July, therefore more than four months later. It cannot be a  
12 reliable estimate that the Court of Appeal will give its judgment in a time that allows it to be  
13 taken into account in this case, and therefore it must be left out of account. So what does  
14 this boil down to? There is only one final issue which is practicality. Because it is a live  
15 issue it should, in my submission, be introduced into the questions in some form, not in a  
16 directory form that suggests it is the only way to approach it, but in a way that enables the  
17 orderly conduct of the appeal and allows rights of appellants such as Carphone Warehouse  
18 to be vindicated.

19 THE CHAIRMAN: Well we want to come up with some draft which makes it clear to the  
20 Competition Commission that we want them to provide us if possible with two alternative  
21 sets of figures for year one and year two – one is figures that would have been arrived at  
22 had the mistakes not been made, and the other is figures which are the same in respect of  
23 elapsed time but different, or possibly different in respect of future time taking into account  
24 what has happened during the expired portion of the price control.

25 MR. TURNER: Yes, that is how we see it. I will obviously deal with any points that my friends  
26 make, but I have covered our response to BT in that address.

27 THE CHAIRMAN: Yes, thank you very much. Mr. Holmes?

28 MR. HOLMES: I think I can be brief on a number of the points, but I will follow Mr. Turner's  
29 method of taking the points in the order in which they appear in your letter, if I may. The  
30 first point concerning the definition of "ancillary services", we similarly do not feel strongly  
31 about this, but we tend to agree with Carphone Warehouse that it might be simpler not to  
32 include a definition of ancillary services by reference to SMP condition FA3A on account  
33 of the point that Carphone Warehouse argues that a broader group of services should have  
34 been included within the basket, but if the Tribunal feels that some clarification is needed

1 of the term then an alternative method would be to include a specific carve out for para.  
2 117.3 of the notice of appeal.

3 On the second point, we see the sense in the Tribunal's argument, and we agree t hat with  
4 the deletion of the square bracketed text the point has been dealt with by Carphone  
5 Warehouse's proposed footnote, that is the point about possible further amendments to the  
6 pleadings.

7 On the third point, there is general agreement to the use of the language inappropriate on the  
8 same basis as was explained in the CTM litigation.

9 Fourthly, we see the Tribunal's point that not all the paragraphs in the notice of appeal  
10 concerning the price control matters are specifically referred to in the questions. If the  
11 Tribunal wanted paras. 88 to 90 to be referred to we would have no objection although they  
12 appear to us potentially relevant not only to question 1(iii) but also question 1(iv), but they  
13 are basically prefatory paragraphs and we would be content for them to be admitted.

14 THE CHAIRMAN: Well the problem is that not all prefatory paragraphs have been omitted ----

15 MR. HOLMES: I understand that, madam.

16 THE CHAIRMAN: -- but I think it has now been confirmed by Carphone Warehouse that they  
17 do not mean by excluding a paragraph that they are dropping the point. My concern was  
18 that we should not get to a stage where the Competition Commission says: "Sorry, we  
19 cannot look at that paragraph because it has not been mentioned in the questions, and we  
20 assume it was left out deliberately from the questions", but I think we are all agreed that that  
21 is not the case, that they can look at the whole of the notice of appeal in effect.

22 MR. HOLMES: Madam, certainly Ofcom would agree with that.

23 Fifthly, there is a drafting point raised by the Tribunal and we agree that it would be  
24 preferable to omit the words "in its approach to" to incorporate it in the original draft for no  
25 better reason than they appeared the last time around, so we are very happy for those to go,  
26 and we are very happy with the way in which they have been excised in the draft  
27 circulated by Carphone Warehouse.

28 On the sixth point it does appear to us correct to ask whether Ofcom rightly estimated the  
29 level of efficiency improvements to be expected in relation to Openreach. Ofcom's  
30 conclusions were in respect of Openreach which is the division within BT Group which  
31 supplies the price controlled services. The reference in the LLU statement of BT Group  
32 was because some of Openreach's costs are costs allocated to it by BT Group. Given that  
33 no finding was made in the LLU statement about the levels of efficiency to be anticipated at  
34 BT Group as a whole, if reference is to be included to BT Group we would prefer a slightly

1 revised version to the text circulated by Carphone Warehouse which makes clear that the  
2 efficiency savings to be expected at BT Group are only relevant insofar as in connection  
3 with costs allocated to Openreach. Madam, I am happy to suggest a form of wording now  
4 or it is perhaps something that we can pick up afterwards, I doubt very much if there would  
5 be any disagreement between the parties and I am sure a form of wording can be found.

6 THE CHAIRMAN: Well why do you not say what you think the form of wording ----

7 MR. HOLMES: Certainly, madam.

8 THE CHAIRMAN: Question 1(i), yes.

9 MR. HOLMES: One possibility would be “Ofcom aired in its estimation of the level of  
10 efficiency improvements that might reasonably be achieved in respect of Openreach’s costs  
11 and/or BT Group’s costs allocated to Openreach for the reasons set out in ...” and  
12 continuing “as at present”.

13 THE CHAIRMAN: “... reasonably achieved in respect of Openreach’s costs ...”?

14 MR. HOLMES: “... and/or BT Group’s costs allocated to Openreach.”

15 MR. TURNER: We are happy with that, madam.

16 THE CHAIRMAN: “... Openreach ...” how does it finish.

17 MR. HOLMES: “... for the reasons set out in paras. 76 ...” It picks up there. So to recap:  
18 “Ofcom aired in its estimation of the level of efficiency improvements that might  
19 reasonably be ...” apologies, madam, apparently “expected to be achieved” would be better  
20 from our perspective, “... in respect of Openreach’s costs and/or BT Group’s costs allocated  
21 to Openreach for the reasons set out in paras. 76 to 84 of the notice of appeal.”

22 THE CHAIRMAN: Thank you.

23 MR. HOLMES: On the Tribunal’s seventh point there is I think little that divides Carphone  
24 Warehouse and Ofcom. We both agree that it would be a complex matter to attempt to  
25 capture the detailed nuances of the argument in the drafting of a question. Having reviewed  
26 the way in which Carphone Warehouse puts the difference between us we think that we are  
27 broadly happy with it in its letter of para.7, so I do not think there is any misunderstanding  
28 between us and Carphone Warehouse as to the issues in the case. Ofcom considers that the  
29 CCA FAC methodology adopted in the statement is a suitable measure of costs for  
30 determining the overall level of the price for each of the controlled services. Ofcom  
31 recognise that for the prices to achieve productive efficiency, the prices fixed for MPF, on  
32 the one hand, and WLR, SMPF, on the other, would have to be equal to the absolute  
33 difference in long run incremental costs, an alternative costs measure. This is common  
34 ground between Ofcom and CPW. The parties differ, therefore, in two principle regards:

1 firstly, CPW disputes whether Ofcom is right that the price difference between MPF and  
2 WLR, SMPF is in fact at least equal to the difference in the respective lyrics for these  
3 services; secondly, CPW argues that for reasons of allocative and dynamic efficiency, a  
4 larger differential would, in any event, be appropriate. Ofcom's position is, in contrast that  
5 the differential resulting from the price controls is sufficient.

6 THE CHAIRMAN: I thought, on the second point, that Mr. Turner was then saying that they  
7 only rely on that as a reason for allocating some costs to some services and not others, and  
8 not as a point overriding a costs allocation.

9 MR. HOLMES: Indeed, madam. We do not dissent from that. There is a large pot of common  
10 costs which has to be divided by one method or another, and Mr. Turner will correct me if I  
11 mis-state what I understand to be the common understanding of the parties on this point.  
12 So, how do you divide up these costs which are shared between the different services which  
13 are being price-controlled, and what Carphone Warehouse says is that those costs should be  
14 divided in light of considerations of allocative and dynamic efficiency in such a way as to  
15 create a broader differential between the different services being provided. Therefore, the  
16 question as framed in terms of an allocation of costs within Openreach, between these  
17 different services, appears to us adequate to capture the point of difference between the  
18 parties.

19 MR. TURNER: There is also a further qualification, for the record - the application of LRIC by  
20 Ofcom was wrong. That was the first point - that they applied an FAC CCA approach,  
21 whereas we say they should have correctly estimated the differential in the LRIC. That is in  
22 our notice of appeal as well.

23 THE CHAIRMAN: So, you accept that they used the LRIC as a cross-check, but you say they  
24 should have done it directly instead of using the other ----

25 MR. TURNER: Broadly speaking, we say that the approach that they actually used was not --  
26 There is agreement on the principle that LRIC is the correct approach, but that the way that  
27 they applied it was wrong and was not the correct application of a LRIC approach.

28 THE CHAIRMAN: For reasons other than these allocative and dynamic efficiency reasons.

29 MR. TURNER: Yes. It is a first point that arises before you get there. Then, on the assumption  
30 that it should be at least a LRIC differential, we say that there are two other factors in play  
31 when it comes to the allocation of costs. Those are the ones that Mr. Holmes has just  
32 referred to.

33 MR. HOLMES: I am grateful to my friend, Mr. Turner. I had hoped to capture that with my first  
34 point. CPW disputes whether Ofcom is right that the price difference between MPF and

1 WLR and SMPF is in fact at least equal to the difference in the respective LRICs for these  
2 services. Forgive me if I failed to capture the point.

3 I think I can turn then to the eighth point - unless the Tribunal has any questions in relation  
4 to Point 7?

5 THE CHAIRMAN: No. Thank you.

6 MR. HOLMES: This, I think now is common ground: Carphone Warehouse accepts the point  
7 that has not yet been taken - they are still considering whether to take it in the light of  
8 clarifications which have recently been requested, and there is therefore no clamour to have  
9 a question referred on it for now.

10 As regards Questions 9 and 10, we, like Carphone Warehouse, agree with the Tribunal that  
11 para. 126 makes a point which properly relates to Question 4 and that reference to that  
12 paragraph should be omitted, as has been done in the draft circulated by Carphone  
13 Warehouse.

14 We have noted Carphone Warehouse's clarification of its position on the three ancillary  
15 services in question. We understand the Tribunal's concern that insofar as there are  
16 arguments about the final level of costs in relation to the three specific services for which  
17 specific alterations were made in the first year of the price control, those do not really go to  
18 glidepath. It might be appropriate to make that clearer. One practical solution which we  
19 might suggest, at the risk of multiplying the number of questions before the Tribunal, would  
20 be to separate out, so that one has Question 3 in relation to the setting of the glidepath for  
21 MPF and SMPF, on the one hand, and then a separate question, just to make clear that this  
22 is really dealing with another, and different, set of points, in relation to the one-off  
23 adjustments to the prices of certain ancillary services. In case there was any confusion on  
24 this point, there were, of course, no glidepaths set specifically in relation to these three  
25 services that were the subject of one-off adjustments. The one-off adjustments were made.  
26 The services then form part of baskets, which, as a whole, are subject to a glidepath. But,  
27 how BT achieves the glidepath within that bundle of services does not relate specifically to  
28 those particular services. It could, for example, choose to reduce the prices of those specific  
29 services in subsequent years provided that other services were increased in such a way as to  
30 achieve for the basket as a whole, the glidepath. So, we see the one-off adjustment point as  
31 really a separate point altogether from the glidepath.

32 THE CHAIRMAN: As far as the glidepath points are concerned, there are, I think, points that are  
33 more general about the glidepath for the baskets which are different from these one-off  
34 adjustment points. I think there are also points about the target prices for the baskets which

1 are different from the targets for these three specific services because they say that you have  
2 had an equal cap for the baskets and you should have differentiated the caps for the baskets  
3 on the basis of the costs, I think. But, I think in respect of those I did not, reading through,  
4 have the same sense of a combination of the target points and the glidepath points as I had  
5 in relation to these three things.

6 MR. HOLMES: Madam, I wonder how much further we can take it. I think the parties have your  
7 concern well in mind now. Could we perhaps see if we can agree, between ourselves, a text  
8 to propose to the Tribunal which addresses the confusion that you have identified?

9 THE CHAIRMAN: Yes. Thank you.

10 MR. HOLMES: That brings me to Point 11. We respectfully agree with the Tribunal that  
11 Carphone Warehouse's proposed addition to Question 4 is not appropriate at this stage. We  
12 would also have significant reservations about the proposal to refer in the alternative two  
13 separate questions as to the level of the price controls for the remaining two years, one of  
14 which was adjusted in accordance with a s.88 criteria adjustment, and one of which simply  
15 reflected any errors identified by the Competition Commission. If I might briefly develop  
16 the reasons why? We make five points in this connection. First, the Tribunal has, as Mr.  
17 Turner noted, not yet determined whether there is any power in either the Competition  
18 Commission or the Tribunal, as we read the disposal on powers judgment, to make a s.88  
19 criteria adjustment of the kind sought by Carphone Warehouse. The Tribunal considered  
20 the point in the judgment, but explained -- Perhaps we might pick up the judgment at Tab  
21 A3 of the bundle for today's hearing. We take it, madam, that the s.88 criteria adjustment,  
22 as used by Mr. Turner, matches the way in which that term is defined in para. 56 of the  
23 judgment. We were slightly concerned in his subsequent account of Professor Bain's  
24 judgment that this was not necessarily entirely clear in that there appeared to be a discussion  
25 of over-charges and undercharges specific to Carphone Warehouse which would really fall  
26 within the compensatory adjustment proposed by BT and discussed in the paragraph  
27 immediately preceding para. 56. But, I may have misunderstood the point that Mr. Turner  
28 was advancing.

29 In any event, at para. 56 one sees the definition of s.88 criteria adjustment as it was  
30 understood by the Tribunal.

31 "BT also put forward a more subtle argument in favour of a modified future  
32 adjustment. Rather than arguing for a compensatory adjustment designed to put  
33 MNO's customers in the same financial position as if the recalibrated glidepath  
34 had prevailed, they framed the argument in terms of re-establishing the *overall*

1           *efficiency* of the price control to ensure that the ultimate price control operating  
2           fulfils the criteria in s.88, taking the four year period as a whole. We refer to this  
3           kind of future adjustment as a ‘s.88 criteria adjustment’”.

4           The method is then described, which is that the proposed PPN method then discussed by  
5           Professor Bain subsequently, the idea being that you would work out in pence how much  
6           higher cumulatively prices were in the elapsed portion compared with the price control as it  
7           would have stood but for the errors, and then you carry that across and make a  
8           corresponding adjustment of the same amount in the final portion of the price control.  
9           The Tribunal, of course, dealt with whether there was any power to make a s.88 criteria  
10          adjustment, or, rather, the majority comprised of yourself, madam, and Mr. Scott, both  
11          concluded that it was not necessary to rule a point out for now, given that Ofcom, amongst  
12          others, my client today, had urged that there was scope for such an adjustment in some  
13          circumstances. But, the majority saw serious difficulties in the exercise of any power (para.  
14          75) and continued,

15                 “Where the errors alleged in Ofcom’s reasoning are of a limited nature, the kind of  
16                 inquiry that would be needed to establish whether and how those errors led to the  
17                 price control deviating from the s.88 criteria may well set in train a much more  
18                 extensive investigation into how the market actually works than would otherwise  
19                 be needed simply to decide whether the grounds of appeal are well founded.  
20                 Making a s.88 criteria adjustment will inevitably prolong and complicate an  
21                 appeal where the appellant chooses at the outset to seek this kind of relief”.

22          That point is then developed in para. 77 - the difficulties or complexities of the factual  
23          inquiry that might be involved.

24                 “The majority of the Tribunal has reached the firm conclusion that the  
25                 Competition Commission should not be asked to embark on this exercise at this  
26                 late stage of the appeal”.

27          The majority proceeds to explain that,

28                 ”The direct effect of overpayment on wholesale customers may be small. FNOs  
29                 pass the payments through to their own retail and transit customers. The pass-  
30                 through by MNOs is more complicated because of the waterbed effect ---“

31          -- that is to say, the possibility that the MNOs will compete away any benefit that they have  
32          obtained as a result of prices in excess of an appropriate level of price control. So, in other  
33          words, in trying to do justice between the parties, or to work out what would be an efficient  
34          outcome applying the s.88 criteria, you have to open up a can of worms in which you

1 consider what happened to the monies paid over to BT in excess of the amount that they  
2 should have had -- whether some of that was competed away in their competition with the  
3 cable operators ----

4 THE CHAIRMAN: You might have to.

5 MR. HOLMES: You might have to. You might have to. Equally, you might have to explore  
6 how Carphone Warehouse was able to deal with any overcharge which is experienced by  
7 passing on the costs to its clients, given that those are common costs shared by all of those  
8 who used LLU's services to supply broadband services in the market place. So, it could be  
9 - and I do not put it higher than this - a very detailed and involved factual inquiry for the  
10 Competition Commission to undertake.

11 My second point is that substantial work might potentially be involved.

12 Thirdly, we say that it would not be appropriate to undertake such work on a sort of *de bene*  
13 *esse* basis, given the risk that this would be a major task. I agree that we cannot be sure  
14 how big a task it will be, but to send this off and say: "you should undertake the inquiry just  
15 in case" does not seem to us to be an appropriate way of proceeding. We say that it would  
16 be more appropriate to try and grasp this and to work out what the correct position in law is,  
17 and this could either be done - I appreciate fully that the Tribunal would be disinclined to  
18 return to this issue while there are still other related issues pending before the Court of  
19 Appeal, but on the other hand this is a discrete point, as was acknowledged by my friend,  
20 Mr. Turner, which is not directly acknowledged in the appeal, and it might therefore be  
21 appropriate as a way through this problem to consider having a preliminary issue in the  
22 New Year where we just revisited the decision which was left over by the majority in the  
23 calls to mobile litigation and just reach a concluded view on the law before asking the CC to  
24 undertake what could be an onerous factual inquiry. We say that that will not risk the  
25 adverse consequences described by Mr. Turner, because before the CC can come to  
26 consider whether there should be a future adjustment it obviously has to decide first whether  
27 there is any error as alleged and the extent of that error and that process will take a few  
28 months of the price control period before they could turn to consider whether a future  
29 adjustment might be required in light of any errors that they identified. If there were a  
30 preliminary issue on this to be considered by the Tribunal before a question were referred,  
31 as was suggested by you, madam, in the alternative on a s.88 criteria adjustment that could  
32 have no adverse impact on the development of the proceedings before the CC.

33 THE CHAIRMAN: And what would be the nature of such a preliminary issue? What would we  
34 be deciding?

1 MR. HOLMES: Madam, that would obviously be for discussion, but I would have thought that  
2 the key question would be whether either the CC or the Tribunal has any power at the  
3 conclusion of the proceedings to make an order requiring Ofcom to substitute for the  
4 unelapsed portion of the price control, replacement controls, adjusted in accordance with the  
5 s.88 criteria adjustment; until we know the answer to that threshold question as to whether  
6 there is any legal scope for such an adjustment it is difficult to see whether it would be  
7 appropriate for the CC to undertake what could be substantial additional inquiry, that the  
8 parties should come forward with evidence and submission on that before the CC.

9 We have a final point on the eleventh point in the letter, question 4. We note that Carphone  
10 Warehouse has not as yet sought relief in its draft amended notice of appeal in the form of a  
11 s.88 criteria adjustment and we raise this not as a technical point but because it does appear  
12 to us to be of some significance, and if I could just ask the Tribunal to turn up the draft  
13 amended notice of appeal at para. 130:

14 “Carphone Warehouse asks that the Tribunal:

15 (a) refer the price control matters arising in this appeal for determination by the  
16 CC .... and

17 (b) determine the appeal in accordance with sections 193(6) and (7) and 195 of the  
18 2003 Act, setting aside the LLU Decision and requiring Ofcom to impose a new  
19 price control on BT in respect of LLU services with effect from 22 May 2009 ...”

20 i.e. the beginning of the charge control period “... in accordance with the Tribunal’s  
21 determination.”

22 Now, before we saw the amendment to the draft reference questions put forward by  
23 Carphone Warehouse at the CMC on 25<sup>th</sup> September, we had understood Carphone  
24 Warehouse here to be seeking a replacement price control for the whole period which was,  
25 at least by BT in the CTM litigation when it came to develop its submissions on remedy  
26 pursued in the alternative to the s.88 criteria adjustment, and there are difficult questions as  
27 it appears to us as to how those two heads of relief would relate to one another, in particular  
28 there would be a risk of over recover insofar as one put in place a replacement price control  
29 for the elapsed period which adopted new figures based on Ofcom’s error, and then in  
30 addition in relation to the unelapsed period one put in place a new charge control adjusted in  
31 accordance with s.88 in order to correct in some way for the price controls originally in  
32 place. Ofcom does not know what the contractual relations are between BT or Carphone  
33 Warehouse so we do not know whether there is any scope for the replacement price control

1 to lead to transfers between the parties as a result of the proceedings, assuming a  
2 replacement price control was in place.

3 THE CHAIRMAN: Yes, because if one asks the CC the question they have to approach it on the  
4 assumption that there has been past over payment or under payment and that there is  
5 nothing that can be done about that or will be done about that.

6 MR. HOLMES: It might be a matter for argument, it may be that the parties would come  
7 forward with submissions about the consequences of that, but at the very least we think that  
8 it would be helpful, and to be absolutely clear we do not say this is a criticism of Carphone  
9 Warehouse, we simply think that it would be helpful in the draft amended notice of appeal  
10 to have a revised section on remedy which made clear how the s.88 criteria adjustment  
11 relates to the relief which is currently being sought for replacement price control. In the  
12 parallel leased lines appeal in which similar questions of relief have arisen the appellant,  
13 Cable & Wireless, has pleaded these two forms of relief in the alternative, and the primary  
14 relief sought is a replacement price control, presumably on the basis that Cable & Wireless  
15 believes in its contractual relations that it is well placed if a replacement price control is put  
16 in place and is lawful following the Court of Appeal's judgment that that gives it the best  
17 relief. But at the very least we would hope that this point might be more clearly pleaded in  
18 Carphone Warehouse's draft amended notice of appeal.

19 THE CHAIRMAN: But you are not taking a point that we should not send this question to the  
20 CC because it has not been properly pleaded in the notice of appeal?

21 MR. HOLMES: Madam, if you were minded to refer a question today we do not say that the  
22 amendment needs to come forward before the questions are referred. We do say that even  
23 despite the substantive points we have made as a technical matter and for good form, given  
24 that appellants are required to plead the relief that is sought. If this relief is to be included  
25 in the questions referred it should also be explicit on the face of Carphone Warehouse's  
26 notice of appeal.

27 Madam, I also note for completeness, the reference questions are being debated also  
28 between the parties in the leased lines' appeal in advance of a CMC which I think is to take  
29 place later in the course of December, and the position the parties have reached, which is  
30 obviously still for the Tribunal to consider is that Cable & Wireless has agreed that the  
31 question on remedy should I think in its entirety await the outcome of the Court of Appeal's  
32 judgment. We understand that you might wish, at the very least, that the CC be requested to  
33 specify clear and precise figures insofar as is possible as to the extent of any error, but I  
34 simply draw to your attention that there is a potential question of case management arising

1 from the fact that similar issues will shortly be debated as between Cable & Wireless and  
2 Ofcom, and speaking off the top of my head there might be some concern if the Tribunal  
3 were to arrive at a concluded view on this question now that without Cable & Wireless here  
4 that some difficulty might arise. I do not suggest that you should not seize the nettle today  
5 and refer what you feel able to.

6 There are two points which I will very briefly pick up. First, we entirely agree for the  
7 record with the CC's proposal of a six month period for the price control, and secondly, we  
8 have obviously seen Carphone Warehouse's corrections to para . 129, unfortunately we  
9 have not been able to consider whether they have any implications for the way in which we  
10 pleaded our case in the defence, but insofar as there were any we will obviously raise them  
11 with Carphone Warehouse in correspondence subsequently.

12 THE CHAIRMAN: Thank you very much, Mr. Holmes. Mr. Williams?

13 MR. WILLIAMS: I take the same course as Mr. Holmes, but I think I will be even quicker on  
14 questions 1 to 9 than Mr. Holmes was. In relation to question 1, BT does not feel strongly  
15 about whether further definition is needed of the ancillary services. If the Tribunal were to  
16 feel that further definition were needed we were simply going to draw the Tribunal's  
17 attention to para. A1(8) and A1(9) of the LLU statement which is where the relevant  
18 services are listed, but we obviously hear Mr. Turner's point about para. 117.3, so we just,  
19 as I say, mention that for completeness.

20 Question 2: we are content with the Carphone Warehouse proposal, and question 3 I think  
21 there is no more to say about.

22 Question 4 was really a question for Carphone Warehouse and they have answered that, and  
23 we are content with the position that has been arrived at in relation to question 5.

24 Question 6 is of greater significance as far as BT is concerned and we explained in our letter  
25 of yesterday, which I hope you will have seen, that we thought that the draft question  
26 correctly referred to Openreach rather than BT generally and we remain of the view that  
27 that is how the question ought really to be expressed, the focus of this appeal is Openreach's  
28 efficiency rather than BT's efficiency, and we rather thought it confused matters to  
29 introduce BT, certainly in the general terms proposed by Carphone Warehouse, and that  
30 was more likely to confuse than to clarify. Having said that, we do not have a difficulty  
31 with Mr. Holmes' alternative proposal, and hopefully that will resolve that question.

32 I am not going to engage with the difficulties of question 7, that has been addressed already.

33 Question 8 has been resolved as well. Turning to questions 9 and 10 we, like Ofcom, are  
34 content for the reference to para. 126 to be moved to question 4, and in relation to question

1 10 it seems to us that the points that Carphone Warehouse is making in relation to question  
2 10 do not directly affect the draft reference questions; that in fact as the Tribunal observed  
3 really go to potential amendments to the notice of appeal, and in relation to that we would  
4 simply say that we received this text late last night, and we in BT (the business side) will  
5 need to consider the suggested amendments to the notice, so we would like the opportunity  
6 to write to Carphone Warehouse in the coming days to let them know whether we have any  
7 difficulty with the text that they have set out, the proposed amendments to para. 129 of the  
8 notice of appeal. There may be no difficulties, but we would at least like that opportunity  
9 rather than for them simply to be waived into the notice.

10 Coming then to question 11, which I think is the main question for today's purposes, we set  
11 out our position our letter of yesterday which I am assuming the Tribunal has had the  
12 opportunity to read.

13 THE CHAIRMAN: Well we got it just before we started this morning, so I think we have  
14 skimmed through it, but if there is something particular that you need to draw to our  
15 attention then you should do so.

16 MR. WILLIAMS: I will address you on the key points made. Like Ofcom, we have concerns  
17 about the *de bene esse* reference of what has been referred to as the s.88 adjustment  
18 question would not be the right approach. I will not repeat what Mr. Holmes has said about  
19 that and the potential work that would be involved and the potentially wasted work. We say  
20 that would not be the right course at a point in time where the Competition Commission has  
21 a great deal on its plate in relation to this appeal on its own and then also in relation to other  
22 appeals. It is right to look at the appeals together to the extent that they are related because,  
23 obviously, we anticipate that there will be a need for some joined-up thinking on those  
24 issues. We say that that is particularly so, as Mr. Holmes said, given that the majority of the  
25 Tribunal has expressed real scepticism, if I can put it that way, that this sort of adjustment  
26 ought to be made.

27 So, how might the point be dealt with? Well, we do say that it is very material that the  
28 MCT appeal is going to be heard quite soon in the New Year. Even if the s.88 question is  
29 not directly part of that appeal, as the Tribunal has observed, it is to some extent bound up  
30 with that appeal. We note that the Tribunal made observations to that effect in its  
31 permission judgment in dealing with the question of permission to appeal in MCT.

32 We say that even if s.88, or the s.88 adjustment question, is not a direct part of the MCT  
33 appeal, it is not unrealistic to think that the Court of Appeal may make observations or

1 findings which directly or indirectly illuminate matters which would be of relevance to the  
2 s.88 adjustment question.

3 THE CHAIRMAN: I made the point in the course of Mr. Turner's submissions that if the Court  
4 of Appeal decides that the Tribunal went too far in the MCT disposal and ought just to have  
5 addressed itself to the last two years, that the effect of that would be to rule out any  
6 possibility of a s.88 criteria adjustment -- I suppose that is right. Do you think that that  
7 must be right?

8 MR. WILLIAMS: We say that there are a range of ways in which the Court of Appeal might  
9 approach these questions, but certainly we see the possibility, as the Tribunal has observed,  
10 that in dealing with the questions which are directly before the Court of Appeal, the Court  
11 of Appeal will make findings of the sort which the Tribunal had described, which would  
12 have a read-across. What the Tribunal makes is one example. It is difficult for us to  
13 anticipate all the ways in which that might play out, but the fact that there is the example  
14 which the Tribunal gives is enough to illustrate the point. That is really what we say.

15 THE CHAIRMAN: Yes. It depends on the basis on which they decide that.

16 MR. WILLIAMS: Precisely, madam. So, I think it is right to say that until this morning's  
17 hearing we had thought that Carphone Warehouse's preferred approach to this question was  
18 for there to be some sort of preliminary issue of the sort which Mr. Holmes described in his  
19 submissions. I was not sure whether I detected an alternative suggestion in Mr. Turner's  
20 submissions to the effect that the question might simply be left open until after the  
21 Competition Commission has made its determination - or perhaps even its provisional  
22 determination - at which point we will know more about whether the point is live, or  
23 matters, in the context of this appeal. For example, if the Commission decides that there are  
24 no errors in Ofcom's decision, then obviously the question of what sort of adjustment, for  
25 what period, might not arise at all. So, I was not sure whether Mr. Turner was saying that  
26 the question of law could be resolved after we know more about what the Commission has  
27 found, rather than as a preliminary issue - for example, in January or February.

28 THE CHAIRMAN: What I understood him to be saying is that suppose they do find that there  
29 were errors, and suppose we do ask them both questions and they come up with two  
30 alternative solutions - the one which is just the re-determination of the whole price control,  
31 the replacement control; the other which is the s.88 criteria adjustment, subject to the point  
32 that Mr. Holmes makes that it is quite difficult to see how those two knit together - then the  
33 Tribunal is under a duty to dispose of the appeal in accordance with the grounds of the  
34 appeal (or whatever the words are) and also, assuming there is no judicial review challenge,

1 or no successful judicial review challenge, we are under a duty to pass through the  
2 Competition Commission's decision to Ofcom and tell them what they need to do. Then, at  
3 that point, we will need to decide what are our powers in disposing of the appeal because  
4 the fact that the Competition Commission may have said, "Well, if you were to do a s.88  
5 criteria adjustment, this is what it would look like in our view", does not empower us to  
6 then order Ofcom to make that change if we do not otherwise have power to do it. So, at  
7 that stage we would have to grapple with this.

8 MR. WILLIAMS: Madam, that is what I understood Mr. Turner to be saying. The only reason I  
9 raise the question is because I had understood Carphone Warehouse's position, before the  
10 last CMC, to be that there ought to be a preliminary issue at an earlier point in the  
11 proceedings dealing with the s.88 adjustment question. Now, I think that is the way that  
12 Mr. Holmes poses to the Tribunal.

13 THE CHAIRMAN: I do not think that ever came across our radar, but that may have been  
14 something ----

15 MR. WILLIAMS: I think the point was made in correspondence, but perhaps not developed after  
16 that.

17 MR. HOLMES: It was not made in correspondence either.

18 MR. WILLIAMS: I do not want to get bogged down, madam.

19 THE CHAIRMAN: It seems that we have the option either of deciding the point before we send  
20 the questions off, or sending the questions off and then, if it turns out to be relevant,  
21 deciding the point later, by which time, of course, the Competition Commission will have  
22 done all the work.

23 MR. HOLMES: Madam, I am so sorry to interrupt. Just briefly, the option that we had in mind  
24 was that you refer the questions off but without the s.88 criteria adjustment point in there  
25 for now, and then make an amendment to the question on remedy. I say that in case there is  
26 any misunderstanding as to our position.

27 THE CHAIRMAN: That is what I understood that you meant.

28 MR. WILLIAMS: Just for the Tribunal's note, madam, the Carphone Warehouse letter I had in  
29 mind was the letter of 23<sup>rd</sup> September. In the discussion of Issue 2 there was a suggestion  
30 of a hearing to be arranged to rule on the point at a convenient date in, say, November.  
31 Obviously, time has moved on since then. That was the source of the confusion, if there was  
32 any confusion - it may have been on my part.

33 Madam, I think I have already said that BT's position is that it would be very unfortunate  
34 and undesirable to have a hearing on the question of principle in the New Year, say, as I

1 think Mr. Holmes is proposing, in the shadow of the MCT judgment, for the reasons I have  
2 given, and that there would be real advantages in leaving over the question of principle,  
3 whether it is referred on a *de bene esse* basis, or not, until this Tribunal has the benefit of  
4 the Court of Appeal's judgment in MCT. So, I think at that point the question is whether  
5 there would be real practical disadvantage in not referring the question to the Commission  
6 on a *de bene esse* basis pending clarification as to the legal position, partly from the Court  
7 of Appeal, and possibly from this Tribunal in the context of a hearing of the sort put  
8 forward by Mr. Turner. In our letter of yesterday we have explained why, in fact, not  
9 referring the matter to the Commission on a *de bene esse* basis is probably unlikely to cause  
10 any delay to the determination of this appeal ----

11 THE CHAIRMAN: Too many negatives in that sentence, Mr. Williams. What is it you are saying  
12 that we do?

13 MR. WILLIAMS: We are saying that if the Tribunal does not refer the matter on a *de bene esse*  
14 basis, the question is, "Is that likely to cause delay to the determination of this appeal  
15 because the Commission has not done the necessary work?" We explained in our letter that  
16 one has to take into account first of all that the question of a s.88 adjustment is a matter  
17 relating to remedies, and it is a matter which we do not think the Commission is going to  
18 get to until, at the earliest, April. I think that is what the Commission's note says.

19 THE CHAIRMAN: So, you are not saying that we should necessarily leave it until the  
20 Commission has reported to us and then decide whether we would want to make a s.88  
21 criteria adjustment to then ask them at that stage. You are saying that we should have the  
22 preliminary issue, as Mr. Holmes suggests, but wait until after we have got the judgment of  
23 the Court of Appeal ----

24 MR. WILLIAMS: Madam, we do not feel strongly about whether it is a wait for the Competition  
25 Commission's determination, or not. We are simply making the point that the right way to  
26 deal with this is to wait until the Tribunal has the Court of Appeal's judgment in MCT. At  
27 that point it might make sense to deal with the matter in the way that Mr. Turner has  
28 proposed. We are simply saying that the MCT judgment ought to come first.  
29 So, the first point we make in relation to the impact on the timetable is that given that this is  
30 a question of remedies, the Commission would not get to it until April in any event. The  
31 further point we make is that it is only realistic to consider the likely course of this appeal  
32 with one eye on the question of WLR because CPW said in its letter of 23<sup>rd</sup> September that  
33 it was very likely to appeal WLR. It has not resiled from that position as far as I am aware.  
34 The reason why it took that position at the time was because of the close inter-dependence -

1 that was its language - between the LLU decision and the WLR decision. So, we simply  
2 make the point that it seems, as we stand here today, highly likely that these two appeals -  
3 or, an appeal in WLR, if it happens, will need to be married up with the LLU appeal at the  
4 Competition Commission so that the related issues in the appeals can be dealt with in a  
5 coherent and joined-up way. So being realistic about the likely course of this appeal, it is,  
6 for that reason, more unlikely that not asking permission to do the work on a *de bene esse*  
7 basis is going to cause any delay to the determination of this appeal in due course. We  
8 think it is more likely that there will be time for the matter to be referred to the Commission  
9 at a later point when the legal position has been clarified without that cause resulting in  
10 delay to the determination of this appeal.

11 Those are the key points we wanted to make in relation to para. 11.

12 I think that is all I need to say at the moment.

13 THE CHAIRMAN: Thank you very much.

14 MR. WISKING: Hopefully, I can be even briefer. As regards the position of Sky, we agree with  
15 Carphone Warehouse. I adopt, therefore, the submissions of Mr. Turner.

16 I do not propose to go through each of the paragraphs of the Tribunal's letter one by one,  
17 just save to say this: as regards the proposed wording in relation to para. 6, we are content  
18 with the proposal put forward by Ofcom. In relation to this question - if I can call it so - the  
19 s.88 question, as I have said, I adopt Mr. Turner's submissions. I just want to make two  
20 short points. First of all, there is some speculation as to how detailed the additional work  
21 might be that is required of the Competition Commission. If it is the case that not much  
22 additional work is required, particularly given regard to breadth of Carphone Warehouse's  
23 appeal, it seems to us there is little prejudice in referring the question. If it is the case that  
24 detailed work is required, then it seems sensible for the Competition Commission to  
25 incorporate that as part of its work plan. It seems to be the most efficient way for it to  
26 approach this. The Competition Commission's timetable, for example, envisages in  
27 December and January that it would spend time in plenary session with the parties,  
28 understanding generally the nature of this particular sector - the technology and so forth. It  
29 seems to us that this is the very sort of area where having this sort of question in mind  
30 would enable it to collect such information as it might need to address this question at a  
31 later stage. Our concern is that by deferring it, we end up with the problem that was raised  
32 in the MCT case - that this question of the additional detailed work, the need to revisit  
33 things, becomes an objection to making the reference at all.

1 The second point which Mr. Turner touched upon is that if it is accepted that in that  
2 situation the reference should be made to the Competition Commission, then there is the  
3 additional problem that because the Competition Commission has to do further work, the  
4 unelapsed time of the price control is running out. Therefore, the scope for it to make  
5 adjustments on a s.88 basis is disappearing. So, again, it almost forecloses the remedy.  
6 As regards having a preliminary issue as a gateway, in my submission it is too late. January  
7 or February -- By that stage, based on the Commission's own timetable, it is moving  
8 towards reaching provisional findings. So, we will never get the opportunity to incorporate  
9 such additional work as is required as part of its work programme. So, it will be a case of  
10 re-visiting its work. In any event, there is always the risk of an appeal. To some extent, it is  
11 also the case that a preliminary issue in January and February is premature because, as Mr.  
12 Williams has said, it would be in advance of the Court of Appeal and it seems, even if the  
13 issues that the Court of Appeal deals with do not directly bear on this question it would be  
14 sensible that the preliminary issue be heard after the Court of Appeal. On that basis we  
15 would support Carphone Warehouse and urge the Tribunal to include this additional  
16 reference on a *de bene esse* basis so that the Competition Commission can include in an  
17 efficient way such extra work as required in its work plan, and that seems to deliver the best  
18 balance in fairness of dealing with this issue. Unless there are any other questions?

19 THE CHAIRMAN: No, that is very helpful, thank you. Mr. Beal, do you want to say anything?

20 MR. BEAL: Madam, I have three very short points. The first relates to timing. We have  
21 respectfully asked the Tribunal for six months to conduct this determination, nobody seems  
22 to have fallen off their chair in response to that, but I certainly do not want to take the  
23 Tribunal's discretion for granted so suffice to say on my part that nobody appears to be  
24 objecting to it.

25 The second point relates to the WLR appeal, and our point on that is simply we are seeking  
26 to draw to the Tribunal's attention the fact it is waiting in the wings and the fact it might be  
27 a more useful resource allocation to deal with that at the same time. However, if there is no  
28 appeal extant it seems to us there is not much we can do about it at this stage.

29 The third point relates to the s.88 adjustment, and on that we do not wish to get drawn in,  
30 with respect, to the competing arguments as to what the law might require, it strikes us that  
31 is not for us to deal with. We would, nonetheless, say that insofar as we are asked to make  
32 findings on the adjustment issue then of course we will do so as far as reasonably  
33 practicable. In that regard we simply ask that we are given a clear steer as to exactly what it  
34 is we are asked to find.

1 There was one point that was made I think by my learned friend, Mr. Williams, that it  
2 would not be an issue until April. With respect, that is not quite right, we envisage certainly  
3 that the parties are free to raise it in the course of the bilateral discussions that we have with  
4 them and, of course, it might be an issue that they wanted to raise at the plenary session that  
5 we have at the start of the procedure. So we certainly do not think it is a remedies' point  
6 solely for determination at the end of the provisional determination being made available.  
7 With that in mind, nonetheless there is scope at the end of the procedure we envisage for the  
8 specific issue of remedies and adjustment to be dealt with, and there is some latitude in the  
9 procedure. If it is going to be a very complex issue then we might be put in the position  
10 whereby we are coming back to the Tribunal and saying: "Please could we have a further  
11 short extension of time to deal specifically with the adjustment issue". Obviously the more  
12 warning we have in advance of exactly what we are being asked to do the better.

13 Unless I can be of any further assistance, those are my submissions.

14 THE CHAIRMAN: Yes, Mr. Turner.

15 MR. TURNER: Just to pick those points up. First, Mr. Holmes makes the point that the Tribunal  
16 has not determined whether there is power in this case. I make the point that a similar point  
17 arises in relation to the inappropriate versus too high debate. The Tribunal is envisaging,  
18 and no one demurs, putting in a question which may result in the Competition Commission  
19 moving in a way or doing work which ultimately turns out to take it somewhere which is  
20 not lawful, but nonetheless it is included on a *de bene esse* basis, that is not a reason for  
21 distinguishing what we are recommending in relation to the remedy.

22 Secondly, at one point Mr. Holmes appeared to suggest that because of the substantial work  
23 that may be involved in considering what we are proposing is a reason for somehow not  
24 dealing with that at all. We refer again – I do not ask the Tribunal to pick this up – to what  
25 Professor Bain said about the method there as a "prompt and practical" means of  
26 approximating the conditions. That is indeed what we are saying here and, to be absolutely  
27 clear, I was saying that we envisage at the moment something along the lines of a pounds  
28 per line adjustment, similar to the sort of approach that was adopted in the previous case.

29 Thirdly, it was suggested by Mr. Holmes, that it may be appropriate to have a court hearing  
30 about this in the New Year. Two points arise in relation to that. As, madam, you pointed  
31 out to Mr. Holmes, what would be the parameters of such a court hearing? Well, it would  
32 be unclear whether it would deal with the general concept of making a s.88 adjustment, or  
33 something more narrow, perhaps focused on a pounds per line method. In any event, the  
34 indeterminacy of that would prove a difficulty. But, more importantly, if there was a court

1 hearing on this in the New Year, that would not lead to a resolution, it would be a racing  
2 certainty that that would lead to an appeal and it is wrong to think otherwise. It will lead to  
3 further work for lawyers here, but it will not help this question.

4 Fourthly, Mr. Holmes referred to the question of the pleading. As to that the Tribunal will  
5 remember in its previous judgment that BT was thought to have properly raised the point in  
6 its notice of appeal which raised this issue, certainly in no more definite a way than  
7 Carphone Warehouse is doing at the moment – the reference for that is para. 81 of the  
8 judgment in the disposal powers case.

9 In this case we did raise the question of a proposed remedy along these lines as long ago as  
10 23<sup>rd</sup> September by letter, a long time ago and there is certainly no doubt about our intention  
11 to rely upon it. So Mr. Holmes rightly says he is not taking a pleading point. What he did  
12 say when the point was teased out, was that we should make clear that we are not arguing  
13 for two remedies at once. He says it is desirable that we should spell that out in our  
14 pleading. We are happy to do that; we are not asking for two remedies at once, and I can  
15 ensure that our pleading does incorporate our position on that as well.

16 Fifthly, Cable & Wireless, it was suggested to the Tribunal that in a parallel case that the  
17 Tribunal is seized with the appellant has agreed that the question of remedy generally  
18 should be put off to await the judgment in the Court of Appeal. We have taken the liberty  
19 of speaking to counsel for Cable & Wireless in that case, and looking at the correspondence.  
20 That is not, in our submission, a correct appraisal. What we do understand to be the  
21 position is that the question of timing certainly has been raised in relation to the  
22 retrospectivity point, because in that case, Cable & Wireless has said that, as part of the  
23 remedies it is seeking it wishes there to be a replacement price control covering the entire  
24 period. Then there has been a debate about the timing of that in relation to the Court of  
25 Appeal judgment.

26 THE CHAIRMAN: Well I do not think we can really take into account what is happening in  
27 another appeal at the moment. I think on the pleading point I would say this, that in the  
28 MCT disposals' case we decided that they had said enough in their notice of appeal to get  
29 the replacement price control for the four year period. As far as asking for a s.88 criteria  
30 adjustment is concerned, what we say in para. 81 is that we are prepared to assume that it  
31 did include the request for relief on the basis we were not going to knock it out on a  
32 pleading point.

33 MR. TURNER: I understand.

1 THE CHAIRMAN: I think that Mr. Holmes has a point in saying that it is really not clear from  
2 the relief sought as to what you say about this, and that what you say both about the  
3 interrelationship between the two kinds of potential outcome would be useful to see, and  
4 also we said in para. 81 of the MCT disposals Judgment that BT had clearly not put forward  
5 a method by which they said this adjustment should be made. Now, whether you are able,  
6 in making amendment to the relief paragraph, to come up with a way in which it should be  
7 done as a manner of limiting the scope of the investigation that the CC has to undertake, is  
8 up to you. When we discussed in the MCT disposals' Judgment the question of how much  
9 investigation there would need to be we had clearly in mind, I think it is clear, this whole  
10 waterbed effect point, that any overpayments received by the mobile phone companies will  
11 have been competed away on the retail side of the market. I have no idea at the moment  
12 whether any similar waterbed effect operates, or is said to operate in this area.

13 MR. TURNER: Yes.

14 THE CHAIRMAN: But it strikes me that it would be helpful to have some further elaboration – I  
15 put it no higher than that – in para. 130 if you are seeking to pursue this s.88 criteria  
16 adjustment point.

17 MR. TURNER: Madam, that is a point well taken, and we shall endeavour to do that. The only  
18 qualification I would make is that ultimately when one comes to the question of the remedy  
19 we can say how we think it could be done – to quote Professor Bain – in a “prompt and  
20 practical” way. We are then, as with any court or tribunal, in the realm of the decision  
21 maker, particularly when you are taking into account s.88 rather than the narrow interests of  
22 an appellant: “This is how we think it should be done”, and so I would respectfully suggest  
23 that we will do that, we should do that, but that ultimately it may be for the decision maker  
24 to take a final view.

25 THE CHAIRMAN: Yes.

26 MR. TURNER: Madam, the sixth point I was going to make was this: you canvassed with Mr.  
27 Holmes what the Court of Appeal in the pending case might ultimately decide. In my  
28 submission, the Court of Appeal would not, based on the point raised in the appeal rule out  
29 a s.88 future adjustment at all because the gist of the appeal is that it is wrong to impose a  
30 remedy which relates to a past period that cannot be complied with and that leaves open  
31 whether, in relation to the unelapsed future period, it is right for the decision maker –  
32 whoever that is – to either say: “Well had matters proceeded in the correct fashion this  
33 would have been the number”, or to stand back and say: “We can look at the period as a

1 whole, but we are only concerned with a remedy that applies to the future period.” That  
2 point, in my submission, is open and will not be shut out by the Court of Appeal judgment.  
3 The seventh point is this, that Mr. Holmes referred to “bringing in the point later on” – a  
4 point that was then taken up by Mr. Williams – but not now. That would involve practical  
5 disadvantages, Mr. Wisking has referred to the practical point from the point of view of the  
6 appellant and, indeed, the intervener, and that is a very strong point which I would  
7 emphasise that we may find ourselves squeezed and thereby prejudiced.

8 Secondly, Mr. Beal has referred to the position of the Competition Commission and he has  
9 made clear that from their perspective also one cannot simply say: “This is a point that can  
10 be left hanging and brought in in April”, it is desirable for them in setting their work plan to  
11 know where they stand now. I would add to that what would be the trigger for bringing in  
12 this point at a later stage if it would not be the delivery of the Court of Appeal judgment  
13 which frankly may be many, many months away after they hear the case which is set for  
14 March next year, and if it is not the provisional findings of the CC then at what point does  
15 this Tribunal assemble and reach a resolution on that? The right time to do it has to be now  
16 and there is no other suitable time.

17 Finally, I emphasise what harm can there be from referring the point now, particularly if the  
18 Group is not going to consider this point until April, and if they are going to factor it into  
19 their thinking beforehand, then it is all the more important that the point should be there.

20 Madam, unless I can assist further, those are my submissions.

21 (The Tribunal confer)

22 THE CHAIRMAN: Thank you very much, Mr. Turner. I think we will adjourn now and come  
23 back at 2 o'clock by which time I hope we will be able to say what we are going to do.  
24 Whatever happens, there is some redrafting to be done; it would be helpful *de bene esse* if  
25 the parties could have a look at the draft over the short adjournment and see what progress  
26 they can make as regards the points we have discussed where we have come to a resolution  
27 during the course of the morning, and if we were to decide to refer the question of the s.88  
28 criteria at this point to the Competition Commission, how that would be drafted. I know  
29 that you have used the tag ‘s.88 criteria adjustment’ because that was the tag it was given in  
30 the MCT disposals judgment. But, you may like to consider afresh whether there is a  
31 different way one can phrase it which does not introduce s.88 into the equation because, on  
32 reflection, I am not sure that that is a useful factor to include in at the moment, partly  
33 because, as it seems to me, the relevance of s.88 is whether, if there is a duty to apply it, it  
34 can then be the source of the power to make the adjustment, and otherwise whether those

1 criteria are the correct criteria for the Competition Commission to apply if it is asked to  
2 carry out this exercise. Neither of those points may actually be settled, such that it remains  
3 an appropriate tag to use. See what progress we can make on that basis. We will come back  
4 at two o'clock to say what we are going to do.

5 (Adjourned for a short time)

6 THE CHAIRMAN: The main issue which has arisen for decision at today's case management  
7 conference is whether an extra question should be sent to the Competition Commission as  
8 regards a possible adjustment to the price control in the event that the Competition  
9 Commission upholds some, or all, of the grounds of appeal. All are agreed that we should  
10 ask the Competition Commission to identify any errors and to give clear and precise  
11 guidance as to how any such error should be corrected, and, insofar as reasonably  
12 practicable, make a determination as to any consequential adjustment to the level of price  
13 control.

14 As far as that consequential adjustment to the level of price control is concerned, we know  
15 from the earlier Mobile Call Termination case that there are two things that the Competition  
16 Commission could be asked to do. The first is simply to say what would have been the  
17 prices set for the whole period covered by the price control if the areas identified had not  
18 been made. The Competition Commission then determines, in effect, a new price control  
19 for the whole period, and the Tribunal then disposes of the case. What the Tribunal's  
20 powers are in that situation was the subject of the earlier judgment of the Tribunal in *BT v.*  
21 *Ofcom* [2009] CAT1 where the Tribunal held that it did have power to determine a new  
22 price control for the whole period and to direct Ofcom to adopt such price control. There is  
23 an appeal from that judgment to the Court of Appeal. We are told that that is due to be  
24 heard on 10<sup>th</sup> March of next year. We do not, of course, know what the result of that appeal  
25 is going to be, or how far the Court of Appeal will give guidance as to the scope of the  
26 Tribunal's powers.

27 The second question we could ask the Competition Commission to consider is to calculate  
28 what adjustment should be made to the period of the price control which remains unelapsed  
29 at the time of the determination in order to take account of the fact that the erroneous price  
30 control has been in operation through the months when the appeal has been pending. We  
31 have referred to this as a future adjusted price control.

32 There are many reasons why the question as to whether a future price control should be  
33 adopted might not prove relevant: (1) the Competition Commission might uphold the price  
34 control and the question of remedy would not then be relevant; (2) the Court of Appeal

1 might indicate in its judgment following the March hearing that the Tribunal does not have  
2 power to order such a future adjustment to be made on disposal; (3) the Court of Appeal  
3 might leave that question open, but the Tribunal might, at some future date, decide that it  
4 does not have power to make a future adjustment on disposal; (4) the Tribunal might  
5 decide that it has the power to make such a future adjustment, but might also decide that the  
6 question of whether that adjustment should be made, and what adjustment should be made,  
7 is a remedy question and not a price control matter for the Competition Commission.

8 Carphone Warehouse in this case, supported by Sky, acknowledge all these imponderables,  
9 but still stay that we should ask the Competition Commission this question now. This will  
10 enable the Commission to factor working out what the answer is into their work schedule.  
11 Ofcom suggest that we should have a preliminary issue heard at the beginning of next year  
12 and then as a result of that preliminary issue decide whether or not to refer an additional  
13 question, having already referred the other questions now.

14 We do not see the value in having a hearing of a preliminary issue on these difficult matters  
15 before we have the benefit of the Judgment of the Court of Appeal in the MCT case.

16 Further, we do not see the value in leaving the question until a time when the Competition  
17 Commission has arrived at provisional conclusions as to whether or not there are errors in  
18 the price control. If there is work which can usefully be done by the Competition  
19 Commission before it comes to any provisional conclusions then they should be allowed to  
20 do it now. If the Competition Commission feel able to postpone any work on this question  
21 until it becomes clearer whether the question is likely to be relevant then we can expect the  
22 Competition Commission to postpone any such work, but there does not seem to us to be  
23 any real disadvantage in referring the question now and we take the point that Carphone  
24 Warehouse say, which is that they wish to avoid being pushed into a position that BT were  
25 in, in the mobile call termination case of being accused of having raised the question only  
26 late in the day once the majority of the work of the Competition Commission has been  
27 done. We therefore decide that we are going to refer this question now.

28 On the drafting of the question, there are three things which need to be made clear. First,  
29 we want it to be clear that we are asking the Competition Commission to come up with two  
30 alternative sets of figures – one with the future adjustment and one without the future  
31 adjustment. Secondly, we want it to be clear that by asking the question we are not pre-  
32 judging any of the knotty legal problems that would have to be resolved before we ever got  
33 to the point when Ofcom actually implemented a new price control incorporating that kind  
34 of future adjustment.

1 Thirdly, we do not want to pre-judge how the Competition Commission might go about the  
2 task of deciding what the future adjustment should be, and what the Competition  
3 Commission would consider relevant, especially if it comes to a balance between a fairly  
4 rough and ready adjustment which involves less work and a time consuming but more  
5 precise investigation, the Competition Commission should be free to work out for  
6 themselves how best to do it, and therefore we think that the reference to the s.88 criteria  
7 may be a bit of a red herring in this context.

8 We asked the parties before the short adjournment to see what progress they could make on  
9 drafting an appropriate question, there were various other drafting points that were raised on  
10 the other questions to be referred which were less contentious and so we will ask the parties  
11 now to let us know how they have got on with that and then we will also consider where we  
12 go from here.

13 MR. TURNER: Madam, I am grateful, I must confess I felt a little bit like the girl from  
14 Rumpelstiltskin sent away to come up with a draft in a short period that everybody would  
15 agree with which would also meet the Tribunal's criteria. We have largely been successful,  
16 having discussed these matters between counsel. There is one point, having heard you,  
17 madam, on which there may be a difference as between the parties and the Tribunal, but I  
18 will come to that.

19 Do you have a copy of the draft which has been discussed by the parties?

20 THE CHAIRMAN: Yes.

21 MR. TURNER: If I can go straight to question 4 on the third page. We have added to the  
22 direction that they should include clear and precise guidance and insofar as reasonably  
23 practicable a determination as to any consequential adjustments, the following: that they  
24 should indicate first what price controls should have been set in the statement had Ofcom  
25 not erred. That deals, madam, with your first point that there should be two alternative sets  
26 of figures because (a) and (b) achieves that.

27 Secondly, and particularly in relation to (b) we have taken pains to avoid a pre-judgment in  
28 any way. So, if you read that, we hope that you will agree that that aim has been achieved  
29 indicating that if the price controls set in Ofcom's statement have, during the elapsed period  
30 of the control, been at an inappropriate level, and on the assumption that it may be [and,  
31 here, Ofcom have asked me to interpose the words 'lawful and'] lawful and appropriate to  
32 adjust the price control applicable during the unelapsed period in order to ensure that [and  
33 here is the part that we have to deal with still] the criteria in s.88 of the Act are satisfied in  
34 relation to the level of the price control taken as a whole over the period covered by

1 Ofcom's statement; what adjustments to that part of the price control should be made, if  
2 any. Again, we have, first, not referred to the price control being too high - we have  
3 referred to 'appropriate'. We have couched it in terms that they may take the view that no  
4 adjustments are appropriate at all in the circumstances of the case, and have given them  
5 complete freedom to decide what adjustments are appropriate, if any.

6 So, all of the first three of the criteria, madam, that you outlined are, we think, satisfied. The  
7 s.88 point is where the parties collectively have stubbed their toe because - and others will  
8 chip in - we take the view that it is desirable to set the statutory basis upon which the  
9 Commission will be approaching this question, if they ever get to it - namely, that they will  
10 be seeking to achieve the result which is required by s.88 of the Act to be achieved by  
11 Ofcom.

12 THE CHAIRMAN: I think that is probably the case, but our issue with that is that that is a case in  
13 relation to all the questions - or certainly all the aspects of the remedy. To single this part of  
14 the remedy question out as having to be in accordance with the criteria of s.88 makes it look  
15 as if those criteria have some special applicability in relation to this exercise which they do  
16 not have in relation to the other parts of the remedy exercise, or indeed the investigation as a  
17 whole, which is what we are currently not clear about.

18 MR. TURNER: I believe it has taken by all the parties - and others will say if they disagree - that  
19 the entire exercise is informed by s.88. It is merely that in order to set the parameters within  
20 which the Competition Commission will consider this task - if they get to it - one needs to  
21 explain the basis on which they will approach it. We could see no easier way than referring  
22 again to those criteria in s.88 as guiding it in this final aspect. It may be that the Tribunal  
23 may want to reflect on this rather than deal with it on the hoof.

24 THE CHAIRMAN: Yes.

25 MR. TURNER: May I mention one or two other points about the draft? Mr. Williams - and I  
26 think supported by Mr. Beal - have said that even a reference of these questions is made  
27 today, they would prefer in para. 3 the date of 1<sup>st</sup> June, 2010 to be inserted rather than 28<sup>th</sup>  
28 May. All parties are happy with that. 31<sup>st</sup> May is a Bank Holiday.  
29 The draft as a whole simply accepted all the changes that were on the previous draft that the  
30 Tribunal saw so that additions or changes are clear. Therefore, on the first page, in 1(c),  
31 you will see that we have implemented what was discussed. Similarly, on the second page,  
32 in Question 1(i) we have taken the language that everybody seemed to be happy with. What  
33 we did not manage to achieve was a change in relation to this ancillary services question.  
34 The parties tend to think that with the clarification that was given in the discussion and by

1 the letters that preceded the hearing that the existing formulation may be adequate. But, we  
2 are in the Tribunal's hands on that.

3 THE CHAIRMAN: We will leave the ancillary services point if the parties are satisfied with that.

4 MR. TURNER: I am obliged. The only outstanding point is whether a reference to s.88 can be  
5 avoided.

6 THE CHAIRMAN: Does anybody else want to address us on this draft before we retire?

7 MR. HOLMES: Madam, we only wish to endorse Mr. Turner's observation that we think it is  
8 very important that there should be a reference to the statutory basis under which the  
9 adjustment might be made. There is no statutory power elsewhere in the Communications  
10 Act which would permit the Competition Commission to make an adjustment to the  
11 unexpired portion of the charge control. There is no express power to do so. The way we  
12 had always understood the point was that once the Competition Commission had concluded  
13 its investigation of errors, it then would stand back and ask, "Is this result congruent with  
14 the duties which arise under s.88?" If it is not by reason of concerns in relation to the effect  
15 of the overcharge, which may have been found to have occurred in the elapsed portion, it  
16 should look at the s.88 criteria and decide what can, and should, be done about it. But, if  
17 one does not frame the question in terms of s.88 we say that it would be very difficult for  
18 the Competition Commission or the parties to know how to make submissions on this  
19 possibility of a future adjustment because they will not know what are the criteria or  
20 conditions which govern the process of the adjustment. We do not understand on what  
21 other basis it could be said that the adjustment fell to be made. If the Tribunal is concerned  
22 that that is unclear, we say that that would be a good reason to debate further the legal  
23 issues if not, perhaps to reach a final ruling, then at least so that these matters are properly  
24 aired and ventilated before the Competition Commission gets to this question.

25 THE CHAIRMAN: I think the problem we have may be in part this idea that the final price  
26 control has to be compliant with s.88. This was discussed in the MCT disposal judgment  
27 where we said that the appeal is bounded by the grounds of the appeal and the issues raised  
28 and that it is not for the Tribunal or the Commission or Ofcom to start, once it has decided  
29 the issues of the appeal, as you say, to stand back and say "Well, is this a s.88 compliant  
30 price control?" It may be. It may not be. It may not be because there are all sorts of issues  
31 which are wrong with it which no-one has thought to appeal. Perhaps the problem here is  
32 the reference to ensuring that the criteria are satisfied, which may be a much bigger exercise  
33 than can be achieved just by making the kind of future adjustment that we are talking about.  
34 I can see that it may be that the criteria that are in fact set out in s.88 are the relevant criteria

1 to which the Commission should have regard when it is deciding this, but the idea that they  
2 have to be satisfied that those criteria are met at the end of this, or that it is those criteria in  
3 the context of s.88, which have to be met in that s.88 applies in some way, I think those are  
4 the things that we are uncomfortable with.

5 MR. HOLMES: Madam, I understand that. Of course, Professor Bain suggested that one could  
6 conduct a s.88 inquiry within the parameters that were fixed by the appeal, so I think he had  
7 in mind that one could investigate whether the s.88 criteria were met when one reached the  
8 question of the future adjustment without thereby throwing everything open so that parties  
9 could come forward in a sort of freewheeling way with any submissions they would choose  
10 to make as to why at the end of the day they think on further reflection that a different price  
11 control would be appropriate, so that the notice of appeal and grounds of appeal set out  
12 therein would still bound the inquiry, and I must emphasise I am not here making  
13 submissions to you as to whether or not it is indeed lawful to make an adjustment of this  
14 kind, but it does seem to us that the only way through in which lawfulness might be shown  
15 would be by reference to the s.88 criteria, and that that must frame the discussions which  
16 will take place before the CC, otherwise it seems to me that there is a risk that we are at sea,  
17 we simply do not know what legal test delimits the future adjustment which is being  
18 proposed.

19 MR. TURNER: May I add to that, we were going to say – and perhaps should have said – the  
20 same thing, because one point that was under consideration in this draft was whether we  
21 should bring into it the words underlined by Professor Bain in para.93 of his opinion,  
22 because we did apprehend that that was a point that might concern the Tribunal, so that one  
23 would add one further short clause into that formulation, so that it reads:

24 “... lawful and appropriate to adjust the price control applicable during the  
25 unelapsed period in order to ensure that within the parameters set by the appeal  
26 ...”

27 the criteria in s.88 are satisfied, and so on. In other words that one does not then launch a  
28 collateral inquiry into things that have not been raised by the parties. One is only concerned  
29 in the way spoken to by Professor Bain, with ensuring that the possible adverse effects of  
30 overcharges in the early period are counteracted by an adjustment made in the later, but  
31 without going into collateral issues.

32 THE CHAIRMAN: Well I think we will need to consider this further. Mr. Williams?

33 MR. WILLIAMS: Madam, before you consider it further, can I make an alternative suggestion  
34 which might deal with your concern about ensuring that the criteria are satisfied point, but

1 which would not be quite as specific and prescriptive as Mr . Turner’s suggested  
2 formulation?

3 In the line: “... to ensure that the criteria in s.88 are satisfied ...” you could have the words:  
4 “... to the extent necessary”, which would make the point that there may be limits to the  
5 extent to which the s.88 criteria bite.

6 THE CHAIRMAN: Where would those words go?

7 MR. WILLIAMS: After the words “... are satisfied ...” So, for example, drawing the  
8 distinctions that were drawn in the MCT Tribunal’s Powers’ Judgment, various factors –  
9 Professor Bain took the view that they did not bite on s.88, and his view was that the  
10 matters raised by the appeal did bite, but that drafting would leave which matters affect the  
11 determination open.

12 (The Tribunal confer)

13 THE CHAIRMAN: We will retire for a few moments just to consider where we are. Before we  
14 do so, are we going to receive submissions on other matters to do with a possible hearing  
15 next week, or the amendments to the pleadings or something else?

16 MR. TURNER: Madam, not from us. Your referendaire mentioned that on the slate you might  
17 have in mind the procedure for resolving the non-price control matters, the issue relating to  
18 confidentiality and Mr. Heaney of Carphone Warehouse and potentially the date for service  
19 of any reply. We have not come prepared to deal with any of those issues today. And we  
20 are expecting to engage in discussion with the other parties prior to a hearing next week.

21 THE CHAIRMAN: Yes, Mr. Holmes?

22 MR. HOLMES: Madam, I have not I am afraid had the opportunity to canvas this with my  
23 learned friends, it does occur to us that the hearing currently scheduled for 2<sup>nd</sup> December –  
24 we understand the purpose of that hearing at present is to deal with the non-price control  
25 matters and it was specifically saved in case there were further contested applications to  
26 amend which required to be resolved. Given that that is not the case and in relation to para.  
27 118A only one issue arises and I understand Mr. Turner will be bringing forward further  
28 amendments once we have clarified our position in due course, we wonder whether the  
29 hearing on 2<sup>nd</sup> December now serves any useful purpose? It may be that the timetabling and  
30 procedural questions can be dealt with adequately in correspondence without needing to  
31 trouble the Tribunal with an oral hearing, but we will leave that as a suggestion. Of course  
32 the other parties may have positions of their own in relation to that.

1 THE CHAIRMAN: Well perhaps you can make use of the time when we are considering this to  
2 have a discussion as to whether there is something we can usefully do on 2<sup>nd</sup> December and,  
3 if so, what it is.

4 MR. HOLMES: Of course madam.

5 THE CHAIRMAN: Thank you.

6 (Short break)

7 THE CHAIRMAN: The wording that we have come up with for Question 4.2(b) is as follows: "If  
8 the price controls set in Ofcom's statement have, during the elapsed period of the price  
9 control, been at an inappropriate level, and on the assumption that it may, having regard to  
10 the criteria which are set out in s.88 of the 2003 Act be lawful and appropriate to adjust the  
11 price control applicable during the unelapsed period, what adjustments to that part of the  
12 price control should be made, if any".

13 That, we hope, strikes a balance between giving a steer to the parties and the Commission as  
14 to what they ought to be thinking about, but does not fall into any of the traps which we  
15 discussed before we rose.

16 Now, what we will then do, if someone will kindly send us an electronic version of this  
17 draft, is make an order referring these questions to the Competition Commission.

18 The only other point I wanted to make, which I hope will be uncontentious, is that in  
19 Question 1(a) it would be helpful to include the name of the statement so that one can see  
20 upfront what it is we are dealing with.

21 What remains to consider then is the current application to re-amend the notice of appeal.

22 There are three points as regards that. There is the point on para. 118(a), which I  
23 understand it is generally accepted that Carphone Warehouse are not in a position at the  
24 moment to say what they want to do about that paragraph. So, I think we will just have to  
25 leave that for a later date. There is then the proposed changes to para. 129, which were  
26 outlined in yesterday's letter, which Mr. Williams says he wants to have an opportunity to  
27 look at - and Ofcom probably as well. Then there are potential amendments to para. 130,  
28 dealing with relief that we discussed with Mr. Turner during the course of his submissions.

29 We do not want to hold up making the reference to the Commission pending the finalisation  
30 of those amendments. We want to get that off straightaway, although we realise that any  
31 amendments to para. 130 may have some effect on the price control matters, but we hope  
32 not such as to require the questions to be adjusted. That is where we are on the draft  
33 amended notice of appeal.

1           There then is the question of what amendments need to be made to the defence, and when  
2           we are going to deal with those, and then the question of whether there needs to be a reply.  
3           Other than the pleadings, the outstanding issue is the point about the admission, or not, of  
4           Mr. Heaney to the confidentiality ring. Have we had an indication as to whether the parties  
5           are agreed on that, or not agreed.

6   MR. TURNER: The parties are not agreed. I have discussed that with Mr. Williams. We both  
7           feel that there is scope for further discussion, but we also both feel that this will not be done  
8           in time for a hearing on Wednesday to be effective. Carphone Warehouse feels that the  
9           issue is sufficiently important that we would not like it to be kicked into the long grass.  
10          Therefore before the Tribunal came back into court we were beginning to look at alternative  
11          dates that at least the parties might manage for a provisional hearing to resolve this problem  
12          in the event that agreement is not reached - because agreement may not be reached.

13   THE CHAIRMAN: Is it something that would need a hearing or that we could deal with on the  
14          papers?

15   MR. TURNER: It is not clear to me that it is a matter that could be dealt with only on the papers,  
16          given the sensitivity of it. The Tribunal may wish to ask questions to satisfy yourself about  
17          whether there are sufficient safeguards. It seems easier to deal with that orally.

18   THE CHAIRMAN: So, as far as that point is concerned is the general view that we would not be  
19          ready to have a hearing about the Mr. Heaney point by next Wednesday, or that it might be  
20          premature because you might be able to resolve it by discussion?

21   MR. TURNER: The only active parties on this are ourselves and BT and we both share that view.

22   THE CHAIRMAN: As far as the pleadings is concerned?

23   MR. TURNER: As far as the pleadings are concerned, we can put those points in order very  
24          quickly. The only matter that the other parties and the Tribunal needs to see is what we are  
25          going to do with para. 130. I can already indicate these provisionally - that the formulation  
26          that the Tribunal has come up with provides a very useful base for us to deal with there. We  
27          do not anticipate that there will be any ramifications arising from any change to para. 130.  
28          We will circulate a draft containing these changes to the other parties, if not by close of play  
29          today, then on Monday. If the other parties indicate shortly thereafter - perhaps within the  
30          following two days, I suggest - whether they are happy or not, then we will be in a position  
31          to decide whether the draft can be amended in that form.

32   THE CHAIRMAN: You will circulate a new draft amended notice of appeal which incorporates  
33          the changes that you were proposing in your application of whenever it was, so that we have  
34          a compendious document in which you have the amendments which have already been

1 considered and any new amendments arising out of today. It is likely that 118A will still be  
2 unresolved, but we will park that for the moment.

3 MR. TURNER: Yes, that is not going to cause difficulties.

4 THE CHAIRMAN: Then if the parties do not contest any of those amendments we can grant  
5 permission and then the parties, I hope, would be able to come up themselves with a  
6 timetable for an amended defence to be served.

7 MR. TURNER: Yes.

8 THE CHAIRMAN: So it looks as if there would not be much for us to do next Wednesday.

9 MR. TURNER: Madam, I was just mentioning to Mr. Pickford, we may also need to address the  
10 question of any reply, I believe that was canvassed at the last hearing, we will also address  
11 that in correspondence with the other parties.

12 THE CHAIRMAN: I have not really addressed my mind to that but you may like to consider  
13 whether a reply might be useful in respect of the non-price control matters, and whether  
14 once the price control matters get into the Commission their own procedure kicks in, in  
15 which a reply may be of limited use – just floating that as an idea that the parties might  
16 want to consider. I have not given it any further thought than that.

17 MR. TURNER: We had been thinking along similar lines. In relation to the price control matters  
18 the limit of our ambitions, as at present advised, is to deal with the legal framework and not  
19 to delve into detail that will then be considered by the Competition Commission.

20 THE CHAIRMAN: So I think the conclusion is that we will not then be all seeing each other  
21 next Wednesday, is that right?

22 MR. TURNER: That seems to be so.

23 THE CHAIRMAN: Any other issues that we need to address?

24 MR. TURNER: Only, madam, on that point, if we can investigate with the referendaire after this  
25 hearing whether there may be a convenient date for a substitute hearing in the week  
26 beginning 7<sup>th</sup> December, which would suit the members of the Tribunal.

27 THE CHAIRMAN: I know that whole week is difficult for me, but we will have to see what else  
28 we can sort out.

29 MR. TURNER: I am obliged.

30 THE CHAIRMAN: Thank you very much everybody for all the work that you put in for the  
31 drafting of the questions, these things always become extremely complicated and I am very  
32 glad that we have been able to resolve them in the course of today and that is largely due to  
33 all the hard work that was put in by the parties before today. Thank you.