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

Case No. 1146/3/3/09

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

11<sup>th</sup> February 2010

Before:

LORD CARLILE OF BERRIEW QC  
(Chairman)

MARCUS SMITH  
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

– v –

**OFFICE OF COMMUNICATIONS**

Respondent

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Graham Read QC and Miss Anneli Howard (instructed by BT Legal) appeared for the Appellant.

Mr. Pushpinder Saini QC and Mr. Hanif Mussa (instructed by the Office of Communications) appeared for the Respondent.

Miss Dinah Rose QC (instructed by Olswang LLP) appeared for the proposed interveners, Cable & Wireless UK, Virgin Media Limited, Global Crossing (UK) Telecommunications Ltd, Verizon UK Limited and COLT Telecommunications (the "Altnets").

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1 THE CHAIRMAN: Good afternoon. You have the agenda. Have you had a copy of this piece of  
2 paper which contained two questions? Can we hand out a sheet of paper which contains  
3 two draft suggested questions for consideration? (Same handed) Can I just ask you to read  
4 those before we take the matter any further? (After a pause) Miss Rose, you are generically  
5 the Altnets, are you?

6 MISS ROSE: I am, I am generically the Altnets, yes.

7 THE CHAIRMAN: Good, thank you. Well let us start then if we may – yes, Mr. Read.

8 MR. READ: Sir, thank you for giving the draft wording and perhaps I can discuss that when I  
9 take each particular point in rote from the agenda.

10 The point I do want to stress at the outset though, because this is quite an important point as  
11 far as BT is concerned, is that the issues raised within BT's notice of appeal do raise a  
12 number of fairly fundamental problems that are affecting not only this case but also ongoing  
13 problems that BT is currently either facing or putatively facing, and that is raised at various  
14 points in the notice of appeal where we indicated how fundamentally important this is to  
15 BT.

16 Our concern throughout all of this is ensuring, if one likes, that one does not try and take a  
17 method for resolving this particular appeal by a short route whilst leaving these important  
18 fundamental issues still to have to be dealt with at a later date. I want to stress that from the  
19 outset because BT is very concerned both about the use of the dispute resolution powers  
20 and, of course, the way that Ofcom has actually determined the question of price control  
21 and cost orientation on the basis of DSAC and aggregation of products, etc.

22 Against that background I will address the specific points raised by the agenda.

23 The first relates obviously to the intervention of the Altnets and, as I think you will have  
24 seen both from BT's letter and from the skeleton argument, BT is not raising any objection  
25 to them being joined. It does, however, make the point quite forcefully that they are acting  
26 as interveners and we do not want in the course of the hearing to be confronted by matters  
27 which properly have been dealt with in a notice of appeal. BT may be tilting at windmills  
28 in this respect, and obviously it is dependent upon what actually goes into the statement of  
29 intervention, but we thought it is important, particularly the way that the original request  
30 was put in, and in particular the reference to ongoing prices, that we flag this up from a very  
31 early stage, the Altnets are under no misapprehension as to the stance that BT is taking on  
32 this. So subject to those points that we have set out in the observations we are content for  
33 the Altnets to be joined, the most important, obviously, being the question that we do also  
34 want the Altnets to be singularly represented as, indeed, they appear to be.

1 THE CHAIRMAN: Shall we deal with these issues one by one?

2 MR. READ: Yes.

3 THE CHAIRMAN: Let us deal with interventions then. There is no objection, Miss Rose, to the  
4 intervention. It is an anxiety of the Tribunal that the Altnets should be represented – I do  
5 not mean in terms of money, far from it – in terms of personnel as economically as possible  
6 and therefore by a single legal team, unless conflicts of interest were to arise between  
7 interveners?

8 MISS ROSE: The position at the moment is that the Altnets are indeed represented by a single  
9 legal team.

10 THE CHAIRMAN: And that will continue?

11 MISS ROSE: I am obviously severely handicapped in dealing with any of these submissions not  
12 having seen the notice of appeal, and in my submission it would not be right, as a matter of  
13 principle, to impose conditions on the Altnets' intervention at a stage when we are not in a  
14 position to identify whether there could be problem. I doubt very much whether there is a  
15 conflict of interest, but I am simply not in a position to deal with it since we have not seen  
16 the notice of appeal.

17 My suggestion is that the right way forward is to allow us to intervene. We have no interest  
18 in running this case in a disproportionate or non-cost effective way. If anybody objects to  
19 the way that we are running our intervention then they can object at the time when and if  
20 they object to anything that is in our notice of intervention, any arguments that we are  
21 seeking to make, or the way that we are being represented. Of course, the normal rule is  
22 that it is up to parties how they are represented but, as I have said, we do not have any  
23 interest in prolonging the length of time or the cost of this appeal unnecessarily, but we are  
24 very anxious that we should not be constrained at this stage by conditions imposed on us  
25 blind.

26 THE CHAIRMAN: Were we to impose conditions such as representation by a single legal team,  
27 and avoiding duplication of submissions which you later found were too constricting then  
28 liberty to apply would enable you to apply in any event, but I think you will find the  
29 Tribunal is anxious to give appropriate directions commensurate to a case of this scale, but  
30 of course to allow liberty to apply.

31 MISS ROSE: Sir, I understand the Tribunal wants to case manage these proceedings effectively  
32 but my submission is that it is wrong in principle to impose conditions on us at a time when  
33 we have not been permitted to see the notice of appeal.

34 THE CHAIRMAN: What is the principle?

1 MISS ROSE: At the moment I am in no position to know what arguments we want to mount  
2 because we do not know what the issues are, neither am I in any position to give any advice  
3 about whether there could be a need for separate representation for the same reason.

4 THE CHAIRMAN: Right.

5 MISS ROSE: And, in my submission, it is the wrong way around to say “We will impose the  
6 conditions and then you can seek liberty to apply to have them removed” when the  
7 conditions are being imposed on us in a situation where we cannot effectively address the  
8 issues.

9 THE CHAIRMAN: Mr. Read has expressed a concern that the Altnets should not raise by  
10 intervention – I am summarising now – points that they could or should have raised on  
11 appeal. I presume that is a given and well understood by the Altnets anyway.

12 MISS ROSE: Again, Sir, it depends what the scope of his proposed restriction is because there is  
13 a difference between a situation in which we would seek to support the decision that has  
14 been made by Ofcom by different reasoning from that which is being used by Ofcom, so  
15 even if there is some defect in Ofcom’s reasoning the result is correct and, in my  
16 submission, we are absolutely entitled to do that in intervention; it has been done many  
17 times before, it has been done in the H3G dispute resolution just as one example. Another  
18 situation, if we were seeking to say that the price should be lower than that which Ofcom  
19 has awarded, now I can see that in the latter case if we were to seek to make a positive  
20 argument that the price that Ofcom has fixed is too high, that you can say that that is an  
21 argument that should have been raised by your own notice of appeal; that is one matter. It  
22 seems to us that the conditions that BT is seeking to impose on us would seek to stop us  
23 raising different arguments from Ofcom, which of course is ridiculous since the whole  
24 purpose of our intervention is not to duplicate the submissions that are made by Ofcom.  
25 But again, I am handicapped in identifying to you what arguments we would wish to make  
26 because of not having had the opportunity to see the notice of appeal.

27 My submission is that the right course is for us to be given leave to intervene and then if  
28 anybody has an objection to the notice of intervention that we submit they can object to it in  
29 the normal course of events. There are big problems of principle in this Tribunal trying to  
30 set limits on the scope of our intervention which could in themselves be unclear or  
31 ambiguous, could leave us in a state of uncertainty as to what we are or not permitted to  
32 argue, and which are imposed on us before we have seen the notice of appeal.

33 I repeat what I have already said that the last thing we want to do is unnecessarily prolong  
34 this case.

1 THE CHAIRMAN: Yes, I understand that, of course. Mr. Saini, do you want to say anything at  
2 this stage?

3 MR. SAINI: No, Sir.

4 MR. READ: Sir, can I make just three points in reply to Miss Rose's contentions? First, this is  
5 not a case where the Altnets have had separate representation throughout the very long  
6 process that the determinations have already taken, so it is quite plain, in my respectful  
7 submission, that they have been perfectly able and capable of working through a single set  
8 of lawyers throughout that extended 15 month process. We think that it is quite important  
9 that the onus should be on them to demonstrate that there is some reason why they need to  
10 step outside the bounds of that single representation.

11 The second point is while, of course, I accept what Miss Rose says about the fact that she  
12 has not seen the notice of appeal yet, and that is solely because obviously BT did not want,  
13 if you like, to tread on the toes of the Tribunal – in other words take a decision about the  
14 intervention before the Tribunal had considered the matter. Although she has not had the  
15 benefit of that there certainly has been an immense exchange of arguments in the course of  
16 the determination itself, there have been repeated lengthy submission documents that have  
17 been put back and forth, and there has also been a series of experts' reports that have  
18 already been disclosed, so the lines are relatively well drawn in any event.

19 BT believes that if there is a problem, if the Altnets when they see the draft notice of appeal  
20 feel there is a problem, then it really should be incumbent on them to come back and say:  
21 "Can we be released from the directions that have been placed upon us?" Sir, that is really  
22 what BT would say about the question of the single representation point.

23 The third point that I would make is the issue of when is something a notice of appeal rather  
24 than, if you like, a supplementary argument to something Ofcom is putting forward? That  
25 is something that can only really be determined once we have seen the statement of  
26 intervention.

27 But to take one example, in some of the numerous submissions that were put to Ofcom  
28 during the course of the determination stage, it was suggested by the Altnets that in fact not  
29 DSAC but FAC should be used as the base line for assessing any over payment under s.192.  
30 That is plainly something that if they are going to raise should have been raised in the notice  
31 of appeal and that is the sort of instance that we certainly do not accept should actually be  
32 raised in a statement of intervention. As I say, it may be tilting at windmills because until  
33 one has seen what the statement of intervention actually says it may be difficult to see  
34 whether or not they have crossed the line or not.

1 THE CHAIRMAN: This is something we have not reached yet, is it not?  
2 MR. READ: It is NOT, and therefore as I say BT is putting the marker down, if you like, but  
3 holding all fire back until it sees what it is confronted with.  
4 THE CHAIRMAN: You look as though you want to intervene, Miss Rose. It sounds to me like a  
5 gypsy's warning rather than something we are going to rule on today.  
6 MISS ROSE: Well if it is a gypsy's warning I am happy to take it in good part.  
7 THE CHAIRMAN: Good.  
8 MR. SAINI: I think we will leave it as a gypsy's warning.  
9 THE CHAIRMAN: Leave it as a gypsy's warning, yes – and please do not think I am being  
10 “gypsyist” when I say that. What is next, Mr. Read, are we on to preliminary issues.  
11 MR. READ: We are on to preliminary issues, I think the battle lines are well illustrated in the two  
12 preliminary issues that you have actually drawn up in the draft order.  
13 THE CHAIRMAN: Can I tell you why we have done this? In our first discussions about this  
14 case it seemed to us that both these preliminary issues at the very least are arguable and if  
15 they are arguable it seems right that we should determine whether their arguability has  
16 greater substance than merely that, and they really turn into quite simply jurisdictional  
17 issues, and although I listened carefully to what you said earlier, it seems to us at first blush  
18 that we have to deal with these jurisdictional issues as part of the route to anywhere else, if  
19 there is anywhere else to go after they have been considered.  
20 MR. READ: I think BT fully accepts that there are a series of steps that the Tribunal may have to  
21 take in order to reach any final decision, and part of those steps may well include reference  
22 to the Competition Commission.  
23 There is, I think, underlying the joinder of issue between BT and Ofcom a point of statutory  
24 construction, and I am looking here at your first preliminary issue on the Competition  
25 Commission. On that point there may be a question of statutory construction as to how  
26 exactly s.193 and Rule 3 of the 2004 Rules work - how wide in breadth they actually are or  
27 are not - may underline it.  
28 BT also has a concern that some of the issues that may need reference to the Competition  
29 Commission are dependent upon how precisely Ofcom puts its case on particular points.  
30 The reality, we say, is that at the moment it is not easy to see entirely the way the matter  
31 might go on specific instances until we know precisely what Ofcom are actually saying on  
32 the particular points raised in BT's notice of appeal. I am happy to illustrate this by a  
33 couple of references if the Tribunal feels it would actually help. In order to do this I need to

1 have the notice of appeal itself, the amended notice of appeal which should be at tab 1.1, or  
2 it may be in bundle 4 I am told because it may have been added at the back.

3 THE CHAIRMAN: We have it.

4 MR. READ: If I can take you first of all to para. 169? I should also perhaps at this stage  
5 mention that within BT's observations there was unfortunately a typographical error in para.  
6 9 and unfortunately the reference there is to s.88 of the amended notice of appeal and it  
7 should have been 188. I apologise if that caused any confusion.

8 If one goes to 169 one can see there that BT is there dealing with the so-called "secondary"  
9 test that Ofcom has prescribed, and BT sets out in 169 that it contends that this conflicts  
10 with regulatory consistency and legal certainty because it has never previously been put  
11 forward as a methodology for determining what exactly "cost orientation obligation"  
12 actually means.

13 There could be a number of answers to this on Ofcom's part. The first answer could be:  
14 "Yes, it has always been an established test, it goes back to 2001 and the guidelines that  
15 were published then, and was extant when the 2004 cost orientation obligation was put on  
16 BT." It might be said that this was implicit if not explicit, within the methodology that was  
17 being considered. Or, they may accept that this is something wholly new that is being put in  
18 the final determination, in which case BT says that that is a rule under s.87(9) relating to the  
19 cost orientation which has been imposed subsequently.

20 That obviously illustrates the point that when one is assessing whether or not this is a price  
21 control matter as defined in s.193(1) and particularly (10) and the Rules, whether or not it is  
22 a methodology that Ofcom is accepting has only just been implemented, whether it is the  
23 methodology that Ofcom says was always explicit or whether it is the methodology that  
24 Ofcom somehow says was implicit from what went previously.

25 I am giving this simply as one illustration of how we say on this side that we actually need  
26 to see the way Ofcom is putting its defence on these points to get a real feel for the structure  
27 of any reference to the CC; and that is why we have been very forthright in our views that  
28 ultimately the only way one can really get to the bottom of what exactly, if anything, should  
29 be referred to the Competition Commission, that can only be done once Ofcom have  
30 actually served the defence.

31 THE CHAIRMAN: Full defence.

32 MR. READ: The full defence to everything. As I say, there may be a wider issue underpinning  
33 all of this as to, if you like, the statutory construction of s.193 and Rule 3 and how far it  
34 actually goes, but we think it might be premature to address that until we have seen the full

1 shape of Ofcom's defence so that everyone is clear exactly what we are talking about.  
2 Subject to that point we think it will be eminently sensible to try and lance as soon as  
3 possible the question of: what is it that we are looking at for the purposes of any reference  
4 to the Competition Commission? We see force in the argument that that should actually be  
5 done at a relatively early stage, although the only caveat I put down is I think originally  
6 there was a suggestion for a one day hearing, I think that one day would probably be needed  
7 to sort out all the issues on the Competition Commission so that if there were any other  
8 preliminary issue tagged on to that it may take slightly longer.

9 THE CHAIRMAN: An awful lot can be done on paper in advance.

10 MR. READ: I absolutely agree with that, but it does require the parties to have actually defined  
11 what the question is.

12 THE CHAIRMAN: If one is looking at those two questions it seems to us, I think I speak for  
13 both my colleagues too, that the first question is going to take rather longer than the second.

14 MR. READ: Yes.

15 THE CHAIRMAN: And that the second could be dealt with fairly quickly – “fairly”, I said,  
16 quickly.

17 MR. READ: Can I turn to the second and tell you how BT sees this, because we think that if  
18 there is going to be a preliminary issue on it, and that is probably the way to define it  
19 subject to one or two issues about the actual drafting, the key point really comes down to  
20 this: that BT considers it is going to be problematic to take off and hear the sub-issues that  
21 Ofcom want to deal on dispute resolution. We see force in the argument that dispute  
22 resolution powers ought to be looked at in the round, and only that way is one going to get a  
23 clear cut answer to the statutory construction of the Rules contained in s.185(2) and we  
24 would say 192 as well, because we say that you have to look at 192 in order to assess and  
25 understand what 185 and 186 actually mean.

26 There are in our view some problems about the way that Ofcom have put forward this idea  
27 of just taking a narrow, I will call it, “jurisdiction” point. They are saying that BT has  
28 raised in Ground IV .A. (a) a particular ground of appeal relating to the way that dispute  
29 resolution should be put. BT is not quite saying that. BT is saying that when you look in  
30 the round about what Ofcom has done in this matter and in particular the way it has taken a  
31 historic dispute about breach of cost orientation obligations and assessed them it is wrong,  
32 and it is wrong potentially for a number of reasons. First, it may be a narrow jurisdiction  
33 point, secondly, it may be because the discretion has been used in the wrong way, or thirdly,  
34 because of the regulatory powers imposed on Ofcom it ought to have been looking for a

1 different regulatory process in any event. Finally, there is the point about s.192, even if  
2 Ofcom did have a discretion to deal with this dispute, whether it should have used its  
3 powers in 192 to actually have ordered the repayment of money given the nature of the  
4 disputes actually involved. I think it is quite clear from our amended notice of appeal and,  
5 indeed, in the notice of appeal, that what BT has been saying consistently throughout is that  
6 whichever way ultimately a Tribunal or court decides dispute resolution issues Ofcom have  
7 simply done in the context of this determination something that those powers were never  
8 intended to achieve.

9 Our problem with taking Ofcom's narrow sub-issue on "jurisdiction" is that we do not think  
10 it is necessarily likely to resolve the matter. The trouble with taking this sub-issue, we  
11 believe, is that if BT succeeds yes, there may be an argument on it, that puts an end to the  
12 appeal, but if BT does not the same arguments about this being an historic investigation are  
13 going to come up again on the question of discretion. So that is why we say, looking at  
14 everything in the round, is actually on the dispute resolution powers is far more important  
15 than simply at the end of the day taking one sub-issue.

16 As a further point to that we say also that if you are looking at the construction of those  
17 powers, if you are looking at how they all intermarry together it is important to look at the  
18 matter in the round. In other words, it is important, when considering what, for example,  
19 the word "must" in s.186 – "Ofcom must consider whether there are alternative means"  
20 Ofcom must, if it does not consider there are alternative means, accept the dispute. So the  
21 word "must" is being used. BT would argue that the corollary of that is that if the word  
22 "must" has been used within the statutory provisions it is likely there is a restriction on the  
23 ambit of the dispute itself, and certainly that Ofcom must have some compensating  
24 discretion elsewhere how to deal with them. I do not want to get into submissions, but I am  
25 trying to use this as an illustration as to why we say that you need to look at s. 185 to s.192  
26 in the round together in order to understand the sub-issue that Ofcom says arises.

27 The final point I want to make about this is that Ofcom seem to believe that this point will  
28 put a complete end to the appeal. The short answer to that is it will not, and the reason for  
29 that is there is plainly going to be an issue of when a dispute is an historic dispute and when  
30 it becomes effectively a prospective dispute. Again, I do not want to get into detailed  
31 arguments for today's hearing on this dispute, but perhaps I can just give you three dates.  
32 The first date is that on 21<sup>st</sup> December 2007 THUS (one of the Altnets) served on BT a  
33 report from the accountants RGL, claiming that BT was and had been overcharging for a  
34 number of years.

1 Then on 25<sup>th</sup> June 2008 the Altnets serve their request to resolve the dispute and finally on  
2 25<sup>th</sup> July 2008 Ofcom accepts the dispute and ultimately agrees that the dispute is  
3 considering the position up to 30<sup>th</sup> September 2008, so that is almost a year – nine months  
4 anyway – after THUS served the original reports from the accountants RGL.

5 Ofcom has clearly awarded a repayment for alleged overcharging for the period 1<sup>st</sup> April  
6 2008 to 30<sup>th</sup> September 2008, and it is a sizeable sum as well. We can see that even, if the  
7 point was to go in BT's favour on this, there may still be a dispute kicking around, and the  
8 notice of appeal would still have to be extant over what happens about cost orientation and  
9 repayment in respect of the sums from 1<sup>st</sup> April 2008 to 30<sup>th</sup> September 2008. We do not  
10 think that although Ofcom characterises this as effectively finishing the appeal, it will  
11 actually have that effect for the reasons that I have just outlined.

12 So whilst we are happy to consider the matter of a preliminary issue on dispute resolution as  
13 a whole i.e. if one looks at BT's notice of appeal looking at it from Ground IV.A, which  
14 includes all the sub-arguments (a) to (e) and is not simply focused on sub-argument (a),  
15 which is what Ofcom wants to achieve, while we can see some force in that we are not  
16 convinced that it will necessarily drastically shorten this appeal, and we think that there is a  
17 risk that unless you assess it in that totality, if you take the sub-issue that Ofcom wants to  
18 raise in itself, the real danger is that either you do not look at the dispute resolution powers  
19 in their full context or, alternatively, you end up still not getting rid of it because of the  
20 prospective element that still has to be looked at.

21 I hope that is helpful in illustrating to you how BT actually sees the problems with taking  
22 dispute resolution on its own as a preliminary issue, which is why BT's position would be  
23 we are more than happy with 1(a) in the draft order, but we do have problems with 1(b) in  
24 the draft order, and we certainly have problems with 1(b) if it is to be limited to the sub-  
25 issue that Ofcom actually say it should be limited to.

26 I hope that helps set out BT's position.

27 THE CHAIRMAN: Thank you very much. Mr. Saini?

28 MR. SAINI: Sir, we support the suggestion that both of these preliminary issues be tried. If I can  
29 deal with the second one first, where there is a dispute. We are rather surprised on this side  
30 of the Tribunal to hear what Mr. Read has just said about why this will not be the  
31 determinative issue. If I could please ask the Tribunal to take up the notice of appeal and  
32 please turn first of all to para. 53, on p. 24 of the amended notice of appeal. I believe these  
33 must have been the paragraphs that the Tribunal had in mind when they formulated their  
34 draft 1(b). It is absolutely clear, Sir, from para. 53 and 60 where this jurisdiction issue is

1 raised, that BT are saying that as a matter of law the correct construction of s.185(1) in the  
2 light of the Framework Directive Ofcom simply had no jurisdiction to entertain this dispute.  
3 If that is right then not only should BT's appeal succeed forthwith, but it will also have a  
4 drastic impact upon many other investigations or dispute resolution processes upon which  
5 Ofcom is currently engaged. For example, you will know the background, there are two  
6 pending disputes which have been split off from this dispute, the trunk and the terminating  
7 services disputes which are referred to in Mr. Read's skeleton argument. If he is right, we  
8 can stop there straight away.

9 So the way that BT themselves have formulated their first ground it is a completely  
10 dispositive issue. What we were surprised to hear, and this forms no part of this notice of  
11 appeal in this first section, is that it is now being suggested that even if BT succeed on this  
12 point there is still some point which the Tribunal has to deal with. If that is going to be  
13 made it should have formed part of his notice of appeal and my friend, if he wants to argue  
14 it, needs to amend this section because it is completely new to us the idea that Mr. Read  
15 could succeed on this first jurisdictional argument and then there will still be something that  
16 Ofcom can deal with. So we are frankly taken by surprise on that point. But as it is  
17 formulated, if Mr. Read succeeded on this point between paras. 53 and 60 it is a knock-out  
18 blow, and that is why we respectfully submit that the Tribunal has correctly formulated  
19 issue 1(b).

20 If it is not a knock-out blow we need to see that pleaded, and to understand why it is not a  
21 knock-out blow. We would respectfully submit that on the current form of the notice of  
22 appeal the Tribunal should order the determination of issue 1(b). With respect to Mr. Read,  
23 we do not understand the point that this issue has to be determined in the round, the way he  
24 himself has pleaded it, it is not an issue that depends on any particular facts in relation to the  
25 matters that go to discretion, it is a straight, hard edged point of law, and it is going to help  
26 not only my learned friend but it is substantially going to help Ofcom, because now that this  
27 spectre has been raised, if we are wrong and we have been wrongly investigating historic  
28 disputes under s.185, the sooner we know that the better. We respectfully submit that issue  
29 1(b) should be determined.

30 We are agreed in relation to issue 1(a) but, as I understand it, Mr. Read wants to see our full  
31 defence on everything. What we have suggested, Sir, is that we serve within a very short  
32 period of time, in a matter of weeks, a defence limited to issues 1(a) and 1(b) so he will  
33 know in full what our position is on price control issues. For example, the point that he  
34 took you to in his notice of appeal, we will have to deal with that.

1 THE CHAIRMAN: What is the disadvantage of serving a full defence?

2 MR. SAINI: It is merely a question of timing and resources, Sir.

3 THE CHAIRMAN: A lot of the work must have been done already, Mr. Saini?

4 MR. SAINI: A lot of the work has been done, but this is not a straightforward case in terms of  
5 factual and expert evidence. We have started doing a lot of work on it and our best estimate  
6 for doing a full defence is the end of March, because that is going to require a lot of work.  
7 It is not because the people at Ofcom or we are being idle, it is because Ofcom, as you may  
8 know, are engaged in another four appeals, some of which are before this Tribunal and  
9 others before the Competition Commission, which involve the same personnel as those who  
10 are involved in this decision. Therefore there is real lack of resources to deal with this. We  
11 could do a full defence by, I believe it is 31<sup>st</sup> March, but what we are offering is that BT can  
12 have, and the interveners can have our defence in relation to issues 1a and 1b, that is the two  
13 preliminary issues by, I think, we suggested 26<sup>th</sup> February, and Mr. Read will know in full  
14 by that date what our case is on price control.

15 It may turn out, if Mr. Read is right on one or more of his preliminary issues, and BT has  
16 not committed itself yet on the price control issue, it is hedging its bets on that, it may be  
17 that we do not need to spend time and money on a full defence, because, for example, if the  
18 matter is sent off to the Competition Commission on the price control issue it would have  
19 been a waste of time and money for Ofcom to spend public resources on preparing a full  
20 defence and gathering expert evidence. Equally, if Mr. Read is right on his s.185 historical  
21 disputes point then we do not need to spend that time and money.

22 So what we put forward, Sir, is a suggestion that we have a trial on both preliminary issues.  
23 They can have our response and the parts of our defence that deal with those preliminary  
24 issues by 26<sup>th</sup> February.

25 THE CHAIRMAN: If we have a trial on the preliminary issues without a full defence, it is very  
26 unlikely that that trial will take place before 31<sup>st</sup> March – it will not.

27 MR. SAINI: It will not.

28 THE CHAIRMAN: It will not.

29 MR. SAINI: It is a resource issue, Sir, ultimately.

30 THE CHAIRMAN: In which case, supposing that the trial on the preliminary issues, if there is to  
31 be one that takes place, say, in May, then what happens to the full defence?

32 MR. SAINI: Sir, we would submit that effectively no full defence should be served until we have  
33 a resolution of the issues, because depending on the way they are decided, it could be a  
34 waste of time.

1 THE CHAIRMAN: It could be. On the other hand in terms of reasonable case management, and  
2 not delaying – if there is to be a final disposal of this case – longer than we have to, it seems  
3 inevitable that the work is going to have to be done in any event.

4 MR. SAINI: Sir, I see the force of that. I was just simply putting forward that if we are going to  
5 have to do a full defence, it cannot realistically be done before the end of March, and I see  
6 the force of what you say, Sir. I am going to sit down now, but it may be that Mr. Read  
7 should indicate whether or not he wants to amend his notice of appeal to explain why  
8 Ground IV .A is not going to be dispositive as it is currently formulated because that may  
9 throw a spanner in the works so far as issue 1(b) is concerned, the point about the different  
10 dates because I may have been slow in following it, but at the moment the point about the  
11 different dates does not appear on the pleadings.

12 THE CHAIRMAN: Do you want to add anything on this, Miss Rose?

13 MISS ROSE: Sir, we do not have anything to say on the second issue, not having seen the notice  
14 of appeal. I just have a couple of comments, as a matter of principle on the first issue. At  
15 the moment it is formulated in terms of whether BT's amended notice of appeal raises any  
16 specified price control matters. Of course, the wording of the Regulations identifies  
17 specified price control matters as being matters that are in dispute and it therefore seems to  
18 me that it ought to say whether BT's appeal raises any specified price control matters,  
19 because it is only when you have seen the defence, at least in outline, that one can tell what  
20 matters are in dispute and therefore eligible in principle ----

21 THE CHAIRMAN: I take your point.

22 MISS ROSE: -- to be specified price control matters, which leads me to my second point, which  
23 is that Ofcom will need to plead, at least in outline, to BT's notice of appeal in order for the  
24 CAT to be in a position to identify specified price control matters. It may be that they do  
25 not have to put in the full detail and expert evidence and so on, but there will need to be an  
26 outline pleading. I am trying to think back, and I think in the mobile call termination cases  
27 there were outline pleadings of the price control matters, or what people considered to be  
28 the price control matters, before matters were referred to the Competition Commission, but  
29 I may be wrong about that in terms of the defence; that was certainly right in terms of the  
30 notice of appeal.

31 THE CHAIRMAN: Thank you. Yes, Mr. Read.

32 MR. READ: I am very grateful to Miss Rose for actually reminding me of a point that I should  
33 have made myself, which is absolutely right, Rule 3 does, in fact, talk about "in dispute",

1 which is quite an important point when you come to consider whether Ofcom should give a  
2 full defence on the matter.

3 Can I deal first with the determination of the dispute resolution powers, because I am quite  
4 happy if Ofcom are prepared to concede today that the determination of sub-issue IV. A(a)  
5 in BT's pleading, if that is going to determine the whole of the determination, including the  
6 period up to September 2008, then it seems to me that far from me being the one that has to  
7 amend the notice of appeal it is actually Ofcom making a concession that their own final  
8 determination for a period after the dispute has been lodged falls away as well, and that is  
9 quite a big concession, and BT is very interested to see whether Ofcom are prepared to  
10 make that concession today. This is not an issue about BT amending its notice of appeal, it  
11 is obvious, and is simple to look at the final determination, that Ofcom have purported to  
12 make an order for the repayment of sums for the period from 31<sup>st</sup> April 2008 to September  
13 2008 and, indeed, if one looks at their bulletin the dispute was clearly defined before  
14 September 2008 as running up to the period to 30<sup>th</sup> September 2008.

15 THE CHAIRMAN: I think I heard your offer of a concession being rejected in close harmony.

16 MR. SAINI: Well perhaps I could help my friend by saying I am not going to make any  
17 concession at all, unless and until I see the pleaded case and what exactly is being  
18 suggested. At the moment I am still rather confused as to exactly what is being suggested.

19 MR. READ: I am not going to get into detailed arguments ----

20 THE CHAIRMAN: We may have to give some directions and decide what they are ourselves.

21 MR. READ: Sir, we say it is all absolutely perfectly clear from our notice of appeal. My learned  
22 friend, took you to para. 53 of the notice of appeal, can I take you back two paragraphs and  
23 see the precise ----

24 THE CHAIRMAN: Paragraph?

25 MR. READ: 51 and 52 on p.23, and see the precise context in which sub-paragraph (a) actually is  
26 developed.

27 "BT considers there are a number of detailed legal arguments over how precisely  
28 the ways that the powers can and should be exercised. However, BT's essential  
29 point is that, whether it is a question of strict jurisdiction or the exercise of its  
30 discretion, Ofcom was fundamentally wrong to use the Dispute Resolution process  
31 in the way it has.

32 BT will briefly review s.185 to 192 of the Act and the various alternative  
33 approaches to how the Dispute Resolution process might be interpreted and how it  
34 applies here."

1 Then it goes on to add:

2 although (a) is longer than the others this is simply because BT set out some of the  
3 legislative factors ...

4 The way BT has always put its case on this is to say whatever the construction of s. 185 to  
5 192 the result that Ofcom achieved is wrong, and it is wrong whether it is a matter of  
6 jurisdiction or whether it is a matter of discretion. What BT were doing in setting out (a) to  
7 (e) subsequently was try to put before the Tribunal the possible alternatives there are for  
8 construing those powers contained in s.185 to 192.

9 What BT says is that however ultimately the Tribunal construes those powers, and it will  
10 need to look at them in their totality in order to construe how they operate, whatever the  
11 outcome the Tribunal should still find that Ofcom applied those powers in a fundamentally  
12 wrong manner, and that is what BT's case is about on the dispute resolution powers. That  
13 is why we have real problems with this concept that Ofcom are putting forward of saying:  
14 "If you take a neat little sub-issue out of the various alternatives that BT put forward then  
15 that will put an end to the dispute". Theoretically it might achieve that result if BT wins on  
16 that particular argument, but for the Tribunal to consider it properly we say you need to  
17 look at all the dispute resolution powers in the round, in order to see what is a question of  
18 jurisdiction, what is a question of discretion, or how the discretion impacts elsewhere in the  
19 dispute resolution process, for example, in s.192. That is why we still have serious  
20 concerns about trying to hive off this sub-issue that Ofcom wishes to do.

21 I think that is probably all I need to say.

22 THE CHAIRMAN: Thank you. Let us look at the question of timetable next, shall we? Let us  
23 just assume for the sake of argument that there is going to be a preliminary hearing. It  
24 seems clear from what you are saying that the preliminary hearing could spin in to a second  
25 day. Subject to checking of diaries the date we had in mind for such hearing was 25<sup>th</sup> May  
26 spilling over into either 26<sup>th</sup> or possibly 27<sup>th</sup>, subject to checking of diaries, as I say. Any  
27 comments?

28 MR. SAINI: I can do those dates.

29 MR. READ: I think my learned junior has problems but we will work around that and we can  
30 certainly make that.

31 THE CHAIRMAN: Well one usually has to work around that problem; sorry, Miss Howard. If  
32 we go from a preliminary hearing to a substantive hearing I am told that that is anticipated  
33 as quite a long hearing by this Tribunal's standards. It has been suggested that we should  
34 set aside up to eight days?

1 MR. READ: We said eight days, but obviously that was on the basis that any preliminary issue  
2 about dispute resolution would not be dealt with, so in effect if one takes that away from the  
3 May hearing then it will shorten it, and of course we put that estimate in precisely on the  
4 basis that we do not know fully what Ofcom are saying at the moment in their defence, and  
5 also, perhaps more importantly, without having formulated clearly what, if anything, needs  
6 to be referred to the Competition Commission, so it is a long stop estimate, if you like.

7 THE CHAIRMAN: It is easier to remove time than add it.

8 MR. READ: Yes.

9 MR. SAINI: From what I know about the case thus far I think it is an appropriate time estimate.

10 THE CHAIRMAN: Have you anything to say?

11 MISS ROSE: Sir, I cannot ----

12 THE CHAIRMAN: You cannot because you do not know what you are going to say!

13 MISS ROSE: Exactly.

14 THE CHAIRMAN: No, that is a fair point. We had in mind a window which starts on 14<sup>th</sup> June,  
15 and lasts for two weeks, but two incomplete weeks. I cannot sit on 15<sup>th</sup>, which is the  
16 Tuesday, and I cannot sit on 18<sup>th</sup>, which is the Friday, and it is not always a disadvantage to  
17 have gaps in hearings of this kind. The following week I could not sit on the Tuesday  
18 afternoon.

19 MR. SAINI: If I could just indicate that I have a real difficulty with that because I have a trial  
20 starting for two weeks on 21<sup>st</sup>, which is a week after the proposed commencement of this  
21 hearing.

22 MISS ROSE: Sir, I also have a difficulty with that window because I am also in a trial starting on  
23 14<sup>th</sup> June.

24 THE CHAIRMAN: We have three of the busiest Silks in the country here! Are we ever going to  
25 achieve unity of purpose in this?

26 MR. READ: Sir, I am obviously not as busy as the other two because I can do that two week slot.  
27 Can I just put in a point that obviously probably in terms of the person who has been  
28 involved most with this so far it has certainly been me, that I think probably BT would  
29 argue if anyone has to give way it would really be more unfair on BT to lose their Silk, but  
30 that is obviously a matter for the Tribunal.

31 THE CHAIRMAN: I suppose you want to come here for a rest cure, do you not.

32 MISS ROSE: There is some truth in that, Sir. I think there is another concern in principle about  
33 losing that date, because it is only three weeks after the proposed date for the preliminary

1 hearing, and certainly in preliminary discussions before we came in I think there was some  
2 anxiety that given the weightiness, as I understand it from rumours ----

3 THE CHAIRMAN: It is weighty!

4 MISS ROSE: I understand it is weighty.

5 THE CHAIRMAN: It is weighty and it is very technically complicated as well.

6 MISS ROSE: I am somewhat concerned that it may be too close to the preliminary hearing as a  
7 matter of principle, even leaving aside my own personal issues with that date, and it might  
8 be much better in terms of people's effective deployment of resources to have the  
9 preliminary issues decided and then take stock, because of course taking the price control  
10 question, we do not know until after the preliminary issue what questions are going to be  
11 before this Tribunal and what is going to have to go to the Competition Commission.

12 THE CHAIRMAN: If we take stock after the preliminary hearing the prospects – leaving Mr.  
13 Read out of it for the moment – of getting either of you here within a foreseeable time  
14 thereafter is going to be pretty near nil, is it not?

15 MISS ROSE: It depends what you think of as a foreseeable time.

16 THE CHAIRMAN: It seems to me we should try and establish a provisional window. It may be  
17 that you are absolutely right that there should be a greater gap between the preliminary  
18 hearing and the substantive hearing, and I see at least some of those instructing Mr. Saini  
19 agreeing. But should we not try and establish a window?

20 MISS ROSE: I agree that we should establish a window. My suggestion, and I put it forward  
21 with the tentativeness of the intervener, is perhaps September might be a good time because  
22 that would give sufficient time for matters to be referred to the Competition Commission if  
23 they have to be, and for the issues that remain before this Tribunal to be crystallised.

24 THE CHAIRMAN: Let us ask Mr. Lusty to produce the diary for a moment. (After a pause):  
25 We will have to look at our diaries. You are going to tell us that you are in a huge and  
26 weighty matter in the Galapagos in September, are you not, Mr. Read?

27 MR. READ: Unfortunately not, it is the Chancery Division in Liverpool, Sir.

28 THE CHAIRMAN: Do you want us to save you from the Chancery Division in Liverpool?

29 MR. READ: The reason I have risen to my feet is simply this, that obviously one of the factors  
30 that you will have seen from BT's observations is the concern about the ongoing issues both  
31 in this particular determination and also in possible other determinations arising again, and  
32 BT is extremely keen to get this matter dealt with as soon as possible. It will have an effect,  
33 for example, you will have seen from BT's observations that there is a question over what

1 we do, or what should be done over the two sub-element component charges that Ofcom is  
2 still investigating at the moment as part of this determination.

3 THE CHAIRMAN: I understand. Tell us about your September problem.

4 MR. READ: My September problem is that I am in two trials and therefore will not be able ----

5 THE CHAIRMAN: For the whole of September?

6 MR. READ: It runs from the very end of August to the middle of September, and then starts  
7 again on 27<sup>th</sup> September for a three week trial.

8 THE CHAIRMAN: Until?

9 MR. READ: Three weeks from 27<sup>th</sup> September.

10 THE CHAIRMAN: Middle of October. Is that Liverpool as well?

11 MR. READ: That is the Liverpool one, the other one is something to do with mobile telecoms'  
12 masts, so that will be a lengthy matter.

13 MR. SAINI: Sir, can I just say that I certainly agree with Miss Rose that we need a healthy  
14 interval between the determination of the preliminary issues and any substantive hearing.  
15 We are ultimately going to be in a position where everyone's diaries are going to cause a  
16 problem, and I think the Tribunal is just going to have to find a window and say that is  
17 going to be a window.

18 THE CHAIRMAN: Speaking for myself I do feel somewhat sympathetic to BT's position and  
19 holding their counsel – I do not mean keeping their counsel, I mean holding on to their  
20 counsel.

21 MR. SAINI: Sir, you will also appreciate that certainly since BT served their notice I have been  
22 quite heavily involved in the case, therefore it is not as if it is going to be easy for Ofcom to  
23 switch as well.

24 THE CHAIRMAN: Right, but very realistically you are suggesting that we decide.

25 MR. SAINI: I do not think there is any alternative.

26 THE CHAIRMAN: We are obviously going to try and accommodate counsel as best we can.  
27 We will have to do that when we retire. Of course, from the dates of hearings all other  
28 things fall, do they not, because we have to work backwards?

29 MR. READ: That is right, although I think my learned friend was indicating a date for the service  
30 of Ofcom's defence, if it is a full defence, of 31<sup>st</sup> March. We do not see a particular  
31 problem with that for a hearing in May. The position normally is that Ofcom under the  
32 rules have six weeks for service of the defence, that would be the normal position, we fully  
33 accept in this case it involves something taking a little longer so therefore we would not  
34 object overly heavily about that, but obviously our concern is that the interveners will no

1 doubt say that they should have a lengthy time, although the key point is that they will of  
2 course have seen the grounds of appeal fairly early on and therefore will have the period  
3 that Ofcom have in drafting their defence to consider how exactly they should play their  
4 intervention and therefore we would say we need a little bit of extra time to adjust their  
5 arguments to actually deal with how Ofcom have put their defence.

6 All we see is that if one looks for either 31<sup>st</sup> March, or perhaps a week earlier and gives the  
7 interveners an extra period of three weeks to finalise off their intervention then it easily fits  
8 within the timetable of a hearing on 25<sup>th</sup> May.

9 THE CHAIRMAN: Right. Let us move on from that. Are there any issues regarding disclosure  
10 that we need to deal with today?

11 MR. READ: We do not think so, because it has been rightly pointed out that BT has made the  
12 issue about the correspondence, that it is very slightly unfair on the Altnets, when they have  
13 not seen the grounds of appeal, for them to be in a position to take any stance on it at all, so  
14 BT has flagged it up but says that that can be parked for today's purposes.

15 MISS ROSE: Sir, on the question of timing for the statement of intervention, the only point I  
16 would note is that 31<sup>st</sup> March is immediately before the Easter weekend, and I would  
17 suggest that it would be appropriate for us to have four weeks from that date, taking in to  
18 account the fact that much of the week following service of Ofcom's defence people will  
19 not be available ----

20 THE CHAIRMAN: Good Friday is on?

21 MISS ROSE: Good Friday is on 2<sup>nd</sup> April.

22 THE CHAIRMAN: So quite early.

23 MISS ROSE: So yes, the bank holidays are 3<sup>rd</sup> and 5<sup>th</sup> April.

24 THE CHAIRMAN: We will take that into account. Are there any issues relating to  
25 confidentiality that we need to deal with today?

26 MISS ROSE: I would suggest that the parties should be invited to liaise to sort out ----

27 THE CHAIRMAN: Yes, I was hoping somebody might say that.

28 MR. READ: I think BT said that in its submissions.

29 THE CHAIRMAN: Before we retire are there any other issues or requests that anybody wants to  
30 make?

31 MISS ROSE: Yes, just to stress that we would like to see the original as well as the amended  
32 notice of appeal.

33 THE CHAIRMAN: Yes, well that should not give rise to any problem, should it?

1 MR. READ: The only logistical issue is that at the moment I think it is still in a confidential  
2 version. Obviously, the quicker the confidentiality ring can be set up that can be given over,  
3 but in the interim what we will try and do is a non-confidential version that can be handed  
4 over.

5 THE CHAIRMAN: This is something that you can sort out among yourselves.

6 MR. READ: The only final point was this question that is raised in para.19 of BT's observations,  
7 which relates to the question of potential stay. If one has the earlier slot for dealing with this  
8 matter hopefully that will fall away because Ofcom will not, in effect, have got 'round to  
9 dealing with the two other sub-component charges in that time, in which case there will not  
10 be the need for us to have to start serving notices of appeal in respect of those and raising  
11 more complicated arguments about whether Ofcom is *functus officio* or not. So dependent  
12 precisely on where the hearing date is likely to fall then that may be something that can fall  
13 by the way. Otherwise we may have quite an argument on whether or not the Tribunal has  
14 actually got jurisdiction to do that or not.

15 MR. SAINI: Can I just make clear, obviously my friend is not pursuing this application, but for  
16 the record we do not accept that this Tribunal has jurisdiction to order any stay of an  
17 unresolved dispute, but my friend is not pursuing any application.

18 THE CHAIRMAN: We have not reached this point yet, have we?

19 MR. SAINI: No.

20 THE CHAIRMAN: If there has to be an application then there can be an application and the  
21 Tribunal will consider it, but I cannot see that there is any real purpose to be served by  
22 giving directions as to that possibility.

23 MR. READ: No, as my learned friend has said I am not pursuing it for today's purposes, but  
24 obviously it does impact on the length of the process by which we take to actually finally  
25 resolve these issues.

26 THE CHAIRMAN: On the basis that intractable disagreements have a happy habit of falling  
27 away I am reluctant to stoke the fire. Is there anything else any of you want to raise before  
28 we retire? We will take a little time because this involves diaries as well, so please bear  
29 with us. Thank you all very much.

30 (Short break)

31 THE CHAIRMAN: We are grateful to counsel for attempting to resolve diary issues, and I know  
32 not everybody is going to be satisfied, but there we are. Obviously this will be turned into  
33 an order, but the directions we are going to give are, first, pursuant to Rule 18 of the  
34 Tribunal Rules the proceedings be treated as proceedings in England and Wales. Secondly,

1 we will order that Altnets collectively be granted permission to intervene, full stop. So we  
2 have been receptive, Miss Rose, to your submissions, but we would ask – and this is not  
3 going to be part of the order – that the Altnets liaise with the party whose position they  
4 support to avoid duplication in the usual way – it hardly needs to be said.

5 Then we are going to order that the following matters be determined by the Tribunal as  
6 preliminary issues and, if you turn to the two questions on the paper that was given to you  
7 earlier, in the third line of question (a) we have removed the last three words, so that it  
8 reads: “BT’s Appeal raises specified price control matters”, and in (b) we have amended  
9 “191” to “192”, so it is “sections 185 to 192.” Those are the preliminary issues to be  
10 determined.

11 We do think it would be of advantage to the Tribunal that Ofcom should file and serve a full  
12 defence, so we will order that:

- 13 \* Ofcom file and serve a defence, together with any supporting documents  
14 and evidence, by 4 pm on 31<sup>st</sup> March,
- 15 \* the Altnets file and serve a joint statement of intervention together with  
16 supporting documents and evidence by 28<sup>th</sup> April,
- 17 \* BT file and serve if so advised any reply to the defence, and to Altnet’s  
18 statement of intervention together with supporting documents and  
19 evidence, and a skeleton argument on the preliminary issues by 12<sup>th</sup> May,
- 20 \* Ofcom, if so advised, file and serve a skeleton argument on the preliminary  
21 issues by 19<sup>th</sup> May,
- 22 \* the Altnets file and serve a skeleton argument on the preliminary issues by  
23 19<sup>th</sup> May,
- 24 \* BT prepare an agreed bundle of documents (hopefully an agreed bundle of  
25 documents) to serve as the bundle for the hearing of the preliminary issues  
26 and an agreed joint bundle of authorities to be referred to at the hearing  
27 with the key sections flagged for reference,
- 28 \* there will be a hearing of the preliminary issues with a time estimate of up  
29 to two days on 25<sup>th</sup> and 26<sup>th</sup> May,
- 30 \* there be a provisional window for the hearing of the substantive issues  
31 starting on 20<sup>th</sup> October, which is a Wednesday going through the rest of  
32 that week and the whole of the following week potentially.

33 That puts you under a lot of pressure, I know, Mr. Read, because you will be coming  
34 straight off the back of something else, but it is the best we can do.

