IN THE COMPETITION APPEAL TRIBUNAL

Cases 1171/3/3/10
1172/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 March 2011

Before:

VIVIEN ROSE
(Chairman)
STEPHEN HARRISON
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

– v –

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

EVERYTHING EVERYWHERE LTD
HUTCHISON 3G UK LIMITED

Interveners (Case 1171)

VIRGIN MEDIA LTD
EVERYTHING EVERYWHERE LTD
TALKTALK TELECOM GROUP PLC
BRITISH SKY BROADCASTING LTD

Interveners (Case 1172)

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H E A R I N G (DAY 2)

APPEARANCES

Miss Sarah Lee (instructed by CMS Cameron McKenna LLP) appeared for the Appellant.

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

Mr. Philip Woolfe (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr. James Segan (instructed by Olswang LLP) appeared for Virgin Media Limited.

Mr. Alan Bates (instructed by Herbert Smith LLP) appeared for British Sky Broadcasting Limited and Talk Talk Telecom Group plc.

Mr. Richard Pike (of Baker & McKenzie LLP) appeared for Hutchison 3G UK Limited.

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THE CHAIRMAN: Yes, Mr. Bates, just remind me, you are for Talk Talk and Sky – is that right?

MR. BATES: Madam, yes, good morning. My submissions will take the following order: first, I will deal with the law, and on that I can be very brief, given that so much has been said about it already. Secondly, I will deal with what the current situation is now with respect to the investigation of the Ethernet dispute, and why any suggestion by BT that Ofcom has exercised its discretion wrongly by opening an investigation is without foundation; then third, and this will account for the bulk of my submissions, I will deal with the factual background and why we say that though BT now seeks to avoid dealing with the history of the negotiations, that history is, in fact, highly pertinent to a number of the issues before the Tribunal.

First of all, the law: on which Sky and Talk Talk essentially adopt Ofcom's position. There are two main legal issues, the first being the meaning of the word "dispute". BT's submission is that there is, as a matter of law, no dispute unless there are objectively justifiable grounds supported by cogent evidence for reaching a conclusion that all avenues of negotiation – and by that it clearly means not ones that already exist but ones that may arise in the future – have run their course and been exhausted.

THE CHAIRMAN: You are quoting that.

MR. BATES: One finds that in the skeleton. The references are in my skeleton. I put the footnotes there to the places where they refer to a need for cogent evidence and a need for all avenues of negotiations be exhausted. They state the test differently in different places, but that is what it comes to.

What we say has become clear in the course of this hearing, is that that is a submission that is essentially constructed on thin air, because there is nothing whatsoever to support it in the legislation or in the case law, and the high water mark really of Miss Lee's case is recital 32 which, for the reasons put forward by Mr. Saini yesterday, simply do not show that which is the purpose for which BT are relying on it.

Yesterday the Tribunal – I think it was Miss Potter – asked a question about the Ofcom guidelines and whether Ofcom could reject a dispute submission when a company refused to give a statement that agreement had not been reached, despite best endeavours negotiation. Of course, I make the point here that, as is common ground, the Ofcom guidance cannot determine the legal position.

I do want to make three further points in relation to that question. The first point is that we accept that, in order for there to be dispute, there have to have been at least reasonable

attempts made by, in this case, Sky and Talk Talk, to raise the overcharge claims with BT and seek repayment. It is rather like if you go to John Lewis and you buy a vacuum cleaner and you get it home and it does not work, you take it back and you ask for a refund. At that point there is no dispute. If, on the other hand, the sales assistant says it was you who broke it and the supervisor agrees with that, then, just as a matter of commonsense in ordinary language, there is a dispute there. In our submission, it really is as simple as that.

Point two is that, as Mr. Saini observed yesterday, BT has not denied that both Sky and Talk Talk and indeed Virgin all made prolonged good faith attempts to progress their claims by commercial negotiation. It is not disputed that we used best endeavours to engage BT in negotiation and it is not disputed that BT's response was essentially to dismiss our repayment claims out of hand.

That brings me to my third point: BT's case that there was no dispute was put forward specifically it now becomes clear by reference to the Tribunal's forthcoming PPC judgment which BT says could potentially lead to further attempts at negotiation, but that ignores the fact that Sky and Talk Talk began pursuing their claims with BT more than three years ago beginning some six months before the BT dispute was even submitted or, at any rate, before it was accepted by Ofcom – I am not sure precisely what the submission date was, and it was certainly long before Ofcom issued its provisional determination in that case in April 2009. Yet time and again BT utterly denied the overcharge claims and observed that Sky and Talk Talk had the right to take the matter to Ofcom if they wished and we will see that when we look at some of the evidence in a moment. So in reality therefore the parties could fairly have been said to be in dispute for a long time now, perhaps since November 2008 and it makes little sense to suggest that even though there was a dispute since that time the dispute somehow disappeared simply because we are now awaiting the Tribunal's PPC judgment. Those are my submissions on the first legal issue.

The other legal issue is as to what the position is where there is a dispute and the party to the dispute has asked Ofcom to resolve it. Now, in my submission one only has to look at the words of s.186(3) to see that far from there being any burden on the party referring the dispute to prove that all possible current and future avenues of negotiation have been tried and have failed, the burden is on Ofcom to demonstrate the satisfaction of the conditions in that subsection because unless those conditions are satisfied, as Mr. Saini has accepted the default position is that Ofcom have to deal with the dispute.

Those are conditions that are expressed in precise language and they are intended to be applied precisely and, as I will explain when I deal with the factual background they were clearly not satisfied in the present case.

Moreover, even if the s.186(3) conditions had been satisfied it would not follow that Ofcom had to refuse to deal with the dispute. Rather, as is common ground, in fact Ofcom would still have had a discretion to deal with it, albeit that Miss Lee takes a particular view as to how that discretion should normally be exercised, but she still accept there is a discretion.

That brings me conveniently to the second area that I want to cover this morning, which is what the present situation is, since it is by looking at the situation that Ofcom's decisions have in fact given rise to that one can see whether BT has any basis for attacking Ofcom's exercise of discretion as unlawful.

The present situation is this at least as respect the Ethernet appeal. Ofcom has decided that the dispute will not be resolved within four months, indeed it could not be now, that has become very clear from the passage of time. There has been no appeal against the exceptional circumstances decision, there is no long stop date for Ofcom to determine the dispute, and although Ofcom indicated that its intention was to progress its handling of the dispute as far as possible pending the PPC judgment, BT's notice of appeal has not identified a single specific step which has been taken by Ofcom to progress the handling of the dispute, which BT contends was an erroneous exercise of Ofcom's discretion, and anyway the judgment is now understood to be imminent; that is where we are now.

In light of those facts in my submission BT' suggestion that Ofcom has gone off the rails somehow in exercising its discretion to handle the dispute and has done so in a way that may lead to a waste of BT's time or cost simply has no basis in fact. Yesterday Miss Lee was able to identify only one substantive disadvantage that was said to arise from Ofcom's decision to accept the dispute and that was the cost of going through the Ofcom proceedings – the need to instruct economic and accounting evidence, and you will remember she talked about the number of witness statements from experts that it had produced in relation to a previous dispute. But in my submission Ofcom declining to get involved does not actually save any of those costs and in that regard it is important to bear in mind what Sky and Talk Talk's complaint is all about.

Sky and Talk Talk's complaint is that they believe themselves to have been charged prices for Ethernet services that were not properly derived from the costs in accordance with condition HH3.1. Sky and Talk Talk have only very limited visibility of the underlying cost data and cost structure, but any proper consideration of that complaint, i.e. the complaint

that the prices were not correctly derived from cost, and that is the only consideration, even by BT itself, would inevitably require detailed economic and accounting analysis, whether by BT's internal experts or by its external consultants. That has always been so, it will be so after the PPC judgment is issued, and it will be so whether Ofcom is involved in dealing with the dispute thereafter or not. The fact that BT appears not to have incurred any such costs as yet in fact serves to demonstrate BT's total failure to make proper inquiries into its customers' complaints, notwithstanding the prolonged nature of those customers' attempts to engage with and negotiate a solution with BT.

BT says it is keen to avoid any duplication of costs by obtaining expert evidence on a basis which might turn out to be wrong once the PPC judgment is out. That concern plainly has no relevance to the Ethernet appeal, given that Ofcom's handling of the dispute has not in fact led to BT being required to provide any evidence of that kind at all prior to the PPC judgment.

So, far from showing that Ofcom's exercise of discretion to accept the dispute has given rise to any waste or duplication, what the current situation in fact shows, in my submission, is that there is no necessary inconsistency between Ofcom's accepting a dispute and Ofcom's being able to progress that dispute in a sensible way. Indeed, in our view, it is arguable that Ofcom should have done more to progress the dispute while the PPC judgment was awaited.

The Tribunal asked the question yesterday about what was the standard of review in respect of Ofcom's discretion and we say it is simply this: that BT has to show that Ofcom's decision is actually wrong. So when the Tribunal looks at that decision the Tribunal can say not just, "Oh, well, we might have done things slightly differently," but that Ofcom has actually gone wrong here; and we say that on the facts of the present case BT is nowhere close to being able to cross that threshold.

I now come on to the third area which I wanted to cover, which is the factual background to Sky and Talk Talk's joint dispute referral. I had anticipated that I might have to make submissions about BT's insistence on claiming without prejudice privilege, a matter on which Sky's position has already been set out in correspondence on which the Tribunal was copied. It seemed to us to be wrong that BT could claim that there was insufficient evidence of a failure of commercial negotiations while seeking to withhold the substance of some of those negotiations, first from Ofcom and now from the Tribunal. It also seemed to us to be legally wrong that BT could pick and choose by claiming that the privilege applies

to some meetings and correspondence but not others. That is what I was going to talk about.

It now turns out, however, having heard the way Miss Lee puts her case, BT has not actually challenged the evidence of Sky and Talk Talk's witnesses about the unfortunate history of the previous negotiations. I want to take a moment to consider what that means. It is not disputed that negotiations were tried over a prolonged period of time and made no substantive progress whatever; nor is it disputed that the negotiations long pre-dated Ofcom's preliminary determination of the PPC dispute and indeed the subsequent appeal to the Tribunal; nor is it disputed that BT first suggested the possibility of resumption of negotiations after the PPC judgment only after Sky and Talk Talk had sent Ofcom the dispute referral; and nor is it disputed that there are no ongoing negotiations at the moment, or even any offer to negotiate now. BT has no answer to our case that the previous negotiations went nowhere because BT simply made bald denials of any overcharge, failed to properly engage with the overcharge claim, even before the PPC dispute.

In that regard I would like to take the Tribunal now, if I may, to the witness statement of Toby Higho, which is tab 8 of the Ethernet core bundle. Toby Higho is the witness for Sky. Just picking up the chronology at para.15, the story begins on 15th January 2008 when Sky sent a letter to BT setting out its concerns. Paragraph 16:

> "BT responded to Sky's letter on 25 January 2008. This response failed to address in any detail the specific concerns raised by Sky. BT stated that the published accounts provided a '*snapshot*' of one year's trading and represented a '*composite of different chargeable activities across the year*'. This opaque statement did not provide any reassurance that BT's prices were cost oriented. As noted above, Condition HH3.1 requires BT to demonstrate that each and every charge is cost oriented. Concerning the comment by BT that the regulatory accounts only provide a 'snapshot' view, it is worth noting that Sky's subsequent review of BT's regulatory accounts for 2007/08 and 2008/09 merely served to reinforce Sky's view that it was being overcharged by BT for BES products.
>
> BT also asserted in its letter of 25 January 2008 that a '*profound influence on our pricing decisions is the competitiveness of the market we operate in …*' It was unclear what this statement meant and how it was relevant to the concerns raised by Sky. As noted at paragraph 9 above, BT had been found by Ofcom to

have SMP in the AISBO market indicating that the market was not effectively competitive."

Then going about five lines down:

"BT's letter also referred to its proposed new 'Orchid' services, which were new wholesale Ethernet services which could, in certain circumstances, by purchased by LLU operators as an alternative to BES. However, such services were different from BES and would only be introduced on a forward looking basis and were therefore irrelevant to Sky's concerns regarding [the historic overcharging]."

Paragraph 18:

"… Sky wrote to BT again on 19 February 2008 …

Paragraph 19:

"… Sky suggested to BT that the parties meet within the next two weeks …"

that is two week from 19th February –

"… and further requested BT to provide a more detailed response to the points raised by Sky."

Mr. Higho then says, with his classic English understatement:

"There was some delay in setting up a meeting, but this was subsequently scheduled for 2 May 2008. However, I understand from Delia Bushell that Nigel Cheek of Openreach telephoned her on 1 May 2008 …"

that is the day before 2nd May meeting –

"… to cancel the meeting, on the basis that BT was not prepared with clear answers on a number of issues, but he explained that he was conscious of time pressures and would be back in touch soon."

"Soon" arrives in para.21, but it was not until 18th July 2008, more than two months after the conversation with Mr. Cheek:

"… [BT] generally repeated the arguments put forward by BT in its letter to Sky of 25 January 2008 …"

i.e. the "snapshot view" point.

"BT's robust stance was in stark contrast to its recent refusal to discuss the matter on the grounds that it was unprepared with clear answers. Further, BT provided no tangible data which explained its pricing methodology of supported its position that it was in compliance with its regulatory obligations."

Paragraph 22 ----

THE CHAIRMAN: When it says "despite the fact that Condition HH3.1 requires that BT be able to demonstrate its prices", is the requirement that it can demonstrate to its customers or to Ofcom or to anybody who asks?

MR. BATES: It is a requirement that it demonstrates it to Ofcom, and that is an important point that I will be coming back to a little later, madam.

THE CHAIRMAN: Very well.

MR. BATES: Paragraph 22:

> "In the same letter, BT recommended that the most appropriate means for Communication Providers (such as Sky) to address any concerns they may have about Ethernet pricing was Ofcom's then ongoing Business Connectivity Market Review … The BCMR concerned only BT's forward-looking regulatory obligations and would not address Sky's legitimate concerns regarding BT's historic BES pricing …"

All of this happens, of course, before 25th July. It is only now that we get to 25th July, which is the time when Ofcom decided to deal with the PPC dispute. So everything I have said so far is before that point.

THE CHAIRMAN: Who are the parties to the PPC dispute?

MR. BATES: I am not sure off the top of my head who the parties were, but they do not include, as I understand it, either Sky or Talk Talk.

THE CHAIRMAN: It is the Altnets.

MR. BATES: Paragraph 23, Sky responded to BT on 16 September 2008 noting that it was disappointed in the responses so far given and pressed for a further explanation. The meeting was eventually re-scheduled for 6 November 2008 and on 14 October 2008, so prior to the meeting, Sky provided an agenda to try to move things on a bit.

Paragraph 25:

> "At the meeting I was informed by BT that it considered the prices of all its Ethernet products were compliant with its cost orientation obligation. When pressed to explain how its pricing was compliant, in the light of Sky's financial analysis based on BT's regulatory accounts, BT simply responded that it was unable to discuss the matter any further. However, it was agreed at the meeting that BT would get back to Sky with any additional information which might assist in Sky's assessment of next steps …
>
> BT sent a letter on 20 November 2008 in which it confirmed that its position remained '*broadly unchanged and it would probably be inappropriate for me to*

> *give you further specifics*' but that Sky '*may wish to raise this further with Ofcom*'."

and given the pressure of time I will not go on and on, but so the story went on and the Tribunal can read it for itself both in Mr. Higho's witness statement and in that of Mr. Heaney.

Yesterday, Mr. Saini said that it is common ground that the parties negotiated in good faith, but that is not quite right. No one denies that the dispute referrers negotiated in good faith, but the reality we say is that the evidence shows that BT never really properly engaged. BT did not want to do the work to assess compliance with HH3.1 and, of course, Sky and Talk Talk Group – and this is the point the Tribunal made to me a few moments ago – unlike Ofcom we have no power to require BT to demonstrate compliance, notwithstanding that the Condition places BT under a continuing duty to at all times be in a position to be able to do so, so the process from our perspective was incredibly frustrating and it quickly ran into the ground.

BT has nothing to say about any of this, indeed, what could it say? Instead what BT says, and I noted down what Miss Lee said about this yesterday, it is transcript page 30, lines 27 to 28. She said: "We [BT] consider the circumstances would be so different after the PPC judgment that the fact that they have …" in her words "stalled is the starting point." So in other words BT's position is that the fact that there was a degree of overlap between the issues in the PPC appeal and the issues affecting the Ethernet dispute in itself meant that Ofcom had no other lawful option but to refuse to handle the dispute, and Ofcom therefore had no need to inquire into the history of negotiations before coming to that conclusion. That, in my submission, plainly cannot be right.

For the reasons explained by Mr. Pike yesterday those Conditions require that the alternative means be available now, and those Conditions are therefore plainly not satisfied by BT's Augustinian stance of "Lord, grant us commercial negotiations but not yet". BT's submission that a possibility of future negotiations would constitute available means for resolving the dispute is legally wrong and if I am right in that submission that is sufficient to dispose of BT's case on whether Ofcom was right to accept the dispute.

But let us say that I am not right in that, it cannot then be right to say that the history of the negotiations is irrelevant. On the contrary, that history (the salient points of which are undisputed) is relevant in two very important ways.

The first of those ways is this: the past negotiations are very relevant to any rational consideration by Ofcom of whether any further negotiations after the PPC judgment would

in fact be likely to provide a prompt and satisfactory resolution of the dispute or, to use the words of Article 22 of the Framework Directive "whether there exists an alternative mechanism that would better contribute to the resolution of the dispute in a timely manner." If the negotiations made little substantive progress in the past then that must surely be a factor to be taken into account in considering whether a resumption of those negotiations would be more likely to produce a resolution now.

What does the history of the negotiations show us? It shows that despite the efforts made by Talk Talk and Sky since January 2008, the negotiations made little substantive progress, that throughout those negotiations BT has shown a marked reluctance to explain its position in relation to the overcharge reimbursement claims, beyond simply denying them as unjustified, or to progress the negotiations. The parties are still as far apart now as they were back in 2008, with BT not accepting that there has been any overcharge at all. The parties are not in agreement with one another as to how to quantify any overcharge, and there has been no agreement as to the principles which could be derived from the PPC case in terms of whether they are or are likely to be cross-applicable to the present dispute.

THE CHAIRMAN: You are further along in that because of the PPC dispute BT has now explained in the context of that dispute how it goes about setting its prices so that they are cost oriented, and there are disputes about whether those principles are the correct ones. So insofar as during the previous negotiations BT was not prepared to explain how it had done it now you know how it has done it at least for PPC. I do not know whether it is accepted that that is how it has done its cost orientation assessments for Ethernet services as well.

MR. BATES: Yes, madam, but I think the important words in the question the Tribunal asked me are "at least in PPC" – because of course cost orientation is not a new obligation of BT, it has been under the obligation for a long time, and it is one of the issues that Ofcom takes up with BT at various intervals in relation to various different products and markets. The application of cost orientation to particular products and services always raises particular issues in relation to those particular products and services, not least because there are important questions about the basket of services, if that is the right way to look at it, and where you derive the cost from in relation to those particular services and how individual charges relate to individual services rather than the costs of a basket of products. So it is by no means clear, at least to us, that BT at any rate is going to accept that any principles derived from PPC or, indeed, the way that BT went about cost orienting in PPC is necessarily the same way as it did it in BES, we think you do not know that.

This is not a case in which the parties negotiation made good progress, notwithstanding the difference between the respective position and if there are one or two sticking points that a judgment of the Tribunal is going to resolve. Indeed, the only things which the parties appear to have agreed on are first, that the outcome of the PPC case was unlikely to be accepted by all of them as being determinative of whether there has been compliance with the Condition in relation to BES and also that in view of the fundamental disagreement between them there was no point in discussing the matter further.

It is also highly relevant that it would be completely to rewrite history to lay the blame for the failure of the previous negotiations at the door of the PPC dispute given, as I have already mentioned, the Ethernet dispute arose before Ofcom had even decided to open the investigation into PPC.

Also, if uncertainty over PPC really was the single main obstacle to reaching agreement then why was it not given greater prominence by BT in the correspondence during the negotiations, and why did BT never propose a suspension of the negotiations pending the Tribunal's judgment and why was it only after the dispute referral that BT raised the potential for post-judgment negotiations to take place, and in that regard I will not take the Tribunal to it in the interests of time, but if I could ask the Tribunal to look later at paras. 23 to 24 of Mr. Heaney's statement where he deals with that issue.

Miss Lee in her submissions yesterday said that the word "likely" in s.186(3) should be read as instead meaning a "realistic prospect". We do not agree that it would be right to replace a statutory word in that way but we also say that even if "realistic prospect" were the correct standard the potential for the post- PPC judgment negotiations to deliver an agreed resolution of the Ethernet dispute fails that test.

Yes, there is a degree of overlap in the sense that the Tribunal's determination of certain issues in the PPC case may serve as relevant guidance for Ofcom in dealing with certain issues in the Ethernet dispute, but that is all we accept. No party has identified any issue in the Ethernet dispute which is expected to be definitively resolved by the PPC judgment, nor has any party suggested that there is any likelihood of the PPC judgment being accepted by all the parties as establishing that there has been any overcharge, let alone as laying down any clear criteria or formula for assessing the quantum of that overcharge. In light of the very disappointing history of the negotiations since January 2008 and the fact that even after the PPC judgment the parties will still be very far apart. The prospect of further negotiations then producing a prompt settlement is, in our view, very remote. So that is the first way that we say the history is relevant.

The second way is that the history is also relevant to the present dispute in that it shows the wisdom of the statutory regime for dealing with disputes, and the importance of that regime in a dispute such as the present one which is between a party which has SMP on the one hand, and its competitor customers on the other hand. We are here dealing with supplies purchased by BT's competitor customers in markets in which not only has BT been deemed to be dominant, but in which Sky and Talk Talk have no realistic alternative but to carry on buying Ethernet services from BT. It is BT that lays down the standard terms on which those supplies are made. It is BT that sets and can vary at will the charges that must be paid, subject only to the protection of regulatory obligation such as Condition HH3.1. Sky and Talk Talk's position is that of companies who believe themselves to be owed millions of pounds by BT but who have no real choice but to go on buying the relevant services from their debtor, even if that debtor refuses to engage constructively with the request for detailed justification of the charges and a concerted effort to quantify the amount of any repayment that is properly due.

Further, in progressing those claims, BT's customers are at a serious disadvantage because as I have already mentioned we have limited visibility of BT's cost structure and we are dependent therefore on BT's goodwill in providing us with persuasive evidence to show the way that prices have been properly derived in the way that the condition requires, otherwise we need to get Ofcom involved. So that in any commercial negotiations about the charges the bargaining positions of the parties are manifestly unequal and it will normally be in BT's interest to delay admitting and compensating customers for any over charge. In the meantime, of course, BT still has the disputed funds which it can invest in its own networks while its failure to address the overcharging we say continues to distort the efficiency of our forward planning and investment decisions and deprives us of the resources to which we say we are entitled, to compete with BT in downstream markets by offering lower prices and/or making additional investments.

So the ability of BT's competitor customers to refer the matter to Ofcom as a dispute, and to obtain a remedy within a relatively short period of time, what it serves to do is to mitigate that inequality of bargaining positions by reducing BT's otherwise strong incentive towards prevarication and delay. BT should not, in our submission, be able to obstruct its customers from involving Ofcom in a matter simply because of BT's unilateral decisions that it is not willing to have further negotiations now, but may be willing at some indeterminate future point in time; rather, we say customers should be able to have resort to the regulator for impartial and timely adjudication at least after reasonable attempts at

commercial negotiations have not shown themselves capable of producing a speedy and satisfactory resolution.

I have taken up quite a lot of time, but I do want to say the wisdom of that policy itself is, in my submission, reflected in the Act particularly in sections 186(6) and 188(4) which is discussed in my skeleton at paras. 14 to 16 where Ofcom declines to resolve a dispute on the basis of alternative means that are available for meeting the conditions in 186(3). Any party can bring the dispute back to Ofcom after four months and insist that Ofcom begin handling it, that is what s.186(6) says.

As BT submits, however, s.188(4) permits the use of the alternative means still to continue after that, but that is in circumstances where Ofcom has already taken on dealing with the dispute and it is already seized of it; Ofcom is and remains involved. So that right to involve Ofcom has a real benefit for parties such as Sky and Talk Talk given the unequal bargaining positions I have already referred to. It is also a real benefit because it means a party like BT cannot keep on delaying its counterparties from involving the Regulator simply by continuing to argue that there still remains some possible scope somewhere for further commercial negotiation.

That brings me to my concluding remarks, which are these: Sky and Talk Talk Group first sought in good faith to negotiate with BT more than three years ago. The previous attempts got nowhere, there has been limited and unenthusiastic engagement by BT and, in those circumstances, we are in my submission entitled to exercise our right under the Framework Directive and sections 185 to 186 of the Act to invoke Ofcom's involvement, and in that way once the PPC judgment has been issued Ofcom will be in a position to move swiftly to resolving the dispute without having to wait months at least for yet further attempts at negotiation which Sky and Talk Talk consider very unlikely to produce any result. That does not preclude further negotiations and, indeed, if Ofcom's involvement prompts BT finally to engage with the substance of the claims and do that economic and accounting analysis that we have been asking them to do with the assistance of internal or expert evidence as they require, then Ofcom's involvement may, in fact, be significant in actually making some further negotiations worthwhile, and thus any costs incurred by BT in that sort of analytical activity will not be wasted.

In any event, if it were true that BT's concern really were to promote negotiated settlements then BT would not be arguing ground 3 of its appeal and saying that actually Ofcom should make greater use of its enforcement powers, because it is far from clear, at least to us, how BT considers that Ofcom, using its enforcement powers, rather than dispute resolution,

would serve to encourage industry parties to make greater efforts at resolving disagreements by commercial negotiations without involving Ofcom. Nor is it clear to us how requiring BT to defend itself against the enforcement powers that could potentially lead to penalties would assist in saving any of the costs that BT claims to be so keen to avoid.

Madam, those are my submissions, unless the Tribunal has any further questions for me?

THE CHAIRMAN: No, thank you very much, Mr. Bates. Mr. Segan?

MR. SEGAN: Let me begin by answering a question which was asked a moment ago, which was the parties to the PPC dispute. You can find them at tab 7 of the authorities bundle. They are Cable & Wireless, Verrizon, Virgin, Global Crossing and Colt.

In short, Virgin Media supports Ofcom's position and submits that BT's appeal should be dismissed. Given that I am an intervener I will not seek to cover all of the issues, I simply wish to make three submissions.

The first submission is that there clearly was, as a matter of fact, a dispute between BT and Virgin on 13th September 2010, which is the date when Ofcom accepted the dispute.

The second submission is that the meaning which BT seeks to attribute to the word "dispute" in order to avoid that obvious conclusion is, in our submission, both illogical and impractical.

The third submission is that Ofcom did not err in deciding that the mere possibility of future negotiations between the parties did not and could not amount to alternative means on the facts of this case. Those are the three topics I want to cover.

Coming to the first of those, which is the factual situation as between BT and Virgin I will not cover every step in the history, the detailed history is set out in Mr. Morawetz's witness statement and also in our statement of intervention. But, in my submission, it will be instructive for the Tribunal to see some of the earlier correspondence. Yesterday, the history that Miss Lee took you to began in May 2010, there is in fact a history before that which is rather important. In order to see that history you will need bundle DF/E and tab 9 of that bundle in particular.

Beginning at p.1 of tab 9 you can see from this email, which is an email from Virgin Media to BT, that it refers to a meeting which had taken place on 23rd October 2009. It is a meeting which Mr. Morawetz described in his witness statement but there is a record of the meeting in the attachments which follow this email. You can see at p.3 of this tab there are brief minutes of the meeting. Under "1.2 Meeting Notes", it is described what occurred, and you can see Virgin Media asserted a significant overpayment, I shall not read the figure

in case there are any confidentiality concerns, but a significant overpayment was cited for Ethernet rental services.

BT's response was that service aggregation is key to examining overcharge; that was their response. There is then attached the slide show which was given by Virgin at that meeting, and I do not ask you to read all of it, I simply ask you to note that this was a detailed explanation of Virgin's claim.

On 11th November 2009, and we see this from p.11 of the tab, Virgin sent a letter in follow-up to the meeting setting out in still further detail its claim and on p.13 just below the table you will see that Virgin explicitly addressed the point which has been made by BT concerning service aggregation. In short, the point was that the SMP condition states that each and every charge should be reasonably derived from its costs and thus that aggregation was not in accordance with the condition.

The next step in the history we find at pp.17 to 19. This is BT's response. In the third paragraph you can see that BT began by taking issue with the DSAC test, or at least the use of it that Ofcom had made of it in the PPC determination.

BT then went on in the final paragraph to point out that there are, in its words: "further substantive differences" – differences not similarities – "between PPCs and Ethernet when considering cost orientation and whether charges have been 'excessive'. You will see that the remainder of the letter consists of nine bullet points, each of which was designed to establish that there were clear differences between PPC and Ethernet products. In particular, you can see, before the final set of bullets, it said "Further, there are clear differences between the PPC and Ethernet products".

Virgin sent a holding reply to that and then sent a substantive reply which we find at p.23. this is an 11 page letter which set out Virgin's position on each of the points which appeared to be in dispute. I shall not ask you to read all of it, simply to see that it is addressing all of the points which are made by BT. At p.33 you can see at the end Virgin maintained its claim that there had been persistent overcharging for Ethernet services by a considerable amount, and again I shall not read the amount.

BT's response came on 2nd March 2010 at p.35 and this Mr. Saini took you to yesterday. There are a number of points which I would emphasise about this letter. First, BT did not address Virgin's substantive comments at all. Instead of doing so BT simply asserted that there was no basis for Virgin's claim and expressed the view, correctly we say, that the parties fundamentally disagreed.

The second point: BT emphasised the "very apparent differences" (its words) between PPCs and Ethernet services – not similarities, differences.

Thirdly, BT at this point was saying, again correctly, that Virgin had the right to refer the matter to Ofcom. In the last paragraph Mr. Nicholson says that he retains the preference that the matter not be referred to Ofcom, but he does not give any indication of any proposals as to how that is to be achieved.

In my submission, if BT and Virgin were not in a dispute at this point it is difficult to envisage when they would have been. Virgin has set out a very detailed rebuttal of BT's case and BT comes back and says: "We are not addressing that, we all fundamentally disagree and if you want you can refer the matter to Ofcom."

We find Virgin's reply at p.37. Virgin, in short, agrees with BT and says, "We will be referring the matter to Ofcom". BT's reply we find on p.39 at the top of the page, Mr. Nicholson, "Vito, thanks for the update". That is it.

As Mr. Morawetz explains, Virgin did subsequently submit a dispute, but then withdrew it, but expressly asked Ofcom to inform Virgin if there were any other disputes raising similar issues which were submitted, and we know that a similar dispute was submitted, Virgin re-submitted its dispute. On 13th September 2010 Ofcom took a decision to accept that dispute.

At no point before 13th September 2010 have BT at any stage indicated that its stance had changed from the letter in March 2010 when it said that the parties fundamentally disagreed. It did not indicate that it had reviewed its stance. Indeed, so far as I can see, BT never even addressed substantively the points made in Virgin's 11 page letter at all.

In our submission, in those circumstances, it is absolutely clear that BT and Virgin were in a dispute. They disagreed on a whole range of issues. We have summarised them and you can find them in the Ethernet core bundle at tab 4 in our statement of intervention, para.3(d), p.2. This is simply a summary of the issues upon which Virgin and BT found themselves in disagreement. I shall not read it out, but I adopt that as a summary of the issues which are in dispute. Of course, fundamentally the dispute was about whether BT owed Virgin some money and, if so, how much, and the parties clearly did not agree on that. Unless and until they came into agreement on that topic there was, on any ordinary understanding of the word, a dispute.

That is the first submission I wanted to make. The second submission is that the meaning of the word "dispute", which has been attributed by BT, in order to avoid that obvious factual conclusion that there was a dispute, is both illogical and impractical. I make that point in

this way: as Mr. Saini noted yesterday, BT does not now appear to dispute that Virgin had engaged in good faith negotiations with BT prior to 13th September 2010, and, what is more, those negotiations have failed to result in an agreement. BT's argument as to why in those circumstances there nevertheless was no dispute is summarised in their notice of appeal which we find at tab 1 of the core bundle, para.12, which says this:

> "In summary, BT contends in this appeal that Ofcom should have found that there will remain considerable scope for commercial negotiations in relation to the alleged overcharge claims after the Tribunal has given its judgment in the PPC Appeal, and that no dispute therefore arose within the meaning of the Act …"

: That is the argument that BT is putting forward. What is more, the argument is being put forward as a question of jurisdiction. We see that not just from the submissions which were made yesterday, but also expressly from the reply and skeleton at tab 9, para.6(i). The submission is summarised thus:

> "A dispute under section 185(1) had not arisen in relation to NCCN 1007 and Ethernet, and Ofcom did not have jurisdiction to open dispute resolution proceedings."

So the argument is said to arise from the very meaning of the word "dispute", and therefore go to the jurisdiction of Ofcom even to entertain the disagreement, to put it neutrally. If that is correct then the argument is and must be an argument of general application. It cannot be confined to particular circumstances. If the meaning of the word "dispute" entails the consequence contended for by BT then it must be the case that there is no dispute in any case where there will remain, in its words, "considerable scope for commercial negotiations once some future event has taken place". It cannot logically be limited to Tribunal judgments. There must be all sorts of things.

There has already been considerable submission on this topic, and therefore I gratefully adopt everything which has been said by Ofcom and I can keep my submissions brief. For our part, we emphasise two reasons why that general submission made by BT cannot, with respect, be right. The first is that it is not in accordance with the basic normal English meaning of the word "dispute". We know from the *Orange* case, and I shall not ask you to turn it up, para.97, that the word "dispute" in this context must be given its ordinary English meaning. In our submission, in ordinary English a dispute does not cease to be a dispute merely because there is some future event which might at some point cause one or other of the parties to change their stance. That is not a necessary part of the word "dispute".

If, for example, I am involved in a boundary dispute with my neighbour, it does not cease to be a dispute simply because it is possible that my neighbour will at some point need to sell the land and therefore resolve the dispute, because no one will buy it off him if he is still in dispute with me. I am still in a dispute until the dispute is resolved. Nor does it cease to be a dispute because it is possible that I might run out of money and throw in the towel. Nor, to bring the facts closer to the present case, does it cease to be a dispute because there is a decision expected from the Supreme Court next week which will clarify the principles applicable to boundary disputes. That may alter our stance, but it does not affect the fact that there is a dispute. We, therefore, respectfully adopt the formulation of Ofcom that a dispute exists when parties have engaged in a bilateral communication and have failed to reach agreement as a result of that communication. It seems to us that it is as simple as that.

The second point that we make in relation to the word "dispute" is that the meaning which is asserted by BT would lead to wholly unacceptable uncertainty. It is important to remember here, as I say, that the argument is put on the basis of jurisdiction. If it is really correct that the question of jurisdiction depends on whether there is some foreseeable event which might cause one of the parties to change their minds in the future and negotiate further, then, in our submission, the consequences of that are little short of bizarre potentially.

On BT's case the reason Ofcom have no jurisdiction over the dispute with my client on 13th September 2010 is that argument in the PPC main hearing was expected on 20th October 2010, and therefore, on its case, the judgment which was expected as a result of that argument was a future event which would give rise to negotiations, therefore negotiations had not been exhausted, therefore there was no dispute. That is their case.

I ask rhetorically, what would happen if BT had turned up – it is entirely possible – on 20th October 2010 and said, "On reflection, we are not offering any submissions, we withdraw this appeal"? It is perfectly possible. On BT's case at that point Ofcom would suddenly, by operation of law, acquire jurisdiction over the dispute with my client. The future event has disappeared. It acquires jurisdiction. In the case of Sky and Talk Talk, of course, it is even stranger, because it would re-acquire jurisdiction. It had jurisdiction before. The PPC appeal is lodged and it loses jurisdiction. BT abandoned the appeal and it regains it. In our submission, that simply cannot be right.

Equally, there is no obligation on the Tribunal necessarily to deal with all the grounds that are advanced in the PPC appeal. Remember, as has already been described, one of the grounds relied on by BT in that appeal is that Ofcom erred in the exercise of its discretion in

accepting the PPC dispute in the first place. I do not know whether that will attract the Tribunal, but if it did then the Tribunal would be perfectly entitled to give a judgment which says, "Yes, we agree, and we are not dealing with any of the other issues" – perfectly entitled.

THE CHAIRMAN: That was the ground that refers to the alternative compliance procedure?

MR. SEGAN: That is right, yes, but as Mr. Saini observed yesterday, there were some submissions made in that case which relate very specifically to the facts of PPC. So it could be a judgment which is of absolutely no assistance to the parties in resolving their dispute in the Ethernet case. In essence, Ofcom's jurisdiction over a dispute becomes dependent on the completely unpredictable decision of a Tribunal as to how it frames its judgment. Remember also that there is no requirement that these ancillary proceedings even involve BT or any of the parties to the dispute. It could be perfectly distinct third parties. It could be the litigation decision of somebody who has absolutely no connection with the dispute which ends up determining whether Ofcom has jurisdiction or not.

We say that this Tribunal should arrive at so, frankly, bizarre a conclusion only if compelled to do so by the clearest possible wording. As Mr. Saini has already shown you, there is no such basis for the argument. Recital 32, as has been observed, is essentially the entire substance of the argument. As Mr. Saini showed you yesterday, on a proper reading, recital 32 actually destroys BT's case because it assumes that the dispute arises before the good faith negotiations – before. If that is right, then BT's case on jurisdiction is nowhere.

For all those reasons, we respectfully agree with Ofcom as to the ground of appeal which is put forward in respect of the meaning of the word "dispute".

That brings me to my final submission, which is that Ofcom did not err in concluding that future negotiations did not amount to "alternative means" within the meaning of the Act. Again, I adopt everything that has been said by Ofcom, and I emphasise two particular reasons why we say that that is the case. The first is that the mere possibility that parties might change their stance after they see the PPC judgment could not, in my submission, rationally found a conclusion by Ofcom that there were alternative means which were likely to lead to a prompt and satisfactory resolution. I emphasise that what the statute requires is that the resolution be prompt, not negotiations. If one looks at much of the evidence and submission which has been put in by BT in this case one would think that s.186 is engaged if negotiations are likely. That is not what 186 requires. It requires a resolution to be likely. In our submission, Ofcom have no material on which to base such a conclusion. As Mr. Saini has observed, Ofcom knew only that the PPC hearing had been fixed. He did not

know whether the hearing would be adjourned, he did not know which arguments would be pursued by BT, he did not know when a judgment would come through, he did not know what the content of the judgment might be. He did know, as I have already shown you, that when it had the opportunity in the past, BT had, itself, contended that there were, in its words, very apparent differences between the PPC and Ethernet disputes.

In that regard, in my submission, it is instructive to have regard to BT's own evidence as to what will happen after receipt of the PPC judgment, and we find that in Mr. Nicholson's second witness statement at para.11, which is tab 10 of the Ethernet core bundle. This is Mr. Nicholson's formulation of what will happen once the PPC judgment is received. He says:

> "Accordingly, I believe that there does remain scope for a realistic attempt at further negotiation following the PPC Appeal judgment, although this is of course entirely dependent on the precise details for the forthcoming judgment."

That is it. So not even BT's own witness is prepared to say that it is likely that there will be a prompt and satisfactory resolution of the dispute.

Alternatively, we could adopt Miss Lee's own formulation of the position yesterday – and I am quoting here from p.16 of the transcript, lines 18 to 19:

> "The shape and outcome of further negotiations is always going to be a matter of speculation and anything can happen."

Respectfully, we agree, and in the circumstances therefore there was no basis upon which Ofcom could rationally have concluded that there were alternative means which were likely to result in a prompt and satisfactory resolution of this dispute.

The second observation I make on this topic is that, for our part, we have no confidence that following receipt of the PPC decision from this Tribunal, BT's stance, if the decision goes against it, will materially change. BT, as I have observed, has in the past been at pains to point out the very apparent differences, in its words, between the two disputes. What is more, we find it unlikely, if the decision goes against it, that it will go without an appeal. We find evidence of that in BT's bundle 3 in the Ethernet dispute at tab 24. This is a letter to which you were taken yesterday. If you go to p.1873, end of the second substantive paragraph:

> "The jurisdiction issue is a matter which BT may in the future (within the PPC appeal) seek permission to appeal to the Court of Appeal."

That is jurisdiction. Remember, members of the Tribunal, jurisdiction is the issue which has gone against BT so far in the PPC dispute. Indeed, the Tribunal should be aware that

BT specifically obtained an extension of time in order to bring an appeal in respect of jurisdiction. We, therefore, have very little confidence that if there is a Tribunal decision and it goes against BT that they will suddenly come running to my client with an open cheque book. For those reasons, we submit that Ofcom's conclusion that future negotiations could not amount to alternative means within the meaning of the Act was unimpeachable.

Madam, those are my three submissions. With regard to the remainder of the issues in this appeal I adopt gratefully what Mr. Saini has said.

THE CHAIRMAN: Where do you stand on the point where there seems to be a bit of a difference between Mr. Pike and I think Mr. Bates and Ofcom as to whether the negotiations have to be current, whether it is possible for future negotiations in some case, which you say is not this case, to amount to alternative means?

MR. SEGAN: It is certainly correct that, reading the statute on its face, future negotiations do not amount to means which are available in the present.

THE CHAIRMAN: Yes, thank you very much, Mr. Segan. Miss Lee?

MISS LEE: Madam, one of the main points that Ofcom made yesterday about the meaning of "dispute" and ground one and the jurisdiction points was that "dispute" means no more than the absence of agreement. Mr. Saini asserted that it was common ground that there was an absence of agreement and effectively that was the end of my case. That was the way he put the point. However, in my submission, in a sense that begs the question of what is meant by an absence of agreement. Mr. Saini began by saying that the parties took different positions about whether or not NCCN 1007, or the claim for the overcharge, should be withdrawn and that, in itself, amounted to an absence of agreement.

He then though, in my submission, qualified that by saying that it had to be an absence of agreement following bilateral discussions, and there was a further step involved. It is not enough that a party simply turns to Ofcom and says, "We believe X, the other party believes Y, we have got a disagreement". It could not, I think, he said, include absence of agreement following attempts to pursue all avenues of commercial negotiation, or following negotiations in good faith. He submitted that you do not have to have negotiated in good faith in order for there to be an absence of agreement or in order to ask Ofcom to open a dispute.

However, my first submission is this: once you begin to qualify what is meant by "absence of agreement" by requiring some form of discussion, by looking to see what steps have taken place prior to your opening a dispute, the question is to what extent must there have

been a failure, to what extent must there have been discussions, and how far can it be said those have failed or been exhausted.

I made the point in para.32 of my reply – and this applies also to submissions made this morning by interveners on behalf of Sky and Virgin – the fact that "dispute" bears its ordinary meaning does not, itself, answer the question of what those conditions must be, and in particular what efforts must have been made before it can be concluded that there has been a failure to reach agreement. In my submission, there is something of an air of unreality about Ofcom's submission that there simply need have been bilateral discussions, but no real requirement to have exhausted those discussions in good faith.

It is very different from the approach that we have seen that they take in the guidelines, and I do make the point that those guidelines are written obviously so as to make matters clear to companies about what they needed to submit and what Ofcom's requirements were. Those guidelines, as I showed the Tribunal yesterday, state clearly that all avenues of commercial negotiations must have failed.

Similarly, and this is a point also made in para.32 of my reply skeleton, Ofcom placed a similar emphasis in its proposed guidelines to the ones that it published in December of last year when it says that they require as a minimum standard evidence that commercial negotiations had been exhausted. So I make a similar point that Ofcom puts the threshold quite high.

In answer to a question from the Tribunal yesterday, I think Mr. Saini in the end responded to the question of how the guidelines can require such things if there is a dispute at an earlier stage and that Ofcom is obliged to accept the dispute, in effect notwithstanding the fact that the requirements have not been met, by saying that actually those requirements all went to the question of absence of agreement. That, in a sense, is the point that I make – in other words, when one looks to see what absence of agreement is, one has to look actually to see what it is that is a pre-condition of absence of agreement. We say that the points that Ofcom take in the guidelines about exhaustion of negotiations are, in fact, correct.

We say that there is an obvious good sense in those guidelines ensuring that disputes are not opened prematurely, and therefore there is a need to ensure the parties have negotiated in good faith and to see that negotiations have been exhausted.

The suggestion is made that Ofcom should say that there is a dispute in the circumstances where negotiations have not been exhausted, that actually the parties should then go off and negotiate as some form of alternative means. That seems to us to be a rather unreal suggestion. The natural approach to take in those circumstances is to say it is premature to

open a dispute. Thus, I emphasise that it is not common ground that there was an absence of agreement here in the sense that Mr. Saini – he said yesterday it was common ground that there was an absence of an agreement – means it, because we disagree effectively on what "absence of agreement" means. We do not suggest that there have been fundamental disagreement between the parties on the core points in 1007 or Ethernet. Of course, there was fundamental agreement, but we say that that fundamental disagreement resulted from the overlap in relation to the two related appeals.

Yesterday Mr. Saini looked at a number of references, and if you look back at them – I do not want to take you to them. The references to the reasons why either party cannot advance their position are clear. For example – and I just give this reference, at p.85 of DFN/9, which was in the 1007 case, which I think we should look at, p.85, point 8, which Mr. Saini read – the only point that I want to draw attention to is the last sentence:

> "Both parties were awaiting Ofcom's decision in the 0845/0870 dispute with interest."

That was at the stage, I think it was July 2010, before the 0845 final determination had been issued. It is clear that everybody that there is a huge amount of overlap in all these cases, and therefore we are waiting to see what the next step is from Ofcom, and in due course what the next step will be from the Tribunal in its decision.

I think it is plain, if one looks at the material, that actually there is a large overlap in relation to the related matters.

I will come on in a moment, if I may, to the similar point in relation to Ethernet, and the points that have just been made against me by Mr. Segan and Mr. Bates.

We say that the position where there is a related appeal – and this was my submission yesterday – is manifestly different from the situation where there may just conceivably be negotiations in the future depending on some other event. It is almost, we say, inevitable that there will be further negotiations after the related judgment in this case because that judgment covers one of the main points in issue between the two sides. It is plain in relation to the NCCNs. I have shown you the reason why NCCN 1007 was issued. There is obviously a development from the previous stance that Ofcom has taken in relation to assessing what the effects of those NCCNs are, and that matter is before the Tribunal. There is plainly an overlap.

In relation to the Ethernet matter, Ofcom itself has recognised that there is an overlap by virtue of its decision in relation to exceptional circumstances. Whilst there have been a number of submissions this morning making the point that it is all very different; it might

not determine any points; and I think Mr. Bates said that no one had said it would determine any particular point, I do not think that is quite right. I think Ofcom itself considers that it may determine the question of whether the DSAC test is correct, it may determine the question of historical points, whether you can claim backwards for a length of time, and in relation to the 1007, as submitted yesterday, actually on one view the judgment in relation to the 956 and 985 and 986 NCCNs may well dispose of the need to deal with 1007 altogether. I submitted very carefully yesterday the point that it was not necessarily the case that it would decide everything, but that it may decide everything in 1007.

In relation to Ethernet it may decide some of the key points. I do not agree with Mr. Saini's categorisation that actually it was common ground that it would not decide anything.

The difference of view, I submit, in this case is effectively as I submitted in para.35.1 of my reply. The position is that Ofcom and the interveners consider that there is an absence of agreement because the parties' views are diametrically opposed in the face of existing related determinations, whereas our submission is that it is premature to conclude that negotiations have run their course. They have been temporarily thwarted, but that they will resume. We say that must have been the understanding of Virgin Media when it agreed to withdraw its initial complaint and then re-submit it.

We do say that this case of related appeal judgments is a special case. Can I deal very quickly with the point made by Three that I have narrowed my submission to the point that it is only in that special case where there are related appeal judgments that there will be no dispute. It is put slightly differently this morning. It is said that I have made a general point which applies to jurisdiction and therefore must apply in other cases.

I did not actually say that I have narrowed my position in relation to a special point. As Mr. Segan submitted this morning, in fact the position is a general one. The position is also consistent, as he noted, with the approach that I have taken in my reply. In other words, I say that it is a general requirement as a matter of jurisdiction that negotiations must have been exhausted, that all avenues of commercial negotiations must have been tried and failed, and that that remains applicable in all cases. That is para.51 of my reply.

What I said at paras.51 and 52 – I will not ask you to turn it up – was that Ofcom itself put the requirements in the guidelines. Obviously they were to serve a purpose of ensuring that premature disputes were not referred. I made the point in para.50, and I re-emphasise it, that Ofcom itself did not consider it unnecessary or impractical or inappropriate to put those terms in its guidelines. That is the analysis that it asks to be provided with, effectively, that

negotiations have failed. It seems a little odd for it to say that, actually, it is an unrealistic or too stringent a requirement.

In para.51 of my reply I said expressly that the nature of the investigation that Ofcom can carry out will, of course, be limited. It is a different point from whether or not a dispute exists and whether negotiations have been exhausted. Of course Ofcom can simply look at the documents, it can ask further questions of the parties, and then it has to apply a realistic, rather than a minutely detailed view of whether or not negotiations have been completely exhausted. In my submission, that does not mean that Ofcom is unable to take a decision about whether or not those negotiations have been exhausted. For example, and I made this point in para.51, if parties have not met or have discussed only a few points or have not really dealt with the substance in any detail at all, or a party has not used reasonable endeavours to persuade an unwilling counterparty to negotiate, Ofcom is perfectly entitled to say, using our approach to the construction of the Act, "Well, it is premature, there is no dispute". That is a general point and it is something that can arise even though Ofcom's powers of inquiry may very well be limited by what it can do in practice.

Similarly, and this is where this case arises, Ofcom can also decide that it is perfectly possible that there is scope for further negotiations on the material that it has. That point essentially arises from the fact of the overlap between the cases which Ofcom will be aware of.

Contrary to Ofcom's submission, we do say that this concept of negotiations being stalled in this particular instance of a related judgment is relevant and is something that arises in relation to the construction of the Act.

There were, I think, two points taken by Mr. Saini on the *Orange* judgment. On paragraph 101, he referred to the fact that encouraging parties as a matter of good practice to submit their disputes in a particular way is very different from holding that Ofcom's jurisdiction depended on contractual dispute resolution procedures having been exhausted. In my submission, and I have again made the point in my reply, the Tribunal was dealing there with the argument about not exhausting contractual procedures and formal requirements.

Secondly, in *Orange* there was not the focus, I think, on the nature of the guidelines in that case, nor the point that I have made as to whether or not it actually is consistent with Ofcom's approach to start issuing requirements that actually it says it is not really obliged to act on because it then has to accept that they are disputed anyway. It is a point that was not considered in *Orange*.

In para.62 of the judgment in *Orange* you see Ofcom relying very much on its requirements. Perhaps I could just ask you to look at that very briefly. It is the authorities bundle at tab 9. It is p.22 of the case report. You will see there that Ofcom relies, in response to a floodgates argument put to it, that actually s.185 is very widely construed, that, firstly, this has not led to problems in practice; and secondly, it refers to its guidelines, and states there the points in paras.13 and 44 about what it is that Ofcom requires parties to submit.

The second point that Ofcom made in reliance on the *Orange* judgment was the point at para.98. At paras.97 and 98 the Tribunal state that, firstly, the meaning of the word "dispute" cannot depend on the terms of the contract between the parties; secondly, there is nothing in the statute that suggests that anything other than the ordinary meaning of the word is intended. Then para.98, it must mean the same as "absence of agreement" in Article 5(4) of the Access Directive.

I think I was asked yesterday whether or not I agreed that "absence of agreement" in 5(4) defined in some way or at least went to the question of what was relevant to what was required for a dispute under s.185. I think probably it is and obviously the Tribunal in *Orange* treated it as such. I do point out that Article 5(4) is, I think, shortly to be repealed. In any event, my submission in relation to these paragraphs is really the one that I made earlier, which is the fact that "dispute" bears its ordinary meaning does not actually answer the question of what steps need to be taken in order for there to be an absence of agreement and what the threshold is, whether there should be exhaustion of negotiations, and so on.

Whilst I have the authorities bundles open, I just wanted to refer very briefly to the *Vodafone* case at tab 12, where Mr. Saini referred to para.46 and read a little bit of it out. The passage that Mr. Saini referred to was the fact that the Tribunal may, depending on particular circumstances, be slow to overturn certain decisions where, as here, there may be a number of different approaches which Ofcom could reasonable adopt. Then it goes on:

> "Vodafone accepted that there were a number of approaches open to OFCOM in arriving at the Decision."

I did want to stress the remaining passages in paras.46 and 47:

> "However, it is still incumbent on OFCOM, in the light of their obligations under section 3 of the [Act] 2003, to conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny that the Tribunal will apply on an appeal on the merits under section 192 …"

In this particular case it goes on in the next paragraph to talk about whether there is a distinction between "robust analysis" and "profound and rigorous scrutiny". Then in this particular case the facts were that the essential question for the Tribunal is whether Ofcom equipped itself with a sufficiently cogent and accurate set of inputs to enable it to perform a reliable and soundly based costs benefit analysis.

I do say that there is more to it, there does have to be robustness, and the standard is not simply was it just one of a range of reasonable points.

I made the point yesterday, and I re-emphasise, I think these matters are all to be dealt with in a judgment to be shortly handed down by the Court of Appeal in relation to questions of standard of proof following argument on, I think, 21st and 22nd February.

THE CHAIRMAN: That is the other appeal, yes.

MISS LEE: The appeal of the 080 preliminary judgment. I think we can probably put the authorities bundle away unless there is anything else.

There were two points made yesterday by Ofcom on recital 32. The first was that it was merely an aspirational recital and it was doing no more than explaining why national regulatory authorities should be there to resolve points. With respect, it appears to us that it is doing more than that. It is actually showing in what circumstances national regulatory authorities should be resolving disputes – in other words, the circumstances in which they are to be asked to get involved. Those circumstances are where an agreed party has negotiated in good faith and has failed to reach agreement. I think Sky in their submissions this morning agreed that that is a requirement under s.185. I have dealt with these points in paras.44 and 47 of my skeleton in reply.

THE CHAIRMAN: Can we just explore that a bit, because one of the things I am not quite clear about now is what the chain of reasoning is between recital 32 and BT's case on this point about the meaning of "dispute".

MISS LEE: My case is this: s.185 and obviously Article 20 define "dispute". Nevertheless, you have to look, when construing s.185, at the Directive and the purposes and to give the Directive, Article 20, a purposive construction. Purposive construction arises from looking, we say, at the recital, and one sees there the emphasis. We say it is not merely an aspirational description of matters, but it is more an explanation of when a dispute mechanism is to be available, and it is when there has been a negotiation in good faith and a failure to reach agreement. That is what recital 32 says.

THE CHAIRMAN: Which part of that do you rely on now that you are no longer arguing that there was the potential in the negotiations that actually took place for the parties to reach an

agreement without there being a referral? As I understand it, it is not the good faith aspect. Is it the failure to reach an agreement aspect?

MISS LEE: It is the failure to reach an agreement, and you have to give that some meaning or context in that you must require some steps to have occurred before you say that there has been a failure to reach agreement.

THE CHAIRMAN: I do not want to put words into your mouth, but would this be a fair summary: you say you cannot say that there is a failure to reach agreement when it is clear that there are likely to be further negotiations once the Tribunal has handed down judgment, and until that happens the negotiations have stalled rather than come to an end, and it cannot therefore be said that there is a failure to reach agreement?

MISS LEE: I think failure to reach agreement does actually have to mean that negotiations have been exhausted. In my submission, that is what it means.

THE CHAIRMAN: That feeds through from recital 32 into Article 20, and then into s.185 and then everyone is agreed that either it comes into Article 5(4) because "absence of agreement" means the same as "dispute", or because Article 5(4) expressly incorporates the procedures under Article 20?

MISS LEE: Madam, yes. It is true, and it is pointed out against me, that there is no reference anywhere in these provisions to all avenues of negotiation being exhausted. We say that is plainly what is meant by "failure of agreement", and that is how I put it. I rely on the guidelines as support for that view being right because I say that was obviously the view that Ofcom has taken in its own actions in explaining what requirements it has in the heading which talks about commercial negotiation, so I make that point about recital 32.

I also make the point that when one comes to construe s.185 and the meaning of "dispute" one has to construe it as a whole and as a workable provision. Therefore it must be the case that there are some thresholds before which a dispute will not come into existence, everyone has made submissions about how difficult it is to get Ofcom to agree that there are alternative means or to extend time. So there is a conveyor belt effectively that you get on very quickly if those submissions are correct. That, we also say, points to there having to be construction of s.185 in the absence of any definition which shows that there is a fairly limited meaning of dispute. I do not want to take my submissions too far and obviously in general terms it cannot be that hard to open a dispute. The parties have made the point it is important for everyone to be able to challenge decisions where they feel it is appropriate and for disputes to be dealt with quickly. It should not be very difficult to open a dispute but I say in these particular circumstances there is a clear reason why negotiations have not

really been meaningful, why there will be some further negotiations and therefore why there is no dispute until such time as the related judgment has taken place. That is really how I make my submission.

The second point that Mr. Saini made about recital 32 was that in effect the word "dispute" appears before you ever see the mention of the conditions of negotiating in good faith or failure to reach agreement, so the view he takes is that "dispute" obviously means something broader than something narrowed by those two conditions. In my submission that approach is wrong. It seems to us to make no difference whether the sentence is constructed that way around, or whether the sentence had simply said: "A party that has negotiated in good faith and has failed to reach agreement should be able to refer a dispute". The word "dispute" comes first. The conditions affect the coming into being of the dispute. Sorry, I have not expressed that very well, but I hope you follow my point.

THE CHAIRMAN: No, I think I have it.

MISS LEE: The question of the likelihood of the matter being resolved in future negotiations goes to two points. First, it goes to the jurisdiction point of whether or not negotiations had failed and been exhausted, and secondly it goes to whether the conditions for alternative means had been met.

I submit on either view if a realistic or reasonable prospect, not fanciful, that sort of test is applied it is satisfied, it is something that occurs in the future, it cannot necessarily be put to a high degree of proof. Nevertheless, we say in this case the degree of overlap does affect the realistic prospect of future negotiations. Again we rely on the point that Virgin Media obviously took this view, and that Ofcom had taken the view in its decision on exceptional circumstances in relation to Ethernet.

THE CHAIRMAN: Is there evidence as to why Virgin withdrew their ----

MISS LEE: Yes, madam, Ethernet, bundle 3, tab 20 and it is a letter of 19th May.

THE CHAIRMAN: (After a pause): Yes, thank you.

MISS LEE: I think Mr. Saini in his submissions yesterday said that clarification from the Tribunal in the Ethernet case would help Ofcom in is future handling of the Ethernet dispute, but I am not sure why that is not equally true also of 1007 and, in any event, the assistance that it provides to Ofcom is only one aspect of the importance of a related dispute. In our submission you should also look at what is the proportionate and efficient outcome for everybody and the effect on all of the parties, so that if it is unnecessary for parties to go through the whole process of dealing with a dispute on a basis that is likely to

alter when there is going to be a related appeal shortly, then that is a factor that Ofcom should take into account.

A further point that I wanted to make was in relation to the approach by Sky and TTG who were opposed even to a finding of exceptional circumstances by Ofcom in relation to Ethernet. We do not really understand why it is they would be assisted by a determination in advance of Tribunal's judgment in relation to the Ethernet dispute, assuming that the timing was such that it could be dealt with in that time anyway, or by a set of submissions being made by BT in advance of the Tribunal's judgment. In any event the facts are that the basis is likely to change following the Tribunal's judgment and, in any event, had there been a determination by Ofcom, the position would be likely to be simply an appeal to protect the position – in other words, it does not resolve the issue finally because all that may happen is that you have a dispute on one basis which is then affected by a related judgment, an appeal to preserve the position and then you have to try and unpick the matters from the related judgment.

There was a suggestion made yesterday by Everything Everywhere that BT might be trying to gain some benefit or block disputes pragmatically if my construction of the Act is correct. We do not, we have to say, understand how this works on the facts. The pre-condition for Ofcom being asked not to accept a second dispute is that there has already been a dispute or determination, an appeal to Ofcom and issuing a later pricing change would not block anything, it would not affect anything and it seems very odd to think that the earlier dispute and appeal to Ofcom would simply be pursued in order to try and block some later dispute from taking place. That seems a rather convoluted, expensive and far fetched means of trying to avoid disputes being taken. We submit that really that pragmatic abuse type point made by Everything Everywhere is not a correct one.

There was a suggestion also from Everything Everywhere that BT's behaviour was wrong in some way issuing an NCCN 27 days after the 080 determination. We do not accept that, Ofcom had said, and I read the passage yesterday that a different structure might have led to a different result and therefore ----

THE CHAIRMAN: But it did curiously still direct that you go back to the pre-956 situation, although their powers include to give a direction imposing an obligation to enter into a transaction between themselves on the terms and conditions fixed by Ofcom, I do not know how much discussion there had been about remedy but I suppose what you are saying is that the order made was too extreme given the actual criticisms made of NCCN 956 and the determination. Is that what you mean?

MISS LEE: Well I say of course it was, I suppose, not at that stage but it did subsequently become subject to an appeal in any event, but I am not sure that it precluded BT in any sense from trying to adapt to the points that were made in the FD and to try to cure what BT appreciated Ofcom were saying was the problem. In other words, it adopted a revised pricing structure in order to address what Ofcom appeared to have identified as a problem in relation to the difficulty with whether or not the 956 created incentives to raise prices. I do not see that there was anything inconsistent or incorrect in BT issuing a further NCCN in those circumstances. I think everyone has accepted that if it had not done so that no one would have willingly said that BT could backdate any changes that transpired following a Tribunal judgment would have made 956 workable. I think perhaps the point you were putting to me, madam, was that Ofcom did not rule out the possibility of ladder pricing altogether, that it was more the details and more the facts.

THE CHAIRMAN: Well that was my understanding, maybe that is more relevant in relation to 985, 986 than 956.

MISS LEE: I simply wanted to make the point that there was no dissent from the suggestion that everyone would not have agreed to changes to 956 retrospectively.

There was a point made on an attendance note, and I do not particularly want to turn it up but it was at bundle 3 of the NCCN bundles, tab 15, and it was an attendance note of 12th May. Actually this goes to the previous point, it was suggested that Mr. Murray had made some point which Mr. Woolfe suggested showed that BT would somehow block disputes and block pricing. That particular reference was simply saying that BT would, if necessary, adapt its pricing to attempt to meet any points that Ofcom had made in its final determination and therefore that is really what they did in 1007, they adapted following Ofcom's findings about the particular NCCN.

The further point made by Three and EE is that they need to protect the position themselves by entering a dispute and that if they do not do that adverse consequences might follow. I just return to this briefly because I made submissions on it yesterday, we do not think that position is right. No one had suggested before this hearing that that was a serious concern. It seems to us there is a difference between the apparent acquiescence and actually raising or making a challenge to BT or to whoever's action is not agreed by other parties. So in practice, in relation to those NCCNs people do challenge pricing changes, and that if there is a challenge in the sense of an attack on, or a rejection of the move that has been made that seems to us to be sufficient and there is no magic particularly in having to issue a dispute. That was apparent from the way the arguments were run in PPC by BT.

Nor do we think particularly that it matters whether or not an SMP condition operates or otherwise. We do not see that as making a relevant difference. The question is whether there has been acquiescence with the change or whether someone has notified an objection to it, it does not have to be raised as a dispute with Ofcom.

THE CHAIRMAN: I think the point that was put against you was that if we are positing what you say should have happened here I suppose is that you serve NCCN 1007 to protect your position because you do not know what the outcome of the 956 appeals is going to be and the charges come into effect and you say that the MNOs ought to exercise a bit of restraint, or Ofcom should or must force them to exercise a bit of restraint by not dealing with the dispute until the Tribunal appeals are resolved.

The point that is being put forward is that at the moment if the MNOs had done that and they had waited until the Tribunal had handed down judgment and there had been the further negotiations and suppose those further negotiations had not resulted in a agreement by the parties, and at that point they had then referred that dispute. Suppose then that Ofcom had determined that dispute in their favour, the question is how far back could they ask Ofcom to adjust for under payments or over payments? Can they be sure that Ofcom would have backdated it right to the initial dispute which might have been a year or so earlier? Would BT have necessarily accepted that that was either a possible remedy or the appropriate remedy. I think that is how it is put against you.

MISS LEE: That is the point I was trying to address. It seemed to me in the TRD pricing cases you referred to yesterday, which I looked at overnight, the position was that it was taken back to the point at which the changes in prices were effective. In the PPC case there is an issue about whether or not historic payments are covered, but the issue is not from the period where this is acknowledgement of an issue, or a claim or a discussion about the over charging, but rather the period before that time until the point where the actual charges took place. The point was if nothing was said then it might be more difficult, but if the point has been raised in discussions with BT in this instance, or whoever it is, then ----

THE CHAIRMAN: I see, it can be raised but without thereby having to be a dispute within the meaning of s.185?

MISS LEE: Yes.

THE CHAIRMAN: And yet it is still possible for Ofcom at the end of the day to adjust payments back to that raising stage?

MISS LEE: Yes, s.190(2)(d) does not limit the remedies or s.192D does not limit the adjustment to the point when the dispute was opened by Ofcom. The dispute by Ofcom is not a magic

date in any sense. We do point out that no one had actually put this forward as a concern before yesterday.

On alternative means there were, it seems to us, a number of views and a number of inconsistencies in the views of the different parties yesterday. Ofcom considered that negotiations and future negotiations were fine as alternative means, but the difficulty arose where those negotiations would take place after an event which you do not know precisely when is going to happen and in particular when it is in the hands of a third party – a judgment of a court or tribunal. I think really its submission was that in those circumstances it is not easy to see that the requirement of promptness is satisfied because it is all open-ended it says. But in our submission that is not necessarily an objection in itself. In the *Unicom* case, for example, it may very well have been the case there that it was not known when consultation was actually going to finish or what the consultation was going to say in the final decision – I appreciate it was Ofcom's decision - and whether Ofcom would, in fact, impose a condition as it was suggested that it might do, when it refused the dispute. So there is always a bit of uncertainty about what is going to happen in the future; about the actual outcome, when it will be and how it is going to be resolved. It seems to us that Ofcom is pressing the matter too hard and taking too strict a view about certainty in the case of a related judgment. There are going to be judgments in these cases, subject to the case being withdrawn I suppose, and if it is withdrawn then obviously the matter can be revisited, looking at the position that Ofcom found itself in in September and October of last year.

Similarly, in relation to mediation, one does not know how long mediation is going to take, and one does not know what the outcome is going to be, and that is a referral to another body, it is something that is out of Ofcom's control. There is no definite knowledge either. It seems to us that Ofcom was trying to read conditions into the prompt and suitable alternative means provision that were not actually found there, and have not been consistently applied by Ofcom in other cases in any event.

No one, I think, responded to the point that the length that it might take for a judgment to be handed down actually would reflect its complexity and although it may seem undesirable at first flush to have to wait a certain period for a judgment to be handed down, for example, the PPC which nobody knew then but everybody knows now has taken a certain amount of time because, as Mr. Saini said, it is a complex case; that fact actually seems to us to give all the more reason for waiting before determining a dispute because of the complexity and the difficulty involved and so it is better to see what the Tribunal says about it than Ofcom

trying to run a dispute in the absence of that guidance in the first place. So I do not think that the point about the length of time in itself can be an objection; in a sense it may run in my favour in that if it is going to take a period of time for good reasons that shows the need to wait for complex issues to be decided.

As to the submission that I think Three and a number of others made that s.186(3)(a) requires current alternative means to be available, again we do not see that that paragraph is so limited as to only current means. The whole point is to allow suitable means to be pursued and the thrust of Mr. Pike's argument was that actually the *Unicom* approach therefore could not be right because it was a future consultation and the possibility of a future Condition being imposed. I think he would also say that dealing with matters as a compliance investigation, which may or may not lead to some finding at the end of the day, would also not count as suitable alternative means because they were future. But it seems to us that in fact there must be flexibility under the Act for different means to be appropriate. It would be bizarre if Ofcom could not adopt an approach that looked in all the circumstances to see how this matter might be dealt with and simply has to commence a dispute, even though for example it knows it is considering issuing a condition that would solve the problem. It is taking too precise an approach to the construction of the Act to place emphasis on the current nature of the wording, the means just have to be available, it does not matter whether they are available now or available in a few months' time.

Can I deal with the related points that were made that if I am right on my points on substantive overlap, and the effect that that should have either on jurisdiction or on suitable alternative means or on exceptional circumstances, that would necessitate a mini-inquiry by Ofcom and that should not really happen when the matter should be dealt with quickly, that it would lead to satellite litigation and a third point that the intensity of review should be limited, certainly on exceptional circumstances in cases where Ofcom has decided that there are exceptional circumstances because Ofcom knows what its own resources are.

Dealing with the first of those, I submit that the requirement of Ofcom to see what sort of substantive overlap there is, is not actually a very onerous one in itself. Ofcom will, of course, be familiar with what the first matter is all about because *ex hypothesi* it will have made a determination on that point and it will also be party to the appeal that is going forward to the Tribunal. So for example, it is very familiar with the issues in PPC it is very familiar with the issues in 080, and 0845. It seems to us it is very easy also for Ofcom to be able to see what the second matter that comes along is going to be about and what the nature of the overlap will be. If the overlap is substantial then in a sense it is going to be

obvious and we say it is obvious in these cases and on the PPC in relation to the DSAC test and so on, in relation to the NCCNs because there are two previous cases dealing with exactly the same points. It is not having to get to grips with anything very difficult, it is simply having to look, as a matter of common sense, to see whether or not there is a substantial overlap.

In any event, it seems to us it has to deal with that question when it is asked effectively to put matters on hold in relation to exceptional circumstances. It has to form a view and it does not seem to us to be reasonable or realistic to say the Regulator should not get involved in these matters. It is plainly involved in deciding what the proportionate and effective way of dealing with matters is, and so it does have to make that inquiry.

As for the point that it might generate satellite litigation, litigation I think would only occur where it is obvious that something has gone wrong, and we say that it has here. But if it has gone wrong then the parties are entitled to bring challenges, and to ensure that regulators are operating correctly in accordance with their duties to act proportionately and efficiently and to ensure that, for example, if there are exceptional circumstances that it recognises those.

So not every case will lead to litigation but if something has gone wrong then there does not seem to be anything wrong in having an ability to challenge that error on the part of Ofcom.

As to the point about lower intensity of review I think this was based on the fact that Ofcom, where it had decided that there were exceptional circumstances had taken that view based on its own view of what it needs and what its resources were but again, in my submission, it should not just be a matter of what Ofcom's needs or resources are, it is just a matter of how Ofcom should determine the procedures in a sensible and efficient way for everybody else as well. As I have submitted it seems very odd that Ofcom should have to go through making a determination if the very following day having made one a related judgment takes the basis away for that determination.

In our submission what has gone wrong here, and we submit it has gone wrong and it should be corrected by the Tribunal, is that there has been too much focus on the specific time that it would take to deliver related judgments or the uncertainty about that time, but the uncertainty is limited because obviously judgments are going to be delivered within the near future, and not enough focus on the practical implications of the overlap and the sensible management of resources for everybody in relation to that point.

I submit, and I submitted this yesterday, protecting the position in relation to costs does not meet the point. Ofcom, I think, is probably unlikely to conduct at the end – having gone through a whole process of determining a dispute – an inquiry as to whether parties should

have shown restraint in referring that dispute in the first place because of a related judgment, it just seems unreal that they are likely to do that, and more sensible, we say, is for them to say: "Look, the sensible thing here is to accept that it is premature and then come back to the matter in future".

I did refer yesterday both to the point about s.196(6) and (7) the parties' costs and Ofcom's costs, and of course in the BIS consultation, which is still a consultation that there is reference to extending in relation to costs. I have some copies of the BIS consultation which I will hand up, dated 13th September 2010. (Same handed)

MR. PIKE: It is in the authorities bundle.

MISS LEE: Is it? I am sorry.

MR. PIKE: Tab 6, madam.

MISS LEE: That is quite right. There are two points, the first, which is relevant to the point that I am just making now – the passage is at paras. 124 to 126, which I think Mr. Pike referred to but did not actually turn up. They go to the point about a suggested change in relation to costs orders in order to encourage ADR and I just mention that for completeness. The other point that Mr. Pike did make, and I might as well deal with that now is the one at para.118. I think he suggested yesterday (and also in his SOI) that actually it appeared that the ability to refer disputes might be removed by the consultation. Of course this is only a consultation, but we submit that if you read para. 118 it is talking about a very specific point, it is not removing disputes in any way in the general sense. It is making clear that what should be open to challenge in future is matters relating to existing obligations, i.e. existing conditions, and not the possibility of making conditions in future.

THE CHAIRMAN: There was some mention of the fact that Article 5(4) in the Access Directive is going to be ----

MISS LEE: Yes, madam, it is and it is me who has said that. If you look on at para. 122 of the consultation you will see there a reference too, but I do not think there is any dispute that this dispute is a matter that comes within Article 20 of the Framework Directive, or s.185(1), so I do not think it arises on this case.

MR. PIKE: Can I just clarify, there is a dispute on that point.

MISS LEE: Oh, is there?

MR. PIKE: Yes. Network access disputes come under Article 5(4) of the Access Directive, and certainly the position that has been adopted by the Government is that the right to refer disputes under Article 5(4) has now been removed. This is a network access dispute under s.185(1), it is not a dispute in relation to an existing SMP condition, so we do say that this is

precisely the sort of dispute that could not be referred if BIS proceeds with their proposed approach.

THE CHAIRMAN: It is not really the BIS approach, it is an amendment of the Directive. Well, perhaps we should not get into that.

MR. WOOLFE: Madam, if I could just assist on that? I think some of the wording of Article 5(4) is being moved over into an amended version of Article 20, so it may not be entirely clear what is going from Article 5(4) and what is being moved into Article 20, but this is the way the Government has interpreted the amendment.

MISS LEE: A separate point that Mr. Pike I think made yesterday was that there was some attempt on our part to draw a distinction between putting matters on hold and staying them – there was not. All that I was saying was that you do not need to use the word "stay", and what I was saying was that whether you call it "staying" or "putting on hold" it falls within s.188(5) which allows Ofcom to take appropriate steps to do as much as is reasonably practical, and I think that was also Mr. Pike's submissions, so I think in a sense we agree on that. I say that that may include in the circumstances it is doing nothing for the time being if the overlap is so great that actually it is not reasonably practical or sensible to carry on and therefore Ofcom can put matters on hold or effectively stay them.

It seems to us in this case there is a tension between the quick resolution of matters set out in the way s.185 is constructed and what should happen where there is already an ongoing process in relation to another matter that has already reached that stage, has reached a determination and has been appealed. We submit it cannot be right simply just to apply the imperatives that you see in the Act generally about quick determination regardless of the circumstances of a related appeal. The Act, we submit, is not so inflexible so as to require that, so all the submissions that have been made about everything being very strict and default position do not necessarily apply in relation to different circumstances, you have to review them appropriately.

A very quick point, just to reply to something else that Mr. Pike said, although I do not think it matters, he said I had asserted things about the policy preference. They are set out in the 0845 final determination so it is Ofcom itself that says these are its preferences and that they have not been followed by the MNOs, and there is a reference to that: bundle 2, tab 7, paras. 5.9 and 5.10 of the 0845 FD.

If I can then pick up the points that were made this morning. (After a pause) There was a suggestion this morning, and I think it came from both Sky and Virgin, that it would be odd if you could have a dispute prior to the point where there is a related appeal up and running,

in other words Sky could have referred earlier, but that falls away when there is a related appeal, and comes back again if the appeal is dismissed or does not deal with a particular point. But in my submission it is necessary to look at the particular time to see whether or not negotiations have been exhausted and if there is a reason why negotiations in a particular period have not been able to be conducted in a meaningful fashion then it is perfectly appropriate, as a matter of jurisdiction, to say it is premature, and this comes back to the tension point that I made a moment ago, one has to look to see what the position is in all the circumstances.

THE CHAIRMAN: Do you say that there has to be a link in the minds of the parties when they are negotiating which acknowledges that the reason why the negotiations are not going anywhere is because of the related appeal and of an acceptance that they will come back to the negotiating table after the judgments, or is it simply the fact of the related appeals and the fact of the negotiations having stalled that is enough? How much consciousness does there have to be?

MISS LEE: I am not sure there has to be consciousness actually. I think it is for Ofcom really to look to see what the effect of the overlap is and if the parties are in fundamental disagreement that matters are likely to change or at least to be clarified once there is overlap.

THE CHAIRMAN: I see, so it is Ofcom's assessment rather than the parties' assessment of what is likely to happen?

MISS LEE: Yes. I think that is right. Can I say a word about the witness evidence and the points that have been made this morning? We propose there be no cross-examination because it seemed to us that first, the witness statements contained to a large extent different interpretations of events and correspondence rather than clashes over primary facts and so people have different subjective views about what is and is not going on, and certainly about the likelihood of what might happen in future which is, in a sense, the point that was made. Secondly, the point that I made in opening that in our view it is not particularly instructive to look at the fact that there are fundamental disagreements prior to these related judgments, and the NCCN case is a prime example of this when actually the position may be very different following a judgment in that case.

So whilst each party may disagree, and I certainly would not accept that BT did not negotiate in good faith in relation to Ethernet, for example, which I think was the suggestion, it did not seem to us to advance the position really to go through a lot of correspondence about that. What Mr. Nicholson said about negotiations is in his first

witness statement which is in the Ethernet core bundle at tab 2. If I can just make one or two very quick points based on the witness statement. Paragraphs 21 and 22, I referred to these yesterday in my opening, I did not actually take the Tribunal to them, and here he is referring to his overall comments, and you will see he says – as I said yesterday, very fairly – in paras. 21 and 22 that the second and third of the objections are different but BT's view is that the first one applies to both PPC and to Ethernet, and secondly, his view is the respective positions were polarised because the parties had different views about the likely impact of the PPC appeal. That, I think, is also the point made on the correspondence. He then says:

> "… it is to be anticipated that the judgment will provide considerable clarification and encourage BT and the Parties to negotiate a settlement in relation to Ethernet. Also, the PPC appeal is likely to resolve legal and procedural points … it is quite possible that not all of the PPC judgment will apply to the Ethernet context, but, in BT's view, there is considerable overlap between the two disputes."

Mr. Nicholson deals with the negotiations that took place after he joined Openreach, which is in May 2009. Many of the points Mr. Bates made referred to an earlier period, but I would simply say that if the Tribunal were to read paras.24 to 26 dealing with Virgin, and paras.28 to 35, you will see that BT, and this refers to correspondence that is exhibited to Mr. Nicholson's statement, which is in Ethernet bundle 3, has set out its position in relation to a number of matters.

THE CHAIRMAN: Is the wording of the SMP obligation the same materially in PPC and Ethernet? You may not be the person to ask.

MISS LEE: Madam, I would need to check that, but I think it is.

MR. SAINI: It is actually at tab 5.

THE CHAIRMAN: We do not need to turn it up.

MISS LEE: Mr. Segan I think looked at the second witness statement of Mr. Nicholson, which is at tab 10. If the Tribunal looks at para.9 to the end of the statement, para.14 ----

THE CHAIRMAN: There he says that it seems difficult for the interveners to argue that there is no scope for future negotiations. That seems to be putting the burden on the person referring the dispute – I suppose that is right – to establish that there is jurisdiction.

MISS LEE: I think the point is being made that it seems a little unrealistic to say, "Because of what has happened in the past there is just no scope to deal with matters in the future". The judgment may very well, as I submitted, concentrate minds in a number of respects. What

you cannot do is rule that possibility out. From paras.13 and 14 it is not accepted that there was a lack of good faith on BT's part.

Madam, unless there is anything I can assist further with, those are my submissions.

THE CHAIRMAN: Mr. Woolfe?

MR. WOOLFE: Madam, I do not want to make any further substantive arguments, simply Miss Lee said that our point regarding the future financial impact of these appeals, and accused me of raising it after the event, had not been raised before. I think she said it had not been raised in writing. Paragraph 20(4) of our skeleton does raise the point, for your note.

THE CHAIRMAN: Yes, thank you very much everyone, it has been very helpful, and certainly helped us to clarify what the issues are. We will now rise and we will come to our conclusion and let you know in the usual manner when we are ready to hand down the judgment. Of course, there is the point about written submissions when the PPC judgment has been handed down, but perhaps the Tribunal will get in touch with the parties when that has occurred.

Thank you very much.

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