

Friday, 14 October 2016

1

2 (10.30 am)

3 THE CHAIRMAN: Mr Holmes, I can't believe this is the last
4 day.

5 MR HOLMES: I know, sir. It has been a long journey but we
6 have finally arrived.

7 THE CHAIRMAN: Anticipation tinged with sadness.

8 MR HOLMES: Yes, sir. We will have to console ourselves.

9 THE CHAIRMAN: How will we do it?

10 MR HOLMES: We are now on ground 4, which is BT's complaint
11 about price. I know a particular favourite of yours,
12 sir, when it comes to modelling.

13 THE CHAIRMAN: I don't see why you have any reason to say
14 that.

15 Closing submissions by MR HOLMES (continued)

16 MR HOLMES: Mr Beard began his submissions under this ground
17 with the allegation that Ofcom had not conducted
18 a proper consultation exercise on the issue of price
19 and, specifically, he contended that the December 2014
20 consultation document had not properly canvassed with
21 stakeholders whether there were any problems with Sky's
22 pricing of its sports channels. He said that the only
23 reference to pricing was in footnote 185 of the
24 consultation document and that there was no specific
25 question as to price. Ofcom's expert witness,

1 Mr Matthew, was also subject to lengthy
2 cross-examination about this. BT's procedural
3 allegation is a bad one. The WMO consultation clearly
4 and explicitly embraced the question of whether Sky's
5 wholesale prices required to be regulated.

6 If I could ask the tribunal to turn up the
7 consultation document which is at DF1, tab 5.

8 Beginning at the front of the document at page 3,
9 paragraph 1.1 sets out what the WMO obligation is and
10 what Ofcom is considering:

11 "The wholesale must-offer obligation requires Sky to
12 wholesale its Sky Sports 1 and 2 channels to other
13 pay TV retailers with certain prices and terms set by
14 Ofcom. We are reviewing the extent to which the WMO
15 obligation remains appropriate or whether it needs to be
16 modified in any way or removed."

17 So the obvious first point is that Ofcom was
18 consulting on whether to modify or remove the WMO
19 obligation which regulates Sky's wholesale prices. The
20 consultees are sophisticated industry players. If they
21 thought there was a continuing problem with Sky's
22 wholesale prices which needed to be addressed through
23 regulation, they would have been in no doubt of the need
24 to say so.

25 Passing down the page to paragraph 1.6, Ofcom

1 explains that it has identified two types of practice
2 which might, in certain circumstances, give rise to
3 concerns. The first is non-supply and the second is
4 distribution of key content, but on terms which would
5 not enable rivals to compete effectively in pay TV
6 retailing. Then, below, Ofcom continues:

7 "In this document we refer collectively to both
8 types of practice as limited distribution."

9 So Ofcom was explicitly considering whether there
10 was a concern with Sky's terms of supply and every
11 reference throughout the document to limited
12 distribution is intended to refer to that type of
13 practice, as well as outright non-supply.

14 Ofcom then sets out the analytical framework in
15 section 4 of the consultation document beginning on
16 page 29.

17 In the heading above paragraph 4.11, Ofcom states
18 that the third step of its analysis is assessing the
19 likelihood of limited distribution. In paragraph 4.12,
20 Ofcom identifies the two types of analysis that it
21 proposes to consider under this head, which the tribunal
22 has seen developed in section 6 of the statement itself.
23 The first is to assess incentives to limit distribution,
24 and the second is to look at the current distribution
25 arrangements, to assess whether this "gives us

1 information regarding the likelihood of limited
2 distribution."

3 As we know from paragraph 1.6 of the document,
4 "limited distribution" includes wholesale supply on
5 terms that are prejudicial to fair and effective
6 competition. So consultees were expressly alerted to
7 the fact that Ofcom will be looking at the terms of
8 Sky's current distribution arrangements as part of the
9 WMO review. One sees that very clearly from the second
10 bullet of paragraph 4.12.

11 Ofcom's initial thinking on incentives and existing
12 distribution arrangements is then developed in section 7
13 at page 64.

14 At paragraph 7.3, Ofcom repeats the two types of
15 practice under consideration, also in the executive
16 summary, and which are both covered by the term "limited
17 distribution", and it is here that one finds the famous
18 footnote 185 on which BT places emphasis:

19 "There are a variety of ways in which the terms of
20 wholesale supply can degrade the ability of a retailer
21 to offer effective competition. These include setting
22 wholesale prices that do not allow a sufficient retail
23 margin to enable the rival retailer to compete
24 effectively."

25 THE CHAIRMAN: I think it was 185 -- 184. You said 185.

1 MR HOLMES: There may be a difference between our versions,
2 sir. In mine, it is --

3 THE CHAIRMAN: It says:

4 "There are a variety of ways in which the terms of
5 wholesale supply can degrade ... These include setting
6 wholesale prices that do not allow a sufficient retail
7 margin ..."

8 That is the one we are talking about, whatever its
9 number?

10 MR HOLMES: That is the one we're talking about, whatever
11 its number. I think the versions have been
12 progressively amended as a result of confidentiality
13 markings, but we are talking about the same passage.

14 THE CHAIRMAN: Right.

15 MR HOLMES: BT says this is the only reference to Sky's
16 wholesale prices in the consultation document.

17 This is factually incorrect, as we shall see, but at
18 all events, it is plain that any informed reader would
19 have been aware of the relevance of price and other
20 terms of supply from the very first page of the
21 executive summary, and would also have seen the
22 analytical framework in section 4 which showed that
23 Ofcom's interest extended to current supply arrangements
24 in the market.

25 So this footnote, whatever its number, would,

1 therefore, not have come as an earth-shattering surprise
2 to those in BT, Virgin and TalkTalk who are paid to
3 engage with the regulator on a daily basis. There is no
4 risk that they would have missed the point.

5 Turning forwards to page 72, you see the heading,
6 "We have considered whether current supply arrangements
7 provide an indication of any risk of limited
8 distribution."

9 Below that the heading, "Sky's key sports channels
10 are currently widely available", and over the page,
11 paragraph 7.31 contains the statement:

12 "That Sky is supplying rival retailers that benefit
13 from the WMO is not surprising. However, we note that
14 Sky supplies a full suite of Sky sports channels to
15 Virgin Media and TalkTalk. This is more than Sky is
16 required to supply under the WMO, which covered
17 SS1 and 2 only."

18 Then a passage of confidential text which I would
19 particularly emphasise without reading it.

20 Then the text continues:

21 "On the face of it, this could indicate that Sky is
22 acting on commercial incentives to supply that are
23 independent of the WMO and render the WMO obligation
24 redundant."

25 So Ofcom was specifically raising for consultation

1 the terms of Sky's existing commercial arrangements and
2 was positing that these could indicate that Sky is
3 acting on commercial incentives to supply independent of
4 the WMO and that this could in turn render the WMO
5 obligation redundant.

6 Now are we to believe that the commercial parties
7 referred to in paragraph 7.31, including in the
8 confidential text, would have overlooked such discussion
9 of their own commercial arrangements with Sky or would
10 have failed to appreciate that here Ofcom was
11 considering such terms as price, or that BT would not
12 have been equally interested by the observation in the
13 final sentence as to the indications to be drawn from
14 Sky's current supply arrangements.

15 This passage, by the way, also gives the lie to any
16 suggestion that Ofcom's consideration of current supply
17 arrangements in the final statement represented
18 a deviation or change of approach from the consultation
19 document. Mr Beard suggested in his opening submissions
20 that, whereas Ofcom had correctly directed itself in the
21 consultation to a forward-looking approach, the final
22 statement looked only at current terms of supply.

23 In fact, Ofcom's approach was consistent throughout.
24 It analysed likelihood of limited distribution by
25 examining both incentives and existing market conduct.

1 Then, turning to page 75, there is --

2 MS POTTER: Mr Holmes, can I perhaps get you to comment on
3 paragraph 7.35?

4 MR HOLMES: So, Ofcom was there setting out a view which at
5 that time it held, before having received responses to
6 the consultation and before having heard what the
7 commercial parties had to say, if anything, about the
8 theory espoused in paragraph 7.31, which, as we have
9 seen from the WMO statement, is the position that Ofcom
10 ultimately arrived at. So this is the proper approach
11 to consultation. Ofcom was setting out its thinking
12 transparently for industry parties.

13 It heard what they had to say and, perhaps as
14 important, what they didn't say about their current
15 commercial terms, and it concluded accordingly.

16 Turning on to page 75, a broad general consultation
17 question is set out at the bottom of the page covering
18 the whole of Ofcom's analysis in section 7, including
19 the implications of Sky's current terms of supply for
20 its propensity to act on its incentives:

21 "Do you agree with our analysis of Sky's incentives
22 to limit distribution of its key content? If not,
23 please explain why."

24 In my submission, given that this follows at the end
25 of section 7, this covered both stages of Ofcom's

1 analysis in section 7, both whether there were
2 incentives, and whether Sky's conduct suggested that it
3 would act upon them. We saw in opening that both BT and
4 Sky endorsed Ofcom's general analytic approach in their
5 consultation responses of looking to current conduct.

6 In section 8, starting on the next page, Ofcom set
7 out its conclusions and next steps. At paragraph 8.6,
8 Ofcom stated:

9 "There are circumstances under which Sky may have
10 incentives to engage in a practice of limiting
11 distribution."

12 In the next sentence it notes:

13 "Similar considerations may also lead to concerns
14 that Sky would engage in a practice of supplying on
15 unfavourable terms."

16 The other part of limited distribution. Then it
17 carries on:

18 "Those terms might be such that a competing provider
19 would not seek supply at all or may result in
20 a situation where a competing provider enters into
21 a supply arrangement but is unable to compete
22 effectively without incurring losses (where the
23 wholesale supply price is such that a competitor cannot
24 offer a competitive retail price)."

25 So here again, Ofcom is returning to the question,

1 also raised in the famous footnote, of Sky's wholesale
2 prices, explicitly referred to here, and specifically
3 adverting to the possibility of a price squeeze.

4 On page 78, Ofcom observes in the heading at the top
5 of the page that continued regulation could take
6 a number of forms, and at paragraph 8.14, Ofcom notes
7 that Ofcom may consider the imposition of an obligation
8 to offer which included specified terms. It goes on:

9 "The particular term which may be of concern is
10 pricing, since this may limit a competing platform
11 retailer's ability to offer bundles at a competitive
12 retail price. Some form of pricing obligation may
13 therefore be necessary to restrict the ability of
14 a holder of key content to limit the ability of its
15 rivals to compete on price. The precise form will be
16 dependent upon the form of remedy chosen to address
17 limited distribution."

18 Ofcom could not, therefore, have been clearer, it
19 was considering whether to regulate Sky's prices as the
20 WMO obligation had done in 2010.

21 Turning to page 87, which is in annex 4, the
22 consultation questions, you see question 8.1:

23 "Do you consider it appropriate to maintain some
24 form of regulation on Sky in order to ensure fair and
25 effective competition in pay TV?"

1 And importantly:

2 "Please provide evidence to support your view."

3 So Ofcom asks consultees, "Should we carry on
4 regulating Sky? Please give us evidence about that".

5 Throughout the document, it has adverted to the terms of
6 supply. In a number of places it has referred
7 specifically to Sky's pricing and it has identified the
8 possibility of regulating Sky's price as the WMO already
9 did.

10 The suggestion that Ofcom did not consult on the
11 issue of Sky's pricing is not well founded.

12 Unsurprisingly, BT, Virgin Media and TalkTalk all
13 referred to the issue of whether Sky should be subject
14 to price regulation in their consultation responses. BT
15 specifically alleged

16 [redacted]##### in its first
17 consultation response, but provided no supporting
18 evidence. I will turn to its subsequent cost-stack
19 analysis and what that shows in a moment. That, in my
20 submission, dispenses with the core consultation
21 complaint, but it is in any event an unpromising
22 argument in the context of a merits appeal.

23 If BT had anything it had been unable to raise in
24 consultation, it could have brought it forward in the
25 appeal, as, sir, you noted in relation to the SkyScanner

1 case. This is, unlike that case, not a judicial review,
2 BT's procedural allegations ring hollow where it has not
3 brought forward any new material which it says it was
4 unable to produce to Ofcom during the consultation
5 process.

6 BT's various other consultation complaints are
7 incorrect for the reasons given in our closing
8 submissions at paragraphs 91 and 92. To pick up two
9 points very briefly, Ofcom was not required to publish
10 consultation responses or to enter into a dialogue with
11 consultees about problems with the material they
12 submitted, that would render consultation completely
13 unmanageable and there is no case law cited in support
14 of such an obligation.

15 [redacted]#####
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22 Turning, then, to the substance of ground 4,
23 Mr Beard first challenged Ofcom's reliance on TalkTalk's
24 and Virgin Media's commercial deals. This is also
25 an unpromising argument for BT for three reasons.

1 First, when investigating whether to regulate
2 a firm's price, it is obviously appropriate for the
3 regulator to consider the actual pricing practices of
4 the firm in question.

5 Second, TalkTalk and Virgin Media did not express
6 any concerns themselves about Sky's current prices. The
7 relevant passages are addressed in our written closing
8 submissions in paragraphs 78 to 80.

9 Third, TalkTalk and Virgin Media are not here, they
10 have not appealed and they have not intervened.

11 BT is left contending that the arrangements to which
12 those other parties are subject did not allow for
13 effective competition. If that were the case, we would
14 find TalkTalk and Virgin here today. They are both
15 substantial and well-resourced companies who are not shy
16 about defending their own interests. TalkTalk
17 intervenes in almost every telecommunications case that
18 is heard in this tribunal, and Virgin Media was an
19 active participant in the 2010 appeals.

20 [redacted]#####
21 #####
22 #####
23 ##### The point does not
24 avail BT for three reasons.

25 The first is that one needs to consider Sky's deals

1 in the round to see whether they suggest that Sky is
2 willing to deal on more favourable commercial terms than
3 the WMO price. Looking at matters from beforehand, even
4 a dominant firm can enter into a fair bet in its
5 commercial pricing.

6 I will not describe the terms in open court, but
7 I would refer the tribunal to the points set out in
8 paragraphs 63 to 65 and 71 of Ofcom's closing
9 submissions.

10 The second difficulty is that
11 [redacted]#####
12 ##### and those are set out in
13 paragraph 80 of Ofcom's closing submissions.

14 The third problem with Mr Beard's argument is that
15 the evidence indicates that the prices paid under the
16 contracts
17 [redacted]#####

18 I will not take you through that material because it
19 is confidential, but I would refer you to paragraph 66
20 of Ofcom's closing submissions.

21 I would simply note in relation to Virgin's
22 contract -- TalkTalk's contract, I beg your pardon, the
23 contract to which Mr Matthew was taken in
24 cross-examination, that we do not accept the
25 construction of the contract that was advanced by

1 Mr Facenna.
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16 The tribunal has also seen evidence about [redacted]
17 and about the [redacted] price under the contracts, but
18 I won't go to that.

19 Mr Beard suggested that Virgin Media and TalkTalk
20 are not effective competitors in the provision of
21 pay TV. As regards Virgin Media, he did not point to
22 anything that had changed since the tribunal's
23 assessment in 2012 that Virgin Media was rightly to be
24 regarded as an effective competitor by Sky and
25 Mr Matthew expressed a similar view now under

1 cross-examination. Virgin Media's market share has held
2 constant despite market entry.

3 As regards TalkTalk, it has enjoyed rapid growth and
4 the tribunal has heard

5 [redacted]#####
6 #####
7 #####

8 That brings me to BT's cost-stack analysis and I can
9 be very brief about this, I have three points to make.

10 First, the analysis does not purport to suggest that
11 BT cannot operate profitably in selling bundled offers
12 which incorporate Sky's sports channels. BT's expert,
13 Mr Harman, readily accepted that this was the case.

14 We have set out in paragraph 96 of our written
15 closing submissions what it was in terms of evidence
16 that Ofcom invited BT to bring forward.

17 Does the tribunal see that?

18 What it instead provided was a model designed to
19 show that a hypothetical stand-alone entrant could not
20 operate profitably at Sky's wholesale rate card prices,
21 so BT was saying to Ofcom, "We want lower wholesale
22 prices and wider retail margins, significantly lower
23 prices based on its model, not because we need them
24 ourselves in order to compete effectively, but so that
25 a hypothetical entrant pursuing a different business

1 model would be able to enter the market".

2 But Ofcom was looking for actual real world problems
3 in the market, as it operates today and it was mindful
4 of the tribunal's observation in 2012 that Sky's
5 competitors would always like lower prices and wider
6 margins, that could not, in itself, be the touchstone
7 for regulatory intervention.

8 The second point is that the central case in the
9 model is uninformative. It does not reflect Sky's
10 retail costs, and that is no criticism of BT, of course
11 BT has no access to Sky's retail costs but when Ofcom
12 looked at the model to see what it showed, it had to
13 take that into account. The model also does not reflect
14 BT's retail costs. Instead, it takes an arbitrary
15 allocation of BT's fixed and common costs of its
16 triple-play business of one-third in order to estimate
17 the costs that would be incurred by a stand-alone pay TV
18 retailer providing IPTV over its own fibre. There is no
19 such thing as a stand-alone pay TV retailer providing
20 IPTV over its own fibre. That is not a business that
21 exists. BT has not suggested by what commercial terms
22 the fibre would be shared in this way between separate
23 operators. This is what I meant when I referred in
24 cross-examination to a "chimera". It was not to suggest
25 that there could never be a stand-alone pay TV retailer

1 in today's market, there are such retailers, it was
2 rather that the type of operator that BT models is not
3 remotely credible.

4 More potentially relevant are the results of the
5 triple-play sensitivity. This is what BT actually does,
6 so its retail costs fit well with what is here being
7 modelled. Also --

8 MR BEARD: I'm sorry, this is confidential material, isn't
9 it? I am concerned you are about to drift into
10 confidential material.

11 MR HOLMES: I don't believe anything that -- I stand to be
12 corrected, but I am not sure that anything I have said
13 so far is confidential.

14 MR BEARD: If it says anything about margins, for example --
15 I don't know what you're about to go into.

16 MR HOLMES: I appreciate the note of warning, but I have
17 sought to be careful in framing these submissions.

18 MR BEARD: I'm grateful.

19 THE CHAIRMAN: It's just specific figures, I think, that we
20 have to worry about.

21 MR HOLMES: Yes, indeed.

22 All of BT's retail pay TV competitors are now
23 exclusively triple-play retailers or predominantly
24 triple-play retailers and that includes Sky itself.

25 Now, the tribunal has seen the results of the

1 triple-play sensitivity and it has also seen how those
2 results are affected on the basis of adjustments that
3 Mr Harman accepted that it was appropriate to make using
4 up-to-date costs from BT and the retail price of the
5 fibre product that Sky's customers actually purchase.
6 So in my submission, Ofcom was right to find that the
7 model did not take matters forward and was entitled to
8 rely on the market evidence as to Sky's commercial
9 wholesale prices.

10 Subject to any questions from the tribunal, those
11 are my submissions on ground 4.

12 THE CHAIRMAN: You are not bothered that some of
13 Mr Matthew's evidence was adjustments made after the
14 decision?

15 MR HOLMES: Sir, Mr Matthew was seeking to explain reasons
16 that Ofcom had in mind at the time of its decision,
17 based on the evidence available to it at the decision.
18 If one considers the two adjustments that were made and
19 were accepted as unimpeachable by Mr Harman, that
20 material was before Ofcom and Ofcom did carefully
21 appraise the model, as was stated in the WMO statement.

22 Now, it did not give an exhaustive account in the
23 statement of its reasons for rejecting the model. It
24 focused on certain particular reasons and, if one looks
25 at the footnotes, they are stated to be in particular,

1 they are not indicated to be exhaustive.

2 But Ofcom was not required, for the purposes of its
3 reasoning, to set out every detail. It was required to
4 give the gist of its reasons for rejecting the
5 modelling, and it did so.

6 Sir, turning, if I may, to ground 5, this is BT's
7 complaint on the subject of reciprocity and the issue
8 here is whether, having found no need to mandate supply
9 generally or to regulate price, Ofcom should have
10 intervened in the negotiations between Sky and BT by
11 imposing a condition on Sky prohibiting it from
12 requiring any cross-licensing of BT's key content.

13 Mr Beard advanced a number of criticisms of Ofcom's
14 approach. First, Mr Beard argued that a prejudicial
15 practice on Sky's part had already crystallised. He
16 contended that the harm to competition is constituted by
17 Sky's insistence on reciprocal sports supply and that
18 the fact of such insistence is not in dispute. That
19 insistence was said to be per se prejudicial on the
20 basis that it leads, inevitably, either to non-supply to
21 BT of an essential input or to BT having to give up its
22 key differentiator in exchange for an essential input.

23 Now Ofcom agrees that it would be prejudicial to
24 competition if negotiations led to non-supply or to BT
25 unfairly giving up its differentiator, but the evidence

1 as to the negotiations between Sky and BT that was
2 before Ofcom suggested that these outcomes were by no
3 means inevitable. The tribunal has seen the documentary
4 evidence and has heard the witnesses about this.

5 Given the time, I will not attempt to take you
6 through it in detail, but the references are set out in
7 Ofcom's closing submissions at paragraph 117. Mr Beard
8 suggested in cross-examination of Ms Fyfield that the
9 meeting notes from July 2015 were not before Ofcom when
10 it took its decision. That is incorrect. Sky had
11 attached the note of its meeting to its first
12 consultation response. Ofcom had that material before
13 it at the time of the decision.

14 It would not necessarily be prejudicial for Sky and
15 BT to exchange key content as part of a wider supply
16 deal. BT has made clear that it wanted to use its
17 content as leverage to achieve just such a deal.
18 Mr Beard's approach is too rigid. He suggests that it
19 is wrong in principle for a dominant supplier to demand
20 reciprocity. Even under article 102, the position is
21 arguably not so straightforward.

22 It would be necessary to consider the capacity to
23 restrict competition. Cross-licensing is frequently
24 applied, even in the context of standard essential
25 patents,

1 [redacted]#####

2 One needs to consider matters in their context and
3 there is also, of course, the matter of objective
4 justification which arises under article 102, but even
5 if Mr Beard's perspective were accepted, the question
6 for Ofcom under section 316 was whether it was
7 appropriate to impose a licence condition. The evidence
8 was that a wider reciprocal deal between the parties was
9 possible. Moreover, Sky's position on reciprocity had
10 not led to any breakdown of supply. It had voluntarily
11 agreed in 2012 to supply its channels to BT via IPTV on
12 the Cardinal platform, although this was outside the
13 scope of the WMO obligation as modified by the interim
14 relief order, and Sky is continuing to make supply of
15 Sky Sports 1 and 2 on YouView without requiring
16 reciprocity, nor to the extended negotiations between
17 the parties.

18 THE CHAIRMAN: But that cannot have been a factor in the
19 decision.

20 MR HOLMES: No, sir, you are correct. That is a reinforcing
21 point to give the tribunal comfort in relation --

22 THE CHAIRMAN: At the risk of going over old ground, you are
23 not saying this a 102 analysis.

24 MR HOLMES: No, sir.

25 THE CHAIRMAN: You are saying it is a 316 analysis. Had you

1 analysed it under 102, the answer would have been the
2 same, is that what you are saying?

3 MR HOLMES: Sir, Ofcom did consider, under article 102,
4 a particular form of reciprocity.

5 THE CHAIRMAN: And closed the file on administrative
6 grounds.

7 MR HOLMES: It did, sir.

8 THE CHAIRMAN: I am not sure where that gets us.

9 MR HOLMES: It did, sir. Because BT had received supply via
10 its application to amend the interim relief order,
11 the -- it is difficult, sir, for me to express a view on
12 behalf of Ofcom as to what position it might take.
13 There may very well be further proceedings under the
14 Competition Act.

15 THE CHAIRMAN: I understand that, but it is just Mr Beard
16 has rather framed his complaint in terms of, if this
17 were a 102 case, it would be an obvious case --

18 MR HOLMES: Let me make a broad --

19 THE CHAIRMAN: In a sense, you have to deal with that, even
20 though you cannot speculate on what might have been --
21 something I would discourage anyway.

22 MR HOLMES: That is fully understood, sir, let me frame this
23 then as a legal submission that comes from my mouth,
24 a broad legal submission.

25 Two points. First of all, Mr Beard did not refer to

1 case law to suggest that this specific practice fell
2 within the category of a per se infringement. He
3 referred to other case law relating to other practices.

4 Yes.

5 The second point is that the case law shows the need
6 to consider effects, potential effects, whether there is
7 a capacity to restrict, and that is a context-dependent
8 analysis under article 102.

9 The third point is that, while the scope of it is
10 not entirely clear from the case law, there is this
11 category of objective justification which would need to
12 be considered.

13 So I do not accept the submission that this is
14 a per se infringement under article 102, that is not
15 where the case law stands in my submission. Does that
16 address your question?

17 THE CHAIRMAN: That is enough I think, for this purpose.

18 MR HOLMES: I am grateful, sir.

19 My final point on this aspect of Mr Beard's case is,
20 even if Mr Beard's perspective were accepted, the
21 question for Ofcom was appropriateness under
22 section 316. That is a wider enquiry than simply
23 whether the practice itself could be prejudicial to fair
24 and effective competition and the evidence was that
25 a wider reciprocal deal between the parties was

1 possible, they were continuing to negotiate and that was
2 a legitimate matter for Ofcom to take into account, in
3 deciding whether to regulate at the time of the WMO
4 statement.

5 Moreover, Sky's position on reciprocity has not led
6 to any breakdown of supply. You have that point. The
7 negotiations between the parties do not appear to have
8 materially affected BT's broader pay TV strategy.

9 I refer you there to paragraph 6.89 of the WMO
10 statement, which notes BT's focus on monetising through
11 bundling of BT Sport with its broadband service, using
12 the regulated access which Mr Petter underlined as
13 particularly important, which BT enjoys to Sky's
14 satellite platform, and also, of course, BT has
15 continued to invest in pay TV, as Ofcom noted.

16 Indeed during the pauses in the parties'
17 negotiations, BT has used its exclusivity to good
18 effect, rapidly acquiring a substantial subscriber base
19 on the DSat platform.

20 THE CHAIRMAN: And the denial of a differentiator?

21 MR HOLMES: Sir, that depends on the terms of reciprocity.

22 So we have seen that there are different proposals on
23 the table at different times. The grant-back condition
24 that was the subject of BT's complaint to Ofcom was very
25 specific. It was that Sky was insisting, in exchange

1 for Sky Sports 1 and 2, on receiving BT's Premier League
2 content. Now, if the only content that BT held were
3 Premier League content, one could see that a deal on
4 those terms might remove any differentiation between Sky
5 and BT as regards sports packages. Equally, another
6 form of reciprocity, which BT

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17 Sir, it may be we will need to correct the
18 transcript on that. I have made that point, in any
19 event, and that is as far as I think I need to go.

20 MR BEARD: I am concerned that there have been, just in that
21 exchange, a number of comments by Mr Holmes which are
22 confidential.

23 THE CHAIRMAN: We will have a look at the transcript. If
24 you are going on, we shall clear the court.

25 MR HOLMES: I am grateful for that indication from Mr Beard.

1 I think I can avoid any further lapse of
2 confidentiality.

3 MR PICKFORD: Sir, if it assists, the status that those
4 remarks are so far attached to, is that they are
5 BT/Sky-confidential. So it is okay for BT and Sky to be
6 here, but not for the public, because -- just what we
7 have adopted so far.

8 MR BEARD: That is absolutely right.

9 THE CHAIRMAN: That is right, is it? Okay. They are yellow
10 in my script.

11 MR HOLMES: It sounds as though my slip has not caused
12 any --

13 THE CHAIRMAN: Is there anybody from the public here? We
14 are not clearing the court, it is all right, you don't
15 have to go.

16 MR HOLMES: The transcript will be corrected.

17 Finally, the evidence is very clear that the
18 negotiations are ongoing, Mr Petter did not dissent from
19 that in his evidence before the tribunal.

20 Mr Beard placed heavy reliance on Dr Padilla's
21 modelling evidence and Ofcom addresses that in its
22 skeleton argument at paragraph 129. The short point is
23 that the modelling is narrow in its scope, not
24 addressing the form of reciprocity that either party was
25 seeking to secure in the negotiations, various of the

1 assumptions in the model are also unrealistic and Ofcom
2 placed weight instead on the "real world" evidence from
3 the negotiations.

4 It was suggested by Mr Beard that Ofcom's expert
5 witness, Mr Matthew, had been unable to address the
6 modelling evidence. Now, sir, I need to take a moment
7 to correct that, because I fear it is wishful thinking
8 on BT's part. It is certainly not borne out by the
9 transcript on Day 7.

10 At page 56 of that transcript, Mr Facenna asked
11 whether Mr Matthew's responsibility for analysing any
12 economic input provided by industry parties extended to
13 Dr Padilla's modelling. Mr Matthews said yes. At least
14 a third of the time allocated for cross-examination of
15 Mr Matthew was then devoted to factual procedural
16 questions.

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12 That brings me to Mr Beard's "panther" point. This
13 arose out of three submissions that I made in opening
14 the case, which were: first, that the parties were still
15 negotiating and there had been no breakdown of supply
16 based on a reciprocity requirement; second, that Ofcom
17 was ready to act, if need be, and that this could be
18 done easily and quickly; and, third, that BT has not
19 come to Ofcom to complain, that the current negotiations
20 have broken down and that supply risks being withdrawn.

21 In response, Mr Beard says first that the grant-back
22 condition, as he calls it, has crystallised. Well, you
23 have my submission that that is not borne out by the
24 evidence of ongoing negotiations, the fact that the
25 parties have each proposed arrangements and that Sky

1 specifically considered the scope of BT's proposal, the
2 possibility of a deal based on the scope of BT's
3 proposal at the July 2015 meeting. The tribunal will
4 recall the two meeting notes.

5 Second, Mr Beard says that the prospect of easy and
6 quick action is unreal. That is also incorrect. It is
7 contradicted by his own submission that a licence
8 condition prohibiting what he calls "grant-back", would
9 be straightforward and proportionate. Action from Ofcom
10 could be taken either under the Competition Act or under
11 section 316 and it could include interim measures.
12 Ofcom has decided matters quickly in the past. In the
13 context of BT's Competition Act complaint, Ofcom decided
14 the question of interim measures within two months.

15 Mr Beard's third point is that BT has complained --

16 THE CHAIRMAN: It decided not to impose them.

17 MR HOLMES: It did, sir. On the basis -- it decided to do
18 so on the basis of an extremely detailed, careful
19 analysis. If you look --

20 THE CHAIRMAN: I am not suggesting for a moment it was not
21 careful and detailed. I am just saying I think the
22 sense of Mr Beard's complaint was that he wanted
23 a quick, favourable response rather than a quick,
24 unfavourable one.

25 MR HOLMES: Indeed, sir, but as your observation makes

1 clear, that confuses Ofcom's ability to act quickly with
2 its tendency to agree with Mr Beard's client and those
3 two things are not one and the same.

4 Mr Beard's third point is that BT has complained
5 throughout this process about reciprocity and has
6 appealed and has also complained under the
7 Competition Act. It is true that BT has certainly not
8 been neglectful of the regulatory avenues available to
9 it in its commercial dealings with Sky. It is not
10 correct, however, that it has ever identified any
11 specific breakdown in the negotiations or in the supply
12 of core content by Sky. When Mr Beard asks what more BT
13 could do, the answers might include pointing to evidence
14 that a breakdown of supply is likely or imminent or that
15 the negotiations have run into the ground. That is not
16 the evidence that is before the tribunal.

17 Mr Petter made clear that he keeps an open mind as
18 to the possibility of a commercial deal and Ms Fyfield
19 has expressed a hope that the parties will be able to
20 build trust and move forward.

21 Mr Beard's further point was to suggest that market
22 monitoring offers no protection. That is both incorrect
23 and unfair. The fact that Ofcom has not agreed with
24 some of BT's regulatory requests, as I have said, does
25 not show that Ofcom is ineffectual. BT referred to the

1 Competition Act complaint as an example of Ofcom
2 proceeding with insufficient speed. You have my point
3 on the interim measures. Ofcom then proceeded to
4 investigate. Ultimately, matters moved on so that the
5 relief sought by BT was no longer required.

6 Now is not the occasion to debate Ofcom's
7 interactions with BT after the refusal of interim
8 relief, but I can say, sir, that it is not accepted that
9 the delays were as a result of any inaction on Ofcom's
10 part in relation to progressing the investigation.

11 Finally, there is the question of proportionality of
12 the WMO as specifically raised under ground 5. Ofcom
13 has never suggested that its reason for not intervening
14 is to do with the work involved in preparing a WMO
15 remedy. If it had decided that the remedy was needed,
16 it would have put its hand to the task. It decided that
17 regulation was not appropriate based on its assessment
18 of competitive conditions in the market now and moving
19 forward.

20 As to the suggestion of a regulatory backstop WMO,
21 which has been proposed in these appeal proceedings, my
22 submission is that it would serve no purpose. Insofar
23 as Sky is already dealing on commercial terms, this
24 would not affect its continued willingness to do so and
25 insofar as Sky is not willing to deal with the

1 particular party, it is already subject to the threat of
2 regulation. There is no counterfactual world without
3 regulation or the threat of regulation, and Dr Padilla
4 was very clear in his evidence to the tribunal that
5 Ms Fyfield's evidence as to Sky's current willingness to
6 supply could be informed by the wider regulatory
7 environment after withdrawal of the WMO and, in my
8 submission, that serves the purpose of a backstop WMO.
9 There is no further purpose that would be served by
10 regulating where there is no specific practice
11 identified as current or likely, that gives rise to
12 a need for intervention.

13 THE CHAIRMAN: So a general obligation to supply subject to
14 fair, reasonable and non-discriminatory terms would
15 serve no purpose?

16 MR HOLMES: Sky has seen already Ofcom's clear expectation
17 in the WMO statement about continued supply. Ofcom has
18 indicated that it is monitoring the market, that it is
19 looking at the terms of dealing between the parties as
20 part of that monitoring process. So -- and as well as
21 that general monitoring, you have both the possibility
22 of regulation under section 316, reintroducing the WMO,
23 the structure of which is already determined, or that
24 there is already a template on which Ofcom could draw.

25 There is also always the Competition Act and the

1 possibility of a reference to the -- a market
2 investigation reference to the CMA which Ofcom is
3 entitled to do.

4 Sir, subject to any further questions from the
5 tribunal, those are Ofcom's closing submissions.

6 THE CHAIRMAN: Thank you very much Mr Holmes.

7 Mr Flynn?

8 Closing submissions by MR FLYNN

9 MR FLYNN: I will crack on. Sir, I feel a little bit like
10 ground 3, squeezed in the middle and it takes a long
11 time before we are given our chance to shine, but we are
12 only here to help the tribunal, as I have said, and to
13 support Ofcom. Despite some gripes in BT closings, we
14 don't think it has seriously been suggested that we have
15 exceeded our remit. We have explained in our
16 skeleton -- I point you to paragraph 13 -- that we are
17 entitled, as an intervener, to vent different views,
18 should that be necessary. There wouldn't be any real
19 point in intervention were that otherwise.

20 So what do we bring to the party, as it were?
21 A broad distinction is -- and you will have seen the
22 division of labour between Mr Pickford and myself
23 through the course of the hearing -- that I want to deal
24 with the live evidence in relation to commercial
25 matters, insofar as relevant to the tribunal's task, and

1 I will do that in words. Mr Pickford deals more with
2 the modelling or the economic issues and he may do so
3 partly in algebra in particular.

4 THE CHAIRMAN: I do sincerely hope not.

5 MR FLYNN: He is going to be disappointed.

6 With that distinction in mind, and given the time --

7 THE CHAIRMAN: I was going to go on to 11.45 and then have
8 a break. How much of this is open court?

9 MR FLYNN: I am intending to be in open court, because all
10 I am going to do, I am going to, as it were, walk the
11 tribunal through our submissions, I don't intend to
12 repeat them, just to show, I think, where the tribunal
13 may find helpful references, but I am just not going to
14 dwell on them.

15 I may be able to do this by 11.45. I hope I will
16 and then, after that, you will hear from Mr Pickford and
17 he will explain confidentiality arrangements at that
18 point, if that is acceptable to the tribunal.

19 THE CHAIRMAN: Is that a threat or a promise?

20 MR FLYNN: It is a promise. I merely say, I promise, that
21 he will describe the confidentiality arrangements.

22 MR PICKFORD: If you insist, when we come back, the first
23 session will be BT/Sky-confidential, that is how I am
24 proposing to start.

25 MR FLYNN: Can I invite the tribunal to take up our closing

1 submissions and, as it were, turn the pages with me?

2 You described Mr Beard's approach yesterday as
3 a somewhat post-modern one of starting at the end and,
4 as he said, working back fast. I am going to start at
5 the beginning and then take you straight to the end and
6 then dwell on the middle.

7 Just to show you what is in our submissions, first
8 of all, there is a beginning, which is the introduction
9 on page 6, and what that seeks to do, in a word, is to
10 say where we are now in our submission following the
11 evidence, and what the tribunal can take, the comfort
12 the tribunal can take, from the evidence that it has
13 heard in relation to the validity of Ofcom's decision.

14 I point you particularly to paragraph 1.6 as
15 an overall summary of where we think the tribunal could
16 end up confidently.

17 At the end, on page 60, there is section 8, which,
18 while it is at the end, is somewhat forward looking. It
19 relates to relief, the relief sought and the
20 inappropriateness, we say, of that, and the long shadow
21 of what we call the long shadow of regulation and the
22 prospect of regulation, what is needed now is a certain
23 outcome, one way or the other.

24 Now, that is the beginning and the end, and then
25 I am just going to take you rapidly through the middle,

1 as it were.

2 Starting on page 9, in section 2 -- I think we may
3 be the only party to have taken this somewhat
4 traditional approach -- we set out some views on the
5 witnesses. Obviously, this is a matter for you, but in
6 our submission, firstly, we would say that you heard
7 full, frank and convincing answers from Ms Fyfield, who
8 is an operator on the front line of the commercial
9 matters which the regulation and the Ofcom's decision
10 are concerned with. Whereas, in our submission, the BT
11 witnesses were somewhat guarded and very much attempting
12 to stick, we would say, to the regulatory script.

13 I say that that is for you, but we set out relevant
14 references to allow us to make that submission to you.

15 Moving on, page 14, you will find what we have to
16 say about ground 1, which is -- I am not going to dwell
17 on that now. That is the law. We maintain and refer
18 back to what we have said in our statement of
19 intervention and skeleton. We adopt what was said by
20 Mr Holmes yesterday and I don't need to detain the
21 tribunal much longer on that, or any longer on that.

22 Then we come to what we have to say on grounds 2 and
23 following. So I am on page 16. I don't propose
24 actually to say anything about ground 3 -- I am sorry to
25 disappoint everyone. We make the point on ground 3 that

1 Sky is already supplying the lion's share of its
2 attractive sports content to BT and that is continuing
3 and has been throughout the relevant period.

4 The lion is our addition to the considerable
5 bestiary that the tribunal has been faced with: we have
6 had Peppa Pig, offering Mr Facenna the chance to delight
7 us -- he is refusing. We have had the chimera --

8 THE CHAIRMAN: And we have had a real gorilla that escaped.

9 MR FLYNN: Precisely, and we have had the panther, but we
10 had an 800-pound gorilla. Numbers are not my strong
11 suit, but that is a big gorilla; that is twice as big as
12 the gorilla that was on the loose in London Zoo
13 yesterday.

14 The real point I would like to draw from that,
15 actually, is that, while that is one of Mr Beard's
16 favourite pieces of tabloid chaff -- the reference, for
17 the connoisseurs, who will remember it being trotted out
18 five years ago or whenever it was, that Sky is the
19 800-pound gorilla. The real point we think comes from
20 the evidence is that, consistently, BT has been
21 understating, possibly even misunderstanding, its own
22 weight and fearsomeness.

23 If you look at paragraph 4.3 on page 16, you will
24 see the topics that we think the live evidence will --
25 where the live evidence will assist the tribunal.

1 I will be mentioning or pointing you very briefly to the
2 first two of those. When we get on to vicious circles,
3 and so forth, that is for Mr Pickford.

4 Now, because this is open and because we haven't got
5 time, I am not going to be giving numbers, but if you
6 look at paragraph 4.9, the section from there to 4.19 is
7 our best effort, after the evidence, to deconstruct and
8 restate in the light of the evidence that you have
9 heard, the numbers for subscribers, customers and
10 anything in between.

11 That is our best effort to do this complicated
12 exercise, but the conclusion that we can draw from it is
13 at the end of that section, so paragraph 4.18, where we
14 say that, overall, if you consider all those numbers
15 properly, the impression that Dr Padilla and BT wish to
16 give of Sky striding ahead and the rivals having no
17 chance to make any inroads on retail subscribers to
18 sports channels, or more generally, is simply false.
19 Then you will see a confidential conclusion which I do
20 not need to read out.

21 We then deal in section C, 4.19 to 4.24, with, as it
22 were, the factual side of Sky's incentives and, as we
23 have said, and we gave the witnesses the chance, nobody
24 suggested that Ms Fyfield either was not telling the
25 truth or did not understand the incentives operating on

1 her. Neither Mr Petter nor Dr Padilla was prepared to
2 say that.

3 We say, when you consider that evidence and notably
4 Ms Fyfield's rejection that BT was in any particularly
5 special or unique position because of its -- the fact
6 that it has successfully secured some valuable sports
7 rights, that did not put them in a different position,
8 as far as she was concerned, when she was assessing her
9 commercial desire to maximise distribution, that she was
10 particularly firm on that point.

11 I point the tribunal to paragraph 4.23, which is
12 a confidential point, but the conclusion we draw at 4.24
13 is that, whatever view you might take of the theory, in
14 practice, given the realities with which we all are
15 faced, it is not plausible that Sky would have
16 an incentive to limit distribution, it could act on
17 a certain incentive with an eye to the future content
18 auctions.

19 We then have a lengthy section on the relevance and
20 scope of the current supply deals. I will say
21 immediately that they, those issues, also go to
22 ground 4, and I will just invite you to run your eye
23 over some of that material as well.

24 So in that section, firstly 4.26, we make a point
25 about BT. I hesitate, but I think I am introducing

1 a new animal to the bestiary here, because we wish in
2 the strongest terms to put an end to the canard that BT
3 puts about that it has only been supplied because of the
4 WMO obligations. It is just a false statement. Sky has
5 always been willing to supply BT and was well before the
6 WMO is in place. That was in Ms Fyfield's evidence, the
7 reference is there, not challenged in cross-examination
8 and it is what the tribunal found in its previous
9 judgment in a lengthy passage which I refer to in the
10 footnote. The idea put forward by Mr Petter that they
11 might have considered appealing against that meticulous
12 examination of the record, or Mr Beard's statement,
13 which I quote there, in cross-examination, are just
14 absolutely hollow. While we are at it, it was
15 suggested -- for what relevant purpose, I am not
16 entirely sure -- that this panel of the tribunal might
17 not consider itself bound or might feel free to disagree
18 with the previous panel chaired by Mr Justice Barling,
19 the unappealed finding, that Virgin Media could
20 compete -- could compete at the rate card prices then
21 prevailing.

22 I am not sure of the relevance, but frankly, you
23 know, that is a point which is just not open to the --
24 THE CHAIRMAN: I think you can trust us to make up our own
25 minds on that.

1 MR FLYNN: I will trust you to make up your mind on all
2 these matters, sir, but that is my particular point on
3 that possibly historical matter.

4 While we are on consistency with the tribunal, it
5 was again said yesterday that what Mr Justice Roth had
6 to say in the application to extend the scope of the
7 interim relief order to BT's YouView platform had some
8 relevance. As we pointed out in footnote 77 of the
9 skeleton and I mentioned in opening, it is made under
10 a totally different premise and does not take us
11 anywhere in present circumstances.

12 Then I am back at 4.28 in our argument. We deal
13 with the current agreements with Virgin Media and
14 TalkTalk. Firstly, perhaps, I would say -- I am not
15 going to read or even take you to all the points that we
16 make, but a lot was made of the possibility or the
17 suggestion that these agreements had only been entered
18 into because the regulation existed in the backdrop or
19 as a backstop and, at 4.31, I take you to Ms Fyfield's
20 evidence on that point.

21 [redacted]#####
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5 Now, the details, of course, of these agreements are
6 confidential, but we set out in some detail in the
7 succeeding paragraphs, and then I will take you to
8 ground 4, we deal with points that have been made in
9 relation to those agreements.

10 The bottom line, as far as we are concerned, and we
11 suggest the evidence before the tribunal bears it out,
12 is that both those parties are doing well in the retail
13 market and they certainly have not suggested otherwise
14 to us, to Sky, and they have not suggested otherwise to
15 Ofcom and their absence from this room, we say, speaks
16 volumes.

17 We make some other comments about other forms of
18 entry which takes us to the end of paragraph 4.41, where
19 we start on the vicious circle, which will be for
20 Mr Pickford. If you flick on -- and I will finish by
21 11.45 -- to page 36, you will see our section on price.

22 Again, much of this analysis is confidential or
23 complicated, but let me just make a few particular
24 points. Paragraph 6.3, we say that no attempt has been
25 made by BT to suggest [redacted]#####

1 ##### are contrary to fair and
2 effective competition or would be likely to be. In
3 fact, it resorts to some abstract criticisms. We say,
4 actually, Ofcom was right to look at what was really
5 going on. Once again, we examine -- this is now moving
6 into section B -- and turning the pages there, we move
7 into some detailed examination of the current deals that
8 Sky has on the wholesale level, agreed outside the scope
9 of the WMO.

10 Perhaps I could just point out footnote 43, which is
11 on page 39, which responds to a point that was made in
12 confidential session by Mr Beard yesterday, and I won't
13 say more than that, except you will see I think there is
14 an answer to an observation that was quoted.

15 Likewise, we had talked about the relevance of the
16 [redacted]prices under these agreements and we conclude,
17 once again, that there is no basis -- we are on page 41
18 now -- to claim that

19 [redacted]#####in
20 the way that they want to compete. I think that should
21 be remembered. I hesitate to mention Peppa Pig again,
22 but it just shows there is an diverse ecology out there
23 and it is a successful one, in our submission.

24 We don't say, I am not going to say, very much about
25 the cost-stack model but, for reasons that we give, we

1 say it was plainly insufficient to put Ofcom on notice
2 of a real problem. We have the chimera point, we know
3 whose costs the model was based on and, importantly, we
4 say at 6.34 that it was open to BT to provide evidence
5 to Ofcom as to its own ability to compete with any
6 prices offered by Sky. BT was invited to do so, and it
7 didn't do so. That is a more robust approach, we say,
8 to illustrating a competition problem than modelling the
9 costs of an imaginary beast.

10 Perhaps I can just conclude with the reference at
11 paragraph 6.35. BT has elsewhere admitted or said to
12 the Court of Appeal that it was not the body that needed
13 price protection; it was the new entrant that did. And
14 BT described itself as a "Goliath", they were a Goliath
15 company, like Virgin Media, that didn't require the
16 price protection at that time. Obviously, if price
17 protection comes, they would love to tuck in behind it
18 and get our channels at a low price, and no doubt a lot
19 of them, a point I think I also made in opening. That
20 is the material to which I would particularly draw the
21 tribunal's attention, that falls on my side of the
22 dividing line.

23 THE CHAIRMAN: Mr Pickford is going to deal with ground 5?

24 MR FLYNN: Mr Pickford is going to deal with ground 5 and
25 vicious circle matters.

1 THE CHAIRMAN: Fine, let's just break.

2 MR FLYNN: You will look forward to that, no doubt, after
3 the break.

4 THE CHAIRMAN: Five minutes.

5 (11.45 am)

6 (A short break)

7

8 (11.51 am)

9 MR PICKFORD: Mr Chairman, members of the tribunal, I have
10 handed up a one-sided aide-memoire.

11 THE CHAIRMAN: It is only on one side because it is in very
12 small print.

13 MR PICKFORD: It is quite small print, it is 11 point font.
14 The reason for it is to make my submissions quicker, so
15 I don't have to be telling you where I am in the closing
16 submissions. My points I am going to make by reference
17 to the aide-memoire, but I don't need to keep stopping
18 to tell you where I am relative to the closing
19 submissions.

20 THE CHAIRMAN: What are we going to do on timing,
21 Mr Pickford?

22 MR PICKFORD: Sir, I have about 40 minutes of submissions,
23 so I can stop shortly after half past.

24 THE CHAIRMAN: 40 minutes?

25 MR PICKFORD: 40. The reason for that, sir, is because,

1 actually, the way that the case has fallen out, I had

2 the greater part of Sky's additional contribution.

3 THE CHAIRMAN: Well, I mean we are not taking extra

4 contributions at this stage. You can have half an hour.

5 MR PICKFORD: Thank you, sir.

6 THE CHAIRMAN: Mr Beard will have to manage with the rest.

7 MR BEARD: I shall.

 Closing submissions by MR PICKFORD

9 [redacted page 47-69]

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(Public session)

10 MR BEARD: In reply, I shall start from the very beginning
11 but I certainly will not go all the way back. Tempting
12 as it is.

13 To start with the law, you have our position --

14 THE CHAIRMAN: Your very last word on the matter?

15 MR BEARD: I never like to say never, but yes.

16 Closing submissions in reply by MR BEARD

17 MR BEARD: First of all, dealing with Mr Holmes' points very
18 briefly, you have seen our primary submissions -- just
19 picking up one or two issues. The essence of Mr Holmes'
20 case on the interpretation of 316 does not end up with
21 any distinction between "must" and "may", he is
22 essentially saying the term "must" is synonymous
23 with "may" in these circumstances. Whilst he is saying
24 we must do something, we must apply our mind, as we
25 explained, that requirement to apply the mind is one

1 that operates more generally. His suggestion that
2 316(1) is no less mandatory than 316(2) is wrong.
3 316(2) is specifying precisely circumstances in which
4 conditions must be included and section 263 does not
5 fall to that interpretation at all.

6 It is notable that Mr Holmes did not suggest that if
7 there is a risk here, anything other than the WMO is
8 appropriate, so he didn't seek to say that a different
9 condition could or should be used, going back to the
10 exchange that I had with you, Mr Chairman, about those
11 issues.

12 So we refer to the submissions we made in relation
13 to law previously.

14 Now, if I turn, then, to the other aspect of
15 ground 2, which is taking Mr Holmes' legal
16 interpretation on its face, there are still two
17 criticisms that we level at it: one is that the analysis
18 is not forward looking; and the other is it doesn't
19 involve a proportionality exercise.

20 Now, it was interesting listening to Mr Holmes talk
21 about why it was you should read the WMO statement as
22 being forward looking. He was able to refer to four
23 paragraphs in which the word "likelihood" is referred
24 to: 1.11.3; 6.3; 6.23; and 7.5.

25 What we have there are essentially book-ends, we

1 have introductory passages in 1.1.11 saying we are
2 looking at likelihood here, that is the executive
3 summary. We have 6.3 which is introductory. We have
4 a passing reference in 6.23 under the heading:

5 "We continue to consider that Sky may have
6 incentives to limit distribution of its key content.
7 However, it is currently supplying ..."

8 Then we get to 7.5, where we see:

9 "In view of our findings about the impact of Sky's
10 key content on competition in pay TV, we have assessed
11 in section 6 the likelihood and impact of Sky engaging
12 in the following practices."

13 In section 6, itself, you do not see any assessment
14 of a likelihood, it just does not exist. There is no
15 consideration of a likelihood. There is no reference to
16 whether or not there is a real risk here. There is
17 nothing forward looking about any of the substantive
18 consideration.

19 Now, we have made clear, we are not saying you
20 cannot look at the present to consider risks in relation
21 to the future, but you do have to take that extra step
22 of looking at what is currently going on and assessing
23 the extent of risk to the future, and it is that second
24 step that is never analysed in the substance of
25 section 6, notwithstanding what is said in 7.5 and that

1 is our criticism of the lack of a forward-looking
2 approach.

3 Turning then to proportionality, which is our second
4 substantive criticism of the approach, now, it is
5 recognised by Mr Holmes that the WMO statement contains
6 barely any reference to proportionality and it certainly
7 contains nothing close to any sort of coherent balancing
8 exercise which could, as we say, justify the removal of
9 existing regulation and nor has Ofcom adduced any
10 factual evidence. We know, in these sorts of regulatory
11 cases in the past, regulators have put forward
12 evidential statements explaining how a proportionality
13 exercise was carried out. That has not been done here.
14 We say it would have been easy, if that exercise had
15 been done, to put forward someone to deal with those
16 matters and the absence of that evidence speaks volumes.

17 But what is important to note is that in the defence
18 and the skeleton argument, there are all sorts of
19 references to proportionality, emphasising the
20 obligation on Ofcom to act proportionately and why it
21 was that a proportionate approach was being adopted
22 here. For instance, in skeleton at paragraph 48:

23 "The relevant question for Ofcom was whether the WMO
24 remained appropriate and proportionate in circumstances
25 where it had found that Sky was in fact supplying on

1 commercial terms that permitted rivals to compete."

2 So in its pleadings, and in its submissions, it was
3 saying proportionality was important. In opening, of
4 course, Mr Holmes relied on those two references to
5 "proportionate" in paragraphs 1.25 and 1.33 and said
6 that these showed a proportionality analysis was in fact
7 done, albeit it was compressed, but now in closing, we
8 see -- and I should say, just for your notes, transcript
9 Day 2, page 53, Mr Holmes, in answer to a question from
10 you, Mr Chairman, says:

11 "Sir, I would say this paragraph [1.25] contains
12 an analysis for the purposes of proportionality."

13 We say it contains nothing of the sort. What it
14 does indicate is that, really, a proportionality
15 exercise was required. Now, when it comes to the
16 position in closing, Ofcom's position appears to have
17 shifted but it is actually quite difficult to understand
18 what Ofcom is now saying here. Initially, it seemed
19 that the position being put forward -- just for your
20 notes, the transcript reference I have is at page 122,
21 line 20, yesterday. Mr Holmes was saying that in
22 relation to what was presently being considered, what
23 was presently necessary, they didn't perceive conduct
24 which made the WMO necessary, so no proportionality
25 exercise was required. Then at pages 123, line 14

1 through to page 124, line 9, he appeared to be saying,
2 well, the only issue we needed to consider
3 proportionality in relation to was in relation to future
4 risk, and he termed that a "narrow issue". Then he went
5 on and said, "No, no, no, we are not actually saying we
6 should separate out present and future", so we are left
7 with a situation where we do not understand what it is
8 that Ofcom are saying they actually did in relation to
9 a proportionality exercise, but what appears absolutely
10 clear to us is that, in relation to what Mr Holmes
11 referred to as the narrow issue of future risk, which is
12 of course the very essence of the criticism that BT has
13 throughout been leveling at Ofcom, that it didn't carry
14 out a forward-looking approach, it didn't look properly
15 at future risk, and it didn't carry out any proper
16 analysis of that future risk, it appears that Mr Holmes
17 is saying, yes, a proportionality exercise is
18 appropriate there, but that we did it in an abbreviated
19 way and that a common sense approach was required.

20 I don't know whose commonsense we are talking about
21 there but on any basis a proportionality exercise in
22 relation to future risk required consideration of the
23 extent of that risk. As I have already indicated, that
24 was not done. Secondly, it required consideration of
25 what an appropriate condition might do in terms of

1 attenuating that risk or generating costs, and that was
2 not done. So, even if we are only focused on what he
3 refers to as the narrow issue and we say is a central
4 consideration here, there was no proper proportionality
5 exercise and that is a singular failing in law in
6 relation to this exercise.

7 The truth is, if you are removing a regulatory
8 measure, you still need to do a proportionality
9 assessment. Ofcom has never said any different
10 previously. Indeed the essence of their approach to the
11 legal test of assessing appropriateness must involve
12 a proportionality assessment -- what is appropriate must
13 be proportionate.

14 Just to set aside one point, where Mr Holmes said,
15 "Well, it is a narrow issue, it is just whether or not
16 the WMO should act as a backstop", well, of course that
17 is the very essence of BT's case here, that the WMO
18 should have acted as a backstop, that the WMO acted as
19 a backstop in relation to future risk of non-supply or
20 unfair terms supply. It does not preclude commercial
21 negotiations. Indeed we say it will ensure that there
22 can be proper negotiations, given Sky's continuing
23 insistence on a grant-back condition.

24 So we say failure in relation to forward-looking
25 approach, failure in relation to the situation of

1 consideration of proportionality. It just wasn't done.
2 That is a major issue here. It undermines the very much
3 nature of the decision that has been taken.

4 In relation to ground 2, what we see is a degree of
5 shifting in the way that the Ofcom defence is put in
6 relation to ground 2, but Ofcom's defence and
7 submissions are still missing the fundamental point of
8 our ground 2, which is not just one about the process of
9 analysis that Ofcom undertook, which we say was itself
10 flawed. It is actually about the conclusions that were
11 reached.

12 There is a substantial degree of agreement between
13 Ofcom and BT that, for example, the Sky Sports channels
14 are essential content, that the Sky has significant
15 market power, that the relevant metric for assessing
16 that in amongst all of the discussion about numbers is
17 revenue shares within the pay TV market. On all of
18 those counts there is actually a very high level of
19 agreement. Sky disagrees but that is a separate issue.

20 What we say is that in the context of that, we also
21 agree that the purpose of the WMO was not to remove the
22 market power, but to facilitate retail competition or,
23 more exactly, to prevent conduct that would prejudice
24 fair and effective competition, and what we say is that,
25 since the right measure of assessment of the context of

1 retail competition is revenue shares and there is no
2 disagreement by Ofcom with Dr Padilla's assessment that
3 retail competition is not effective, and no more
4 effective than in 2010, we say you need that remedy in
5 place whose purpose was to ensure fair and effective
6 retail competition, when we are in agreement that there
7 has not been an improvement here.

8 So far, Ofcom just have not given a proper answer to
9 that. That is the part of ground 2 that is not properly
10 dealt with. There are no compelling reasons being given
11 why, in all those circumstances, one should move away
12 from the WMO.

13 Sky takes a different approach in many regards and,
14 as I say, disagrees with all sorts of points on numbers
15 and analysis. It also tries to place reliance on the
16 CAT judgment, and we say that that is both historical
17 and not helpful and we disagree with the outcome of it,
18 but it perhaps doesn't matter.

19 One observation just to make in the context of all
20 of this is of course that Sky has emphasised, it says,
21 that it is willing to wholesale always on the basis of
22 a grant-back condition and always on its terms, but the
23 irony about all of that is, why are we worried about
24 a WMO in those circumstances? What is wrong with a fair
25 pricing obligation in these circumstances?

1 That takes me on to pricing grounds. Now, Mr Holmes
2 stressed at the outset that he didn't accept our
3 criticisms of the consultation process that had been
4 undertaken by Ofcom in relation to pricing. It is
5 important just to focus on what it is we are saying
6 about consultation. We are not taking it as
7 a freestanding procedural fairness ground. That is not
8 the point that we are taking here. What we are saying
9 in relation to a consultation is that Ofcom, in
10 its December 2014 consultation, was not at all
11 highlighting any suggestion that it wanted to carry out
12 analysis of pricing. We only find a single reference to
13 potential margin squeeze issues in that footnote 184 and
14 185. Yes, there are references of course, as we have
15 set out in our submissions, to unfair terms amounting to
16 a constructive refusal to supply in the circumstances.
17 That is throughout that consultation document, but what
18 we were saying was nobody knew that you were looking for
19 pricing information to be provided at that time and,
20 actually, the position couldn't have been clearer
21 [redacted]

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13 As it was, in the July consultation they only dealt
14 with the first of those. They didn't deal with the
15 pricing issues and that, of course, [redacted],
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18 #####and it is
19 why they did put in their cost-stack analysis modelling
20 right at the end of the process, because that was the
21 only opportunity they had in the circumstances. So when
22 Mr Holmes said "Ah, well, BT haven't turned up and said
23 they would have put in something different" -- no, we
24 did put in what we could. The point is that Ofcom had
25 moved away from their position recognising that proper

1 pricing analysis was required and just dropped it. We
2 say that then conditions how one looks at the relevant
3 threshold test here, and the threshold test here is
4 whether Ofcom was on notice that there was a concern,
5 the point being that they had talked about consulting on
6 these matters and had not done so, they had then
7 received material from BT -- and I should say the
8 process here is referred to in the witness statements of
9 Mr Williams, his first witness statement at paragraphs
10 88 through to 118, the second witness statement, which
11 is in N2, tab K, at paragraphs 15 and 16, and his third
12 witness statement, which is in R1 at tab D, paragraphs
13 23 to 29.

14 That process was not properly followed and it
15 conditioned the way in which the analysis was then being
16 carried out in relation to concerns relating to pricing.

17 Now, there are a number of points to make in
18 relation to that, and we have highlighted in our closing
19 submissions, first, in relation to the position of other
20 parties in the market, and I am not going to refer to
21 anything confidential, I am just going to refer to, in
22 relation to the two parties of particular interest, our
23 closing submissions at paragraph 128 and 131.

24 I do so just against the backdrop of paragraph 7.35
25 in the December consultation which Ms Potter

1 highlighted, where Ofcom had previously been saying:

2 "We consider that the existing supply arrangements
3 may be of limited value in determining the extent to
4 which Sky would or would not supply its key sports
5 channels in the absence of regulatory intervention."

6 Mr Holmes said, well, the world had moved on
7 following the responses from those people. Well, just
8 look at those responses. They do not provide any good
9 justification to say there is no pricing concern here.
10 Not at all.

11 Just in passing, there is a slightly technical point
12 that I should pick up in relation to construction of
13 a particular contract, one to which you will understand
14 I am referring, DF2, tab 10, page 69 -- that is the
15 relevant contract. Our position on the construction of
16 that is set out in our closing at 124A and we stand by
17 that analysis.

18 So what we say is that Ofcom was rightly in December
19 recognising the limitations of reliance on the current
20 agreements in the market for the purposes of
21 consideration of whether or not to maintain the WMO. It
22 changed its position between then and the final
23 decision, having received those representations, which
24 we say do not allay concerns, particularly, in relation
25 to future matters and then also having had material from

1 BT, the cost-stack analysis.

2 I will do my best to talk about this without
3 straying into confidential information as far as Sky is
4 concerned.

5 In relation to the cost-stack analysis, it is clear
6 on any basis that that material was more than sufficient
7 to give Ofcom cause for concern about pricing by Sky,
8 and potential pricing by Sky, in relation to the
9 wholesale supply of Sky Sports, and that crosses the
10 threshold as well.

11 Now, the criticisms levelled at it, Mr Holmes says,
12 well, the cost-stack analysis is not saying that BT
13 cannot act profitably here. That is no part of the
14 cost-stack analysis. It is following the model that was
15 used in 2010 and the Court of Appeal said was correct,
16 which is looking at new entrants. So it is a very
17 strange criticism to level.

18 It is not dealing with Sky's costs, that is true.
19 It is dealing with BT's costs because that is all that
20 BT could do.

21 Yes, of course modifications of BT's costs had to be
22 made because of the way that BT holds its costs, but
23 they were not arbitrary selections, as Mr Holmes put it.
24 We explained why the modifications were done and we did
25 our best in relation to them. We carried out

1 sensitivities in relation to these matters. We did
2 carry out a sensitivity even in relation to triple-play
3 matters. We explained why that sensitivity continued to
4 give cause for concern but we also note that
5 a triple-play analysis is not what Ofcom did in the
6 course of the WMO statement and consultation. So to
7 level that as a criticism in relation to our cost-stack
8 analysis is, again, misplaced.

9 So in relation to all of these key issues, those
10 criticisms are unfounded and there was plainly
11 sufficient indication to warrant further enquiry, and
12 Ofcom did nothing. It didn't ask for relevant
13 information, such as any information, even the most
14 general information on margins. Mr Matthew recognised
15 that [redacted]

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17 #####
18 #####
19 Indeed what we saw in Mr Matthew's statement was
20 effectively an attempt to scramble to justify the
21 approach that had been adopted by Ofcom on an ex post
22 basis.

23 First of all, all of his adjustment approach is ex
24 post rationalisation. He accepted it had not been done
25 before. Mr Holmes said, "Well, we didn't put all of our

1 reasoning in our WMO statement", but Mr Matthew accepted
2 that all of his adjustment analysis had been done after
3 the WMO statement.

4 More than that, it is just not sound. We went
5 through this in cross-examination. We have set out our
6 position extensively in our closing submissions. Those
7 adjustments do not stack up. They are all trying to
8 move in one direction and the most important of those
9 adjustments, the ones that shift things the most, they
10 really have no justification. I am not going to repeat
11 my submissions in relation to those.

12 On that basis it was quite wrong for Ofcom, having
13 indicated that it was going to consult further on
14 pricing, to rely on statements made by people that
15 didn't assist it in this regard, and to dismiss concrete
16 material that, at the very least, gave rise to real
17 concerns here, when the threshold, as I say, was were
18 they on notice there was a potential concern, a risk,
19 a real risk, because that is the test we are dealing
20 with here.

21 If I can then move on to ground 5 and the grant-back
22 condition, Mr Holmes started off saying it is not
23 necessarily prejudicial to competition to have
24 a reciprocal deal. We accept that -- no part of BT's
25 case to say to the contrary. It is the compulsion point

1 that we are concerned with here. Is compulsion here
2 prejudicial to fair and effective competition? Yes,
3 absolutely it is. And it is clear from all of the
4 evidence that that is the position that Sky has
5 maintained throughout -- rather emphatically by
6 Ms Fyfield, and I refer to the quotes we have included
7 in our closing at paragraph 205. There is no dispute
8 about that.

9 Mr Pickford in his closing said the interim position
10 is different.

11 MR PICKFORD: That was not my only point.

12 MR BEARD: I would not presume to suggest it was.

13 MR PICKFORD: There is a factual dispute there, sir.

14 THE CHAIRMAN: It is all part of the story, Mr Pickford.

15 MR BEARD: We say the interim position is of no assistance
16 here. We are looking at long term dealings, and
17 Ms Fyfield was clear on her position about that. It is
18 not just about whether or not there could be a narrow
19 deal, it is about whether or not there is compulsion
20 here and we say that that compulsion means that you have
21 a crystallised problem in respect of which the WMO, or
22 a WMO -- and we have referred to the fact that a WMO
23 dealing with the grant-back condition does not need to
24 be specifying each and every price -- deals with that
25 problem.

1 Mr Pickford particularly, but also Mr Holmes, sought
2 to suggest that our case had morphed into a 102 case
3 here. It is not a 102 case, as we have tried to
4 emphasise throughout. What we are saying is that, when
5 you consider whether or not the operation of a GBC, the
6 grant-back condition, could prejudice fair and effective
7 competition, or does prejudice fair and effective
8 competition, what you have to think about is the fact
9 that it is being forced by a player with market power,
10 because that is Ofcom's finding, and with essential
11 content to channel inputs.

12 THE CHAIRMAN: Mr Beard, I hesitate to ask questions at this
13 late stage, but your case on ground 5, does it depend on
14 your winning on ground one or is it independent of it?

15 MR BEARD: It is entirely independent of ground 1.

16 THE CHAIRMAN: Entirely independent. Thank you.

17 MR BEARD: If Mr Holmes is right about applying of the mind,
18 you still have a situation here where there is
19 a crystallised problem and there is no good basis for
20 Ofcom having rejected a WMO in these circumstances.
21 Obviously, if we are right on ground 1, first of all,
22 the matter falls away because the decision is flawed by
23 reason of lacking forward-looking analysis and lacking
24 a proportionality assessment, and in particular it lacks
25 a proportionality assessment in relation to a grant-back

1 condition -- there is nothing there on that -- but even
2 if we are just focusing on the specific impact of the
3 mandatory condition in section 316(2), even if you don't
4 accept our submissions on that, these arguments still --

5 THE CHAIRMAN: Fine, because I think you did say at the
6 beginning that ground 1 suffused all the rest of the
7 case but I think you are putting to us that it doesn't
8 here.

9 MR BEARD: Well, it depends which bits of ground 1 you are
10 talking about. If one it is talking about the lack of
11 forward-looking consideration, that does obviously
12 suffuse all of the case and it does cover also aspects
13 of the GBC ground 5, as does proportionality of course,
14 because, as I say, in relation to the grant-back
15 condition, there is no proportionality assessment.
16 Ground 1 effectively has the two aspects. It has the
17 strict statutory construction aspect and it also has the
18 lack of compliance with the statutory condition, even if
19 we accept Mr Holmes' approach.

20 I just go back to the attempt by Ofcom and Sky to
21 suggest that, really, what we are doing is saying you
22 must hit a 102 threshold here. We are not saying that.
23 All we are saying is the sorts of considerations that
24 lead 102 to prohibit compulsion are the sorts of
25 considerations you need to have in mind when you are

1 applying section 316 -- so market power, essential
2 inputs, compulsion -- and that those are taken into
3 account under a different legal test which is
4 undoubtedly lower, the prejudicing fair and effective
5 competition test.

6 Mr Pickford at one point seemed to suggest that
7 there was not a finding that the inputs were essential.
8 If what he is saying is that for the purposes of 102
9 there is no finding that it is essential, we are not
10 demurring. This is not a 102 case and we stand on
11 Ofcom's findings in relation to the essentiality and
12 importance of Sky's content. In relation to his comment
13 that the conditions involved are not requiring supply of
14 sports channels in return for sports channels on the
15 basis of a grant-back condition, he said those are not
16 extraneous conditions because it would be manifestly
17 unfair for Sky not to be able to get money back on its
18 investments. That is not a correct approach, even under
19 102, because what you are asking yourself is whether the
20 supply by Sky is being made subject to some sort of
21 compulsion or addition of extraneous requirements, and
22 the counter deal that is being required is extraneous in
23 a 102 sense but, since we are not dealing with 102, that
24 is not critical here.

25 His key point was, what really matters is where the

1 parties end up. We have explained why that just is not
2 the correct test here. We have tried to do it by
3 analogy with other circumstances. In the start of
4 closing, I referred to the exclusive supply situation.
5 It is plain that an exclusive supply obligation being
6 imposed by a dominant undertaking is in fact per se,
7 effectively, abusive but the fact that a purchaser who
8 is not subject to any obligation actually buys all of
9 its products from a dominant supplier, the fact that
10 that might be the outcome without the exclusive
11 condition does not tell you whether or not the
12 exclusivity arrangement prejudice fair and effective
13 competition or, in that case, constitutes an abusive
14 dominant position.

15 So we say it is not right to ask yourself what
16 matters is where the parties end up, we say what matters
17 here is the compulsion being imposed by a party with
18 substantial market power who has, as Ofcom has found,
19 essential inputs and is imposing that compulsion
20 requirement in relation to the supply of those essential
21 inputs.

22 Just picking up one or two miscellaneous other
23 points, there was a suggestion that the provision of
24 Sky Sports 1 and 2 on the Cardinal platform by IPTV is
25 voluntary. Mr Matthew fairly accepted that that was

1 irrelevant.

2 Turning then to some of the more technical points
3 that Mr Pickford dealt with, and I will deal with these
4 very swiftly, both Mr Pickford and Mr Holmes sought to
5 say, "Well, Dr Padilla's reports are unrealistic". We
6 say, as we have explained in closing, they are looking
7 at real world, in particular when you are looking at,
8 for instance, the static models, they both entirely
9 ignore all of the rich data and information you get from
10 the consumer choice modelling exercise. So, in relation
11 to that, it is clear that they were looking at the real
12 world. In relation to the dynamic modelling exercises,
13 we also have set out why it is that Dr Padilla must be
14 treated as providing a clear statement of how these
15 matters work, which -- and I think this is important in
16 the face of these criticisms from Sky -- provides
17 an account of the dynamic incentives that Ofcom has
18 accepted in the WMO.

19 If one looks, for instance, at paragraph 6.27 and
20 6.28, one sees that Ofcom is recognising these dynamic
21 incentives and Sky are effectively collaterally trying
22 to overturn those findings. They are not entitled to do
23 so. Clearly Sky had misunderstood how Dr Padilla ran
24 that model, considering all subscribers. Mr Pickford
25 suggested that there was nimble repositioning by

1 Dr Padilla. Dr Padilla may well be nimble but he was
2 not repositioning himself at all in relation to those
3 matters. It had been clear over time and there is no
4 contradiction in his model in relation to those issues.

5 Going back to the other criticisms that Mr Pickford
6 made of Dr Padilla, and in particular his new emphasis
7 on the lack of consideration of subscriber fees, just
8 picking it up briefly, because Mr Pickford was in part
9 giving new evidence as he went along, it is not
10 factually accepted that per subscriber fees approaches
11 are most common.

12 Mr Facenna took Dr Padilla to passages in Padilla 2,
13 the second report, explaining why it was that initially
14 the modelling didn't include wholesale fees. That was
15 because it was concerned it would bias the model in
16 favour of BT. When Ofcom asked why there were not lump
17 sum fees or wholesale fees in the modelling, we explored
18 the modelling with an inclusion of lump sum fees and
19 showed that that made no difference, and when Ofcom
20 started asking about inclusion of pure per subscriber
21 fees, we actually built an extension which showed how
22 these matters might operate but that those issues, if
23 taken into account, would not be either good for
24 competition or consumers.

25 He suggests in passing, by reference to 7.24 in his

1 report, that the subscriber fees that should be modelled
2 should not be so high as Dr Padilla suggested. He
3 refers to an annex A, which involves all sorts of
4 algebra we have never seen before. It is quite
5 inappropriate for that sort of material to be submitted
6 at this stage. In any event, having received that
7 overnight, we did canvas it with Dr Padilla. If the
8 tribunal were minded to consider any of that material,
9 we would need to respond to it because we think, having
10 gone through it, it is wrong.

11 It is just worth mentioning that Dr Caffarra, who is
12 the relevant person who should have dealt with all of
13 these things, raised the issue of subscriber fees in her
14 report but actually refused to model them. What we are
15 seeing here is an attempt to bring a second round of
16 attacks on Dr Padilla which were not raised previously
17 in relation to any of these issues.

18 His analysis was entirely sound in relation to these
19 matters. There is no good criticism of them and the
20 idea that Dr Padilla's report should have been being put
21 to Ms Fyfield in circumstances where there is an expert
22 economist dealing with these issues is something of
23 a remarkable and indeed a desperate suggestion, trying
24 to undermine the basis on which we proceeded here.

25 So we are left in these circumstances with

1 a situation where we say that Ofcom has not recognised
2 the significant risks that exist when it decides to
3 remove the WMO. It has not carried out a legally
4 appropriate analysis. It didn't look at matters
5 properly on a forward-looking basis. It didn't carry
6 out a proportionality assessment. It has relied on
7 agreements that do not tell you about real risk into the
8 future, particularly in relation to pricing. It has not
9 properly recognised how, in relation to the grant-back
10 condition, BT could not rationally accede to it and that
11 that will stymie the supply.

12 This is all in a context where Sky maintains
13 continually it is a willing wholesaler. If so, why does
14 it insist on a grant-back condition in these
15 circumstances? It is because it thinks it is fair to do
16 so. It doesn't recognise that its position, the
17 substantial market power and essential input, makes it
18 different here, and Ofcom has failed to take that into
19 account when concluding on the risk and the concerns of
20 the existing problems relating to the grant-back
21 condition.

22 Maintaining the WMO in the present situation was
23 plainly the appropriate course for Ofcom to have
24 maintained and even if, in particular in relation to
25 ground 5, a WMO were to be focused less on specific

1 prices and merely on the fact of ensuring supply, what
2 that would do is generate a degree of certainty,
3 certainty that enables a key rival in pay TV to take its
4 competition and its competitive offering to Sky and
5 compete as Ofcom should want it to, and this tribunal
6 can ensure will happen.

7 Unless I can assist the tribunal further, those are
8 our closing submissions.

9 THE CHAIRMAN: Just to say, I think we are not inclined to
10 pursue further algebra, so we shall not be requiring
11 further material from you.

12 MR BEARD: I am grateful.

13 THE CHAIRMAN: A line has to be drawn somewhere.

14 So that concludes the oral hearing. I think, on
15 this occasion, we are going to probably not give
16 an ex tempore judgment. You will get a judgment in due
17 course.

18 Can I thank everybody for their very hard work and
19 enthusiastic and vivid imagery that has been deployed
20 and has suffused the argument, and also for putting up
21 with the necessary but complicated confidentiality
22 arrangements which we must adhere to and which are not
23 always easy but which are necessary, dare I say, in the
24 real world.

25 Thank you very much. Unless there is anything else,

1 I think that is it.

2 (1.09 pm)

3 (The hearing concluded)

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I N D E X

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