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4 record.

5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No.: 1426/3/3/21

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8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Friday 4 February 2022

14  
15 Before:  
16 **BEN TIDSWELL**  
17 (Chairman)  
18 **DR CATHERINE BELL CB**  
19 **PROFESSOR MICHAEL WATERSON**  
20 (Sitting as a Tribunal in England and Wales)

21  
22  
23 BETWEEN:

24 **CITYFIBRE LIMITED**

25  
26  
27 Appellant

28 v

29  
30 **OFCOM**

31 Respondent

32  
33  
34 **A P P E A R A N C E S**

35  
36 Josh Holmes QC, Jessica Boyd and Isabel Buchanan (instructed by Bristows LLP appeared  
37 on behalf of the Appellant)

38 Monica Carss-Frisk QC, Naina Patel and Khatija Hafesji (instructed by Ofcom appeared on  
39 behalf of the Respondent)

40 Robert Palmer QC and Laura John (instructed by Addleshaw Goddard LLP appeared on  
41 behalf of British Telecommunications plc)

42 Philip Woolfe (instructed by Towerhouse LLP appeared on behalf of Sky UK Limited)  
43 Fergus Randolph QC (instructed by TupperS Law appeared on behalf of County Broadband  
44 Limited, Jurassic Fibre Limited, Swish Fibre Limited and Zzoomm plc)

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1  
2 **Friday, 4 February 2022**

3 **(10.30 am)**

4 THE CHAIRMAN: Yes, good morning, everyone. These proceedings are being live  
5 streamed and, of course, many are joining on the Microsoft teams platform, so I must  
6 start, therefore, with the customary warning. These are proceedings in open court,  
7 as much as if they were being heard before the Tribunal physically in Salisbury  
8 Square House. An official recording is being made and an authorised transcript will  
9 be produced but it is strictly prohibited for anyone else to make an unauthorised  
10 recording, whether audio or visual, of the proceedings and a breach of that provision  
11 is punishable as a contempt of court.

12 So thank you, everybody and thank you for your skeletons and for your efforts to  
13 co-operate to agree matters.

14 In terms of running order this morning, what we suggest is that we deal with the  
15 uncontroversial items in the agenda first. So I think that is forum, confidentiality and  
16 disclosure. And then go on and address the proposed interventions, following which  
17 I anticipate that we will give a ruling as to interventions but not necessarily with  
18 reasons at this stage, depending on where we end up and then after that, it seems  
19 sensible to go on and talk about the future conduct of the appeal which I expect will  
20 be clearer once we know where we are with the interventions.

21 Are counsel happy with that approach and is there anything else we should be  
22 concerned with today?

23 MR HOLMES: Good morning, Sir, members of the Tribunal. Very happy for my  
24 part. I appear for CityFibre, the Appellant. I hope that you will have received  
25 overnight a revised directions order which Ofcom has prepared to reflect the  
26 agreement which has been arrived at between the two main parties, Ofcom and

1 CityFibre, as to the conduct of the case. It contains proposals, obviously subject to  
2 the Tribunal's views but it works towards one of the sets of dates that we understand  
3 the Tribunal is available.

4 THE CHAIRMAN: Yes. Thank you, Mr Holmes. We did have that. I'm not sure  
5 that's gone to the proposed interveners.

6 MR HOLMES: No.

7 THE CHAIRMAN: And, in fact, I think the only material thing, as far as I'm aware, is  
8 the question of timetabling. So maybe it would be helpful -- well, we can return to  
9 that once we've dealt with the interventions, but it might be helpful if that was made  
10 available in the period in which we're retiring to talk about the intervention, so at least  
11 counsel for the interveners that succeed, if one can put it that way, have the  
12 opportunity to make observations about it when we reconvene.

13 MR HOLMES: Yes, of course, Sir, we'll try to make arrangements between us. I'm  
14 sure that we can get it across to the interveners.

15 THE CHAIRMAN: Great, thank you. So if people are happy to proceed on that  
16 basis and there's nothing else that anybody wishes to raise at this stage, shall we  
17 start with forum, which I think seems to be straightforward and agreed by everybody,  
18 England and Wales.

19 MR HOLMES: Yes, Sir, we're all agreed that the forum is England and Wales.

20 THE CHAIRMAN: Great. Thank you. Confidentiality, thank you for the draft order,  
21 I understand that's agreed by all parties, including the proposed interveners?

22 MR HOLMES: Yes, Sir, yes, it's an uncontroversial order in a form that's well  
23 familiar to the Tribunal. So subject to any comments or concerns that the Tribunal  
24 has, that can be made today.

25 THE CHAIRMAN: Thank you. I don't think we have any concerns on that. Then the  
26 last of the easy items is disclosure and our understanding is that no further

1 disclosure is sought by any of the parties at this stage.

2 MR HOLMES: That's correct, Sir.

3 THE CHAIRMAN: That's dealt with those. In that case we can move on to  
4 interventions and it's clear to us that this is a significant commercial matter for all of  
5 the proposed interveners and it seems as a result, on that basis, that the Appellant  
6 and the Respondent accept sufficiency of interest under rule 16(1) and that does  
7 seem to be common ground and the question does seem to be whether the Tribunal  
8 should exercise any discretion, either to permit the intervention or to limit the scope  
9 of any intervention that's permitted. So that's the basis on which we're proceeding,  
10 unless somebody tells us otherwise.

11 MR HOLMES: Yes. Right, Sir.

12 THE CHAIRMAN: Yes. Thank you. Just in terms of what we're interested in, in  
13 addition, obviously, to the specific points that arise in relation to different applications  
14 for intervention, we are interested in the question of what are the limits on  
15 interveners to introduce a case or evidence going beyond what the appellant or  
16 respondent would normally be permitted. And there's that reference in JD Sports,  
17 paragraph 27 and again in the H3G case, Hutchinson 3G case, at 44 and it may well  
18 be there's some difference, depending on whether one has an appellant or a  
19 respondent in answering that question, but we're interested just in that question of  
20 whether the interveners are in the same position, essentially, as appellants or  
21 respondents in relation to introducing argument or evidence and then we're  
22 interested in how that applies to the grounds that have been advanced by CityFibre  
23 here and in particular, for example, what would the respondent be permitted to  
24 introduce in relation to those items. And that takes us to the point about the internal  
25 logic of the decision, I think is the way you put it, Mr Holmes.

26 MR HOLMES: That's right, Sir.

1 THE CHAIRMAN: Yes.

2 Then I think the third point we're interested in is a general point, is this question of  
3 the merits and if, as is said, I think, by you, Mr Holmes, you're bringing a traditional  
4 judicial review case, what, if any, significance does the requirement to take account  
5 of the merits have in this case and is there a particular submission that any party is  
6 making that might change the analysis in relation to the former two questions  
7 because of that point. So perhaps if you could bear those in mind as we go along, it  
8 would be helpful to have your views on those.

9 What we thought we might do is deal with the interventions as separate applications.

10 I'm afraid that does make it a bit more cumbersome but I think that's probably the  
11 right way to do it and we were thinking we would start with BT, Mr Palmer, if you're  
12 happy to kick off.

13

14 **Submissions by MR PALMER**

15 MR PALMER: Yes, Sir, members of the Tribunal, I am. Thank you very much. This  
16 is my application on behalf of BT, for BT to intervene. Sir, as you have rightly said,  
17 we're in the territory of rule 16 which imposes a threshold question of a requirement  
18 of sufficient interest which everyone has agreed is met. So the sole question  
19 becomes one under rule 16(6), which is how should the Tribunal exercise its  
20 discretion, given that that provides that the Tribunal may permit an intervention,  
21 where that test of sufficient interest is made out. And there is some authority as to  
22 how that discretion should be exercised. It is common ground that it should be  
23 exercised in accordance with the rule for governing principles and that is the main  
24 obligation on the Tribunal, to ensure that each case is dealt with justly and at  
25 proportionate cost. And that includes, this is rule 4(2)(d), that it's dealt with  
26 expeditiously and fairly.

1 Now, I'm going to come in a moment to Mr Holmes' main contention that the real test  
2 boils down to whether you can add value as an intervener and that submission  
3 needs to be dealt with with a great deal of caution because the circumstances in  
4 which the test is simply whether you're going to add value are very context specific  
5 and I'm going to show you in what way in a moment. I'm just going to start by  
6 reminding the Tribunal that the main test is what is in accordance with the governing  
7 principles, including fairness.

8 So if we go to the authorities, the B&M case which you'll find in the authorities bundle  
9 at tab 11.

10 THE CHAIRMAN: Yes. Thank you.

11 MR PALMER: Page 328.

12 THE CHAIRMAN: Yes. Mr Palmer, I think you might have gone on mute.

13 MR PALMER: No idea how that happened, Sir. I had. Yes.

14 I was at paragraph 9 on page 328, if you're with me that far.

15 THE CHAIRMAN: Yes, thank you.

16 MR PALMER: And there you see, really, the principles I've just set out:

17 "Once you get past the threshold question [three lines up from the bottom of the  
18 page], the exercise of the discretion will be carried out in accordance with the  
19 governing principles, in particular so as to ensure that the case is dealt with justly  
20 and at proportionate cost."

21 And that doesn't differ substantially from the test previously set out by the Tribunal in  
22 BSkyB, namely whether allowing the intervention would be consistent with the just,  
23 expeditious and economical conduct of the (audio cuts out).

24 That is the (audio cuts out) exactly which element (audio cuts out), what is  
25 expeditious and what is economical on a case-by-case basis. You'll find the same  
26 principle, I needn't turn it up, in the Sabre case, which is the authorities 13,

1 paragraph 8. You'll really see the same test reiterated in the same terms. It's the  
2 governing principles which count.

3 THE CHAIRMAN: Mr Palmer, sorry to interrupt you. We lost you for a minute when  
4 you were just articulating the key point coming out of that and I think the connection  
5 between the paragraph and where you were saying we need to look at it on a case  
6 by case basis. Would you just mind saying that again. We just lost your connection.

7 MR PALMER: I'm sorry, we're just looking at the top of page 329. The key test  
8 really being indistinguishable from the test set out in B Sky B, whether allowing the  
9 intervention would be consistent with the just, expeditious and economical conduct of  
10 the proceedings.

11 Now, in different circumstances, different elements of that test may come to the fore  
12 and B&M and Sabre, which are the two cases which Mr Holmes relies upon, are very  
13 different in context to the position that BT finds itself in this case.

14 THE CHAIRMAN: So if you're saying -- essentially, you're saying you need to look  
15 at the circumstances in each case.

16 MR PALMER: Yes.

17 THE CHAIRMAN: And that actually is the right approach, rather than just imposing a  
18 test of whether it adds value or not. Is that the position?

19 MR PALMER: That's right. Sir, in some contexts, and B&M is one and Sabre is  
20 another, that will boil down to whether the intervener can add value. But in the  
21 present context it's my submission to you that there's a fundamental issue of fairness  
22 to BT which was not present in the same way in Sabre and B&M, because in this  
23 context, as you will know, this appeal concerns the terms of business upon which BT  
24 is trading. It's its own terms which of are BT's own devising, the Equinox offer, which  
25 Ofcom has, in effect, approved by deciding not to intervene to disapprove them and  
26 so that has a direct impact on BT in a way which was not present in either B&M or

1 Sabre.

2 Let me just remind what B&M was about. That, if you turn back a page to page 327,  
3 was a challenge to a decision of the CMA to add B&M, who was a grocer business,  
4 to the list of designated operators who were subject to the groceries code. And the  
5 proposed intervention was from Tesco, on this application for judicial review by B&M  
6 and Tesco's interest was just that: look, we think there should be a fair playing field  
7 for all big grocers and our interest is ensuring that the CMA's decision is upheld  
8 because in fairness to us, Tesco, B&M should be playing on the same level playing  
9 field as everybody else. And the question then, in that context, was: well, what is  
10 Tesco, beyond indicating that broad interest in the playing field being level, what is  
11 B&M going to add?

12 In Sabre, which if you turn forward in the authorities bundle to tab 13, you will  
13 remember that this was a case in which the CMA had prohibited a merger, it had  
14 prohibited Sabre's acquisition of Farelogix and the proposed intervention was from  
15 the American Society of Travel Advisers and their interest was that, effectively, travel  
16 advisers had an interest, representing travel agents had an interest in the end  
17 efficiency and economy of the travel business as a whole, in effect, and whether this  
18 merger would in fact improve the efficiency of the civil aviation business.

19 So in neither case were Sabre nor B&M's commercial interests directly, as in  
20 immediately, affected by the decision of the CMA. It wasn't their terms of business  
21 which was in issue, it wasn't their merger which was in issue. It wasn't their being  
22 subjected to a regulatory regime that was in issue. Whereas in this case, BT is the  
23 operator with significant market power which has been subjected to SMP conditions.  
24 It's BT whose terms of business have to be approved by Ofcom. It's BT whose  
25 terms of business the Appellant in this matter say will have an unacceptable effect  
26 on competition and it's BT which must be in a position to comment on the evidence

1 | relied upon by both the Appellant and, indeed, Ofcom, the Respondent.

2 | The same may be said of the JD Sports case, Sir, which you mentioned a moment  
3 | ago. That's at authorities tab 14. That was concerning the acquisition by JD Sports  
4 | of Footasylum and it was Frasers Group who were seeking to intervene in that  
5 | matter and in the end, I don't think they even passed the test of sufficient interest.  
6 | But, Sir, you mentioned the reliance by Mr Holmes on paragraph 21 of that decision,  
7 | which you'll see (audio cuts out) bundle (audio cuts out), where you'll see that this  
8 | was an application for judicial review of the CMA's decision contained in its final  
9 | report and the final sentence --

10 | MR HOLMES: I'm very sorry to interrupt, Mr Palmer. You cut out, I'm afraid, on my  
11 | connection, at the moment when you were giving the reference to the case that  
12 | you're currently looking at. Would you mind repeating it for me and I apologise.

13 | MR PALMER: It's JD Sports at tab 15, paragraph 21, which is on page 368 of the  
14 | bundle.

15 | MR HOLMES: I'm grateful.

16 | MR PALMER: This was, as I said, a merger case, acquisition by JD Sports of  
17 | Footasylum. Frasers had sought to intervene to support the CMA's decision. That  
18 | was refused but part of the context for that at paragraph 21 is the passage, Sir, to  
19 | which you made reference earlier, the sentence at the end of that paragraph, "There  
20 | is very limited scope for the introduction of new evidence, whether by the parties or  
21 | by an intervener." And that was the position in all three of the cases I have  
22 | mentioned: B&M, Sabre and this case, JD Sports, all of which were what I would call  
23 | pure reviews of the CMA's decision.

24 | In this case, different -- (audio cuts out).

25 | THE CHAIRMAN: Mr Palmer, I'm sorry, you're dropping in and out a bit. Do you  
26 | want to try it again? I think it probably is your connection on this occasion at least,

1 I don't know if there's anything you can do about that.

2 MR PALMER: There's nothing I could do apart from leave and dial back in again if  
3 it's persistent.

4 THE CHAIRMAN: Well, let's keep going but I think if it does do that, we might have  
5 to ask you to do that, because it just starting to occur a little bit.

6 MR PALMER: Yes, thank you. Okay. Well, let me know.

7 So I'm just making the point that in all three of the cases I've mentioned, B&M, Sabre  
8 and JD Sports, it was a pure JR (audio cuts out).

9 THE CHAIRMAN: I'm sorry, Mr Palmer, I'm going to have to ask you to drop out and  
10 come back in again, otherwise I think we're not going to get everything you're saying.

11 (Pause)

12 MR PALMER: Sir, I hope you can hear me now.

13 THE CHAIRMAN: It sounds good so far. I think we just got to JD Sports,  
14 paragraph 21. You were talking about the three cases being pure judicial review.

15 MR PALMER: Pure judicial review because the test on the statute is one of judicial  
16 review but there's an additional element in the context of a Communications Act  
17 appeal which was not present in any of those cases and that is the element imported  
18 by what is now article 31 of the European electronic code, communications code, or  
19 it used to be in article 4 of the framework directive, which is the requirements on the  
20 Tribunal to have due account of the merits, take due account of the merits. And it is  
21 wrong for Mr Holmes to rely on this test, paragraph 21 of the JD Sports case in a  
22 Communications Act context because, as I'm going to show you, to do that is  
23 contrary to Court of Appeal authority which applies in this sector, not in the merger  
24 sector, Enterprise Act sector with which that case was concerned. So that is  
25 emphatically not the approach to be taken in this context and that position is not  
26 changed by the fact that Mr Holmes says his challenge is confined to what he calls

1 traditional judicial review grounds. And I will return to this but the short point now is  
2 first of all, even on the traditional judicial review approach, as he accepts in his  
3 skeleton, there is still an onus upon him to show the materiality of the errors that he  
4 alleges.

5 THE CHAIRMAN: So can I just -- sorry to interrupt you. I just want to get a sense of  
6 where we're going with it. I understand you want to take us to the cases but just so  
7 I understand, are you saying that in this particular case, notwithstanding the way in  
8 which CityFibre's put its challenge, there is a difference of approach to be taken  
9 because there is the potential for a challenge to be made on the merits or are you  
10 saying that the nature of CityFibre's challenge is one that permits either a broader  
11 approach to JR or some other way of meeting the requirements of the merits.  
12 I wasn't sure which way you were going with your point.

13 MR PALMER: It's not the former, it's closer to the latter. The first point is that even  
14 on Mr Holmes' case, he has to engage with the merits. That is because he has to  
15 show the materiality of the errors he alleges, but in the case of ground 1B, which is  
16 the consultation challenge, the allegation that the consultation was inadequate, he  
17 relies on the evidence of Mr Dunn to show that that failure was material and, as  
18 he puts it, to CityFibre's prejudice. He puts forward Mr Dunn's new evidence. We  
19 will want in, fairness, for reasons I'll explain, an opportunity to comment on that  
20 evidence. The real thrust of that evidence, insofar as it's material to the consultation  
21 point, is at present, behind the cloak of the confidentiality redactions. So we cannot  
22 say at the moment whether or not we would accept it and what it is we would say  
23 about it. The point at this stage is one of fairness. We have to have that opportunity  
24 and, unless Mr Holmes, who has been busily shaking his head whilst I've been  
25 making the submission, unless he's going to say to the Tribunal "we place no  
26 reliance upon this evidence at all, we withdraw it and we now accept it's not material

1 to any of our grounds of appeal", unless he says that, we, in fairness, will need an  
2 opportunity to comment upon it because it is based on assumptions, as to what  
3 Openreach, BT Openreach, is going to do in future with regards to the roll out of its  
4 FTTP network, both as to when and as to where. Those are assumptions made by  
5 Mr Dunn and by Cartesian, his consultants, whose report we have not seen. It is  
6 said to be material to his ground 1B at least. It's also referred to under ground 1A. If  
7 those assumptions are going to be made about Openreach's network, we need an  
8 opportunity to review that and we may or may not, depending on what those  
9 assumptions are, have something to say about it.

10 So even (audio cuts out) evidence, and I'm going to give more examples later on --

11 THE CHAIRMAN: Sorry to interrupt you again, we just lost you again for a second.  
12 The last sentence. You might want to keep an eye on your connection again.

13 MR PALMER: So even on his own case, he has to rely on that evidence to establish  
14 materiality, unless he now disowns it entirely and makes assumptions about  
15 Openreach's network, Openreach's coverage, including Openreach's future plans  
16 and we, in fairness, need an opportunity to comment upon that. That's not evidence  
17 that was before Ofcom, so Ofcom does not have our response to that evidence. We  
18 need that opportunity. So straightforwardly, even on his own approach.

19 But secondly, as again I will develop in due course, the point is that Ofcom, in  
20 responding to this appeal, is not confined to the evidence that was before it at the  
21 time it made its decision. I'll show you Court of Appeal authority to that effect and  
22 that is why it is straight away distinguishable from the strict JR approaches under the  
23 Enterprise Act, such as JD Sports. And, similarly, interveners are not restricted to  
24 that evidence. And, in particular, Ofcom has already adduced two witness  
25 statements, including that of Mr Matthew, explaining in more detail the approach that  
26 it has taken, explaining that CityFibre has misunderstood the test which it, Ofcom,

1 applied, explaining that when it said it was testing at the first stage of its analysis to  
2 see if there was any potential impact on altnet competition, that that imported tests  
3 as to likelihood and materiality.

4 Now, Mr Holmes might say to you, when it comes to his turn, "we accept that Ofcom  
5 were entitled to find that there was no likely or material impact on competition. Our  
6 challenge is only confined to whether or not that was, in fact, the test that it should  
7 have applied and we say the test it should have applied was one of there being  
8 clearly no impact of any kind whatsoever."

9 If he says that, I will accept the amount of evidence that we can bring to bear on that  
10 issue will be much more limited. But if he does not accept that, and we, of course,  
11 don't have any reply from CityFibre to Ofcom's evidence, but if he engages with  
12 Ofcom's evidence that no impact was either likely or material, then those are merits  
13 points which the Tribunal can and must take into account, pursuant to article 31 and  
14 they're ones which, in fairness, BT must be heard on as well.

15 So those are two respects in which we are not in the same territory as a strict JR, a  
16 strict JR in the Administrative Court or even in the CAT on an enterprise appeal,  
17 2002, JR of a merger's decision, we really are just looking at the material that was  
18 before the decision-maker at the time and looking at it in much more narrow terms.  
19 But that is changed by the two respects which I have indicated in this article 31  
20 context.

21 THE CHAIRMAN: So can I just -- on your second point. So it would be consistent  
22 with a normal JR or a strict JR -- let's call it a normal JR -- be consistent with a  
23 normal JR for the regulator or the decision-maker, pursuant to their duty of candour  
24 to explain what they've done and be transparent about that and that is obviously,  
25 I think, the way that Ofcom has approached the matter and it appears -- indeed, from  
26 their own documents, I think they say that. Are you saying that in that exercise

1 they've gone beyond that to address merits points which engage the taking account  
2 of the merits in a way that they wouldn't have been permitted to or might not have  
3 ordinarily done in a normal JR context?

4 MR PALMER: No, no, I don't say they've gone further. It's a slightly more nuanced  
5 point than that. What they have done specifically is to take issue with Mr Holmes'  
6 contention that the test which Ofcom had to apply was that there would be -- at stage  
7 one -- clearly no impact and they say: no, no, that is wrong. The premise upon  
8 which your entire appeal is brought in that respect is incorrect. When we were  
9 looking for whether there was or was not any potential impact, that imported issues  
10 as to likelihood and materiality of any impact which might eventuate from the  
11 Equinox terms.

12 Now, Mr Holmes has not yet had the opportunity of engaging with that further  
13 explanation of the test which Ofcom applied and Mr Holmes may well wish to engage  
14 with the evidence of Mr Mathew which explains why there was no likely and material  
15 impact of the Equinox terms. This, CityFibre have not yet done. But to the extent  
16 that any issue is taken with the likelihood and materiality of those impacts further  
17 down the line in this appeal, BT must be cited, in fairness. BT must have an  
18 opportunity to comment on that likelihood and materiality, given the centrality of its  
19 interest in this matter. Now, it is not for today's business to predict or seek to predict  
20 exactly how CityFibre might respond to that evidence and exactly how it might refine  
21 its case, unless of course, Mr Holmes tells you that he accepts all of that evidence,  
22 that he accepts that the impact would not be likely or material and simply hangs his  
23 hat on the sole, pure point of law that Ofcom somehow misdirected itself in applying  
24 that test and ought to have focused only on a test of there being clearly no impact.

25 THE CHAIRMAN: Yes. I see. So I think I understand that, just to make sure that  
26 I've got the submissions. So you're saying that because Ofcom has responded in

1 that way, it effectively opens the door?

2 --

3 MR PALMER: It does.

4 THE CHAIRMAN: -- for CityFibre to take a different position, different from the one  
5 so far articulated, in which they might be addressing merits points rather than the  
6 points that have been addressed to date.

7 MR PALMER: And given the evidence of Mr Dunn, I would be astonished if it took  
8 the position that no impact was either likely or a material. In fact, Mr Dunn's  
9 evidence suggests that CityFibre thinks the impact would be likely and material. But  
10 the moment you have engagement with those merits and that engagement, as I say,  
11 is entirely legitimate under article 31, BT's interests are directly engaged and we  
12 wish to respond to anything which is said about those matters. So absent  
13 a concession by Mr Holmes along the lines that I have set out, we say, in fairness,  
14 we have to be there, given that this is our terms, our conditions, our business and  
15 our, ultimately, article 1, protocol 1 rights which are in play.

16 So this is all very different from the precedents relied upon by Mr Holmes. We're not  
17 in Sabre, B&M territory. The extent to which we can add value, to the extent that it's  
18 necessary to add value, is, to be perfectly candid, rather unknown to us at the  
19 moment because we cannot see the confidential material. What I can say with  
20 complete equal amount of candour and straightforwardness is, if, having been  
21 admitted as an intervener, if, having been admitted to the confidentiality ring, we look  
22 at it and we say: you know what, there's really nothing we can add to what Ofcom  
23 has already said here. We can't add (audio cuts out) and BT (audio cuts out)  
24 expense which the Tribunal also has.

25 THE CHAIRMAN: Sorry, we just lost you in the last sentence. So I think you said  
26 you --

1 MR PALMER: We will not duplicate. We have no interest in incurring our own time  
2 or expense providing evidence to the Tribunal which the Tribunal already has. The  
3 key point at this stage is one of fairness to BT in having that opportunity to review  
4 that confidential material, initially at least, through its external advisers only, and  
5 taking a view as to the extent to which further evidence is required later on down the  
6 line.

7 So I just want to make good some of my submissions on the law. I do appreciate the  
8 Tribunal will have some familiarity with this, but may I just take you briefly to the  
9 authorities.

10 There's EE at tab 8 of the bundle, the authorities bundle, a decision of the Court of  
11 Appeal, and it's at page 165.

12 THE CHAIRMAN: Yes.

13 MR PALMER: It's looking at the appeal standard. Paragraph 24. It is all in what  
14 was then the article 4, now the article 31 context:

15 "The appeal is against the decision, not the reasons for the decision. It is not  
16 enough to identify some error in reasoning. The appeal can only succeed if the  
17 decision cannot stand in the light of that error. If it is to succeed, the appellant must  
18 vault two hurdles. First, it must demonstrate the facts, reasoning or value judgments  
19 on which the ultimate decision is based are wrong and, secondly, it must show [and  
20 here we are dealing with a price control measure, so] its proposed alternative price  
21 control measure should be adopted by [here] the Competition Commission. If the  
22 Commission Or Tribunal concludes that the original decision can be supported on a  
23 basis other than that on which Ofcom relied, then the appellant will not have shown  
24 that the original decision is wrong and will fail."

25 So just pausing there, it does not assist Mr Holmes to say, for example, in relation to  
26 ground 2, "our target is the internal logic, ie the reasoning of Ofcom." Even if it

1 vaults that hurdle, it still has the second hurdle to vault which is to show that,  
2 therefore, the outcome was wrong. And you will have noted Sir, if I can ask for  
3 a moment to pick up the other bundle, bundle 1, tab 2, which is CityFibre's notice of  
4 appeal --

5 THE CHAIRMAN: Yes.

6 MR PALMER: If I could ask you within that bundle to turn to the final page of the  
7 note of appeal, which is at page 32.

8 THE CHAIRMAN: Sorry, just give me a minute. Sorry, it's just going between  
9 bundles can be a little bit cumbersome if they're not open and I hadn't expected you  
10 to do that.

11 MR PALMER: I'm sorry, I'm Luddite enough, even in the telecoms world, to use  
12 paper.

13 THE CHAIRMAN: Not at all. So bundle 1 --

14 MR PALMER: Tab 2.

15 THE CHAIRMAN: Tab 2.

16 MR PALMER: Page 32.

17 THE CHAIRMAN: Yes, I have that, thank you.

18 MR PALMER: And it's paragraph 58, where you can see what CityFibre's actually  
19 inviting the Tribunal to do:

20 "CityFibre seeks by way of relief, an order quashing Ofcom's conclusion on question  
21 1."

22 And:

23 "2. An order directing Ofcom to conduct an analysis of the Equinox offer under  
24 questions 2 and 3."

25 In other words, it is asking the Tribunal to find that the answer to question 1 is yes,  
26 there is potential impact, therefore proceed to questions 2 and 3. So it is ultimately

1 asking the Tribunal to find on the merits that question 1 is met and it does so by  
2 saying: look, any other conclusion is irrational. That doesn't change the fact, the fact  
3 that it puts it in that JR term, that it still must succeed in showing, whether irrational  
4 or not, that Ofcom reached the wrong answer on question 1. That's why they are  
5 saying to the Tribunal: we want you to quash the answer on question 1. There's only  
6 one answer which could rationally be given, so they should have gone on to consider  
7 questions 2 and 3 under the test.

8 So looking back at EE, if you still have that open on another tab -- I don't know if you  
9 do, Sir, if you have that accessible?

10 THE CHAIRMAN: I do, yes.

11 MR PALMER: Terrific. Paragraph 24. Again, their second hurdle in the context of  
12 this case is to show that, really, only one answer should have been or could have  
13 been given to question 1.

14 THE CHAIRMAN: Yes.

15 MR PALMER: So that is the test and they appear to say that they can meet that test  
16 but that is the test that they have to show that Ofcom was wrong on question 1,  
17 whether by reason of an error in reasoning or otherwise.

18 Now, this case was determined, that's the EE case, was determined in 2013, which  
19 is before the amendments came in to the Communications Act, bringing in the new  
20 judicial review wording. But, Sir, you'll be happy to recall that the question of what  
21 difference that makes has been considered by the Tribunal already in the case of  
22 Virgin Media which is at tab 15 of the authorities bundle, a decision of Mrs Justice  
23 Falk, sitting with Mr Doran and Mr Holmes and within tab 15 of the authorities  
24 bundle, it's page 388, beginning at paragraph 52.

25 THE CHAIRMAN: Yes.

26 MR PALMER: And I will take this quickly, Sir, because I realise that in every

1 | telecoms appeal, the Tribunal is shown these authorities and that they are neatly  
2 | summarised here in fact. But at 52 it's recognition that now the new domestic appeal  
3 | standard in section 194A is has come in. There's no dispute that this needs to be  
4 | interpreted, compliant here with what was then (audio cuts out) in the present case  
5 | before you, in light of article (audio cuts out). And it makes that clear, that you need  
6 | to have care in considering early case law but under the T-Mobile case, it's clear that  
7 | the same standard for success would have to be shown, whether the case was  
8 | brought by way of judicial review or appeal, and that's paragraph 53. And  
9 | paragraph 55, a reference to Lord Sumption saying that what article 4 required was a  
10 | right of appeal not just being a right of judicial review because of the requirement to  
11 | ensure that the merits of the case are actually taken into account. So that reiterating  
12 | what the Court of Appeal had already said in T-Mobile. And then at paragraph 56,  
13 | this is the Court of Appeal case, BT v Ofcom, about introduction of new evidence.  
14 | So this is the distinction between our case and the JD Sports case, which Mr Holmes  
15 | refers to, which you referred to earlier, which held, paragraph 60, that there was  
16 | nothing in article 4 confining the function of the appeal body to a consideration of the  
17 | merits as they appeared at the time of the decision under appeal:

18 | "The expression 'merits of the case' is not synonymous with the merits of the  
19 | decision of the national regulatory authority."

20 | Then over the page you can see a reference to what Mr Justice Green, as he then  
21 | was, says in the Hutchinson 3G case. The focus is Ofcom's decision and whether  
22 | Ofcom got their decision materially wrong and that, going on at 58, recalling the EE  
23 | case:

24 | "It's not enough to identify some error in the reasoning of the decision, it can only  
25 | succeed if the decision cannot stand in light of the error."

26 | So that EE ratio surviving the introduction of the new domestic appeal standard, in

1 light of the effect of article 4.

2 Now, there's one authority there which I just need to look at in a bit more detail. It's  
3 the Hutchinson case, because Mr Holmes places some reliance upon this. You will  
4 find that at tab (audio cuts out) --

5 THE CHAIRMAN: Sorry, can you give the reference again, please. Mr Palmer, are  
6 you there?

7 MR PALMER: I'm sorry, Sir, you cut out on my connection, at least then. I didn't  
8 hear what you just said.

9 THE CHAIRMAN: I just asked for the reference but I found it myself. So tab 89.

10 MR PALMER: That's it, and within that, paragraph 189, please.

11 THE CHAIRMAN: Yes.

12 MR PALMER: From paragraph 39, you'll see a similar review of authority and at 40,  
13 the point I've just taken you to from Mrs Justice Falk's decision:

14 "It's not a de novo hearing on the merits, it is a challenge to the decision. It is for this  
15 reason that the test focuses itself on the negative, ie whether the decision is  
16 materially wrong."

17 At 41, the second point concerns the task confronting the court:

18 "This will depend upon ... "

19 And he enumerates three factors:

20 "1, the nature of the decision being challenged; 2, the nature of the ground of  
21 challenge [Mr Holmes puts some emphasis on that]; and 3, the nature of the  
22 evidence needed and relied upon to advance the challenge and each of those points  
23 warrants additional consideration."

24 So at 42 he looks at the first, the nature of the decision. There's little I need to say  
25 about that, other than noting that this is also a case, as you see, from the bottom of  
26 that page, where the decision-maker's required to take into account a very wide

1 range of facts or predictions about facts which may themselves be characterised by  
2 uncertainty, leading to the exercise of a judgment call involving the balance of many  
3 conflicting, possibly ephemeral considerations.

4 At paragraph 43, he turns to the grounds of challenge and this is what Mr Holmes  
5 relies upon. He says:

6 "In this case, the grounds vary in their nature. Grounds 1 to 3 have been advanced  
7 as traditional judicial review arguments focusing upon the logic and reasoning of the  
8 decision and whether Ofcom failed to take account of relevant considerations.  
9 Footnote, Mr Turner and Mr Beard QC at various junctures, invited me to consider  
10 the merits of their arguments, nonetheless. Ground 4 was essentially a procedural  
11 challenge to the fairness of the consultation process. Ground 5 is different and  
12 amounts to an invitation to the court to conclude that Ofcom simply got it wrong on  
13 the merits. There's no difficulty in addressing any of ground 1 to 4 by recourse  
14 limited to normal principles of judicial review. In relation to ground 5, the extent to  
15 which merits can be taken into consideration will depend upon the nature of the  
16 decision and the evidence tendered by the claimant."

17 Just pausing there, there is no revision there, of the need, even in a judicial review  
18 case, even in a case where the ground relied upon is an attack on the internal  
19 reasoning of the decision or the internal logic of the decision, to prove materiality.

20 We'll see that again in a moment. That is, of course, reiterated at paragraph 40.

21 At 44, the nature of evidence tendered:

22 "Evidence considered as compendious ... only a tiny fraction has been  
23 prayed-in-aid to the grounds. The court cannot be expected or required to conduct  
24 its own research ... must rely upon the evidence identified by the parties. This does  
25 not, however, imply that the court will ignore the totality of the relevant evidence  
26 behind the impugned decision. The court might well have to consider an argument

1 that the decision is inadequately evidenced by putting the evidence highlighted by  
2 the claimant into the broader context of the evidence as a whole."

3 Although Mr Holmes says his ground 1A is a judicial review ground alone, it is in fact  
4 an attack on Ofcom's decision of precisely that nature, where he says that the  
5 evidence referred to in the decision is not sufficient to support the conclusion of  
6 overlap arrived at in the decision. But in making that submission, he cannot confine  
7 the Tribunal's consideration only to the evidence specifically referenced in the  
8 decision, hence the witness statements produced by Ofcom, excavating, if you like,  
9 the work which was done which underlies that reasoning. And hence, also, the need  
10 for other parties, including here at least, BT, to be able to put forward before the  
11 Tribunal, evidence which it may have produced to Ofcom as part of its consultation  
12 responses but which Ofcom has chosen not to refer to or new evidence relating to  
13 the up-to-date position. The latest projections, for example, of future roll out of the  
14 Openreach FTTP network. All of which is admissible, as we know from the Court of  
15 Appeal in the BT case and all of which would be directed towards this argument that  
16 the decision is inadequately evidenced. So we'd be putting evidence highlighted by  
17 the claimant into the broader context of the evidence as a whole. And I repeat, we  
18 know from the authorities I've just shown you, that that's the evidence as a whole,  
19 relevant to the merits of the case, not just the evidence which happens to be referred  
20 to in the decision.

21 I'm going to --

22 THE CHAIRMAN: Sorry to interrupt you. Just in paragraph 44, where  
23 Mr Justice Green, as he was, talks about a decision being inadequately evidenced,  
24 do you submit that he's referring to all of grounds 1 to 5 or was he just talking about  
25 ground 5 or does it not matter?

26 MR PALMER: My connection's breaking up again, but I think I've got the gist of your

1 question, if you can hear me.

2 THE CHAIRMAN: Yes.

3 MR PALMER: Ground 1A and ground 2 both engage this principle. Ground 1A says  
4 the evidence referred to in the decision doesn't support the decision arrived at.  
5 Ofcom is entitled, and we are entitled, as an intervener permitted to intervene, to  
6 refer to evidence beyond that which is specifically referred to in the decision. The  
7 authority makes that clear. Ground 2 is a rationality challenge which I'll come back  
8 to in a moment, but I've already presaged what we say, where Ofcom's defence to  
9 ground 2 is: look, you've misunderstood the test we've applied. We, on the  
10 evidence, concluded that there's no likely and material impact on altnet competition.  
11 And to the extent that CityFibre chooses to engage with that defence, that will  
12 require reference to the evidence as a whole, to evaluate.

13 So just going on, I said just to complete that authority at paragraph 45, two lines up  
14 from the bottom:

15 "No need to create a hybrid category of judicial supervision. The statutory instruction  
16 to take into account the merits can be factored into the traditional [that's the  
17 traditional judicial review] approach. It can, for instance, be used as a sanity check  
18 on the end result of the analysis and/or it can feed into the assessment of the  
19 materiality of any breach of public law principles which is prima facie found (audio  
20 cuts out) information (audio cuts out) in a case, evidence as to the merits will be  
21 relevant to consider materiality."

22 So materiality is key. CityFibre appears to accept that proposition and, indeed,  
23 likens it to the test applicable on a judicial review application in the High Court under  
24 section 31 of the Senior Courts Act, where even after finding an error of law, the  
25 High Court must go on to consider whether it made any difference and must refuse  
26 relief if it considers that, despite whatever flaw is identified, it is highly likely that the

1 same result would have been arrived at anyway.

2 We say CityFibre's right to draw attention to that provision and right to draw  
3 an analogy with the materiality test in this case and evidence as to the merits going  
4 beyond that referred to in the decision, is relevant to it.

5 So that's all I wanted to say on the law. So let me just broadly encapsulate -- I'll  
6 endeavour not to repeat what we've said in the skeleton argument, or indeed, what  
7 I've said already, but the broad headings which arise under this appeal which at this  
8 stage, prior to seeing the confidential material, we can already identify, are, first,  
9 Mr Dunn's witness statement, unless it's to be withdrawn by Mr Holmes. If I could  
10 just turn to that to make good what I said earlier. It's in bundle 1, tab 4, page 42.

11 THE CHAIRMAN: Yes.

12 MR PALMER: From paragraph 18, headed "The likely level of overlap in the next 12  
13 to 24 months", and they say:

14 "We've worked with the consultancy firm Cartesian to estimate the likely level of  
15 overlap between CityFibre's network and Openreach's FTTP network at different  
16 points in the period up to 2016 and this report was not before Ofcom."

17 Paragraph 19:

18 "CityFibre does not have access to detailed Openreach build plans covering this  
19 period, so with the assistance of Cartesian, we have sought to estimate the likely  
20 level of overlap by predicting where and when Openreach will build and mapping this  
21 against CityFibre. Cartesian's modelling of Openreach's build ... .

22 Carry on -- we don't know. We don't know what follows there. It sounds like pretty  
23 relevant to Openreach.

24 21:

25 "In addition, CityFibre estimated the total number of homes that Openreach will have  
26 passed by fourth quarter of 2023, against two alternative Openreach plans."

1 And various assumptions then made, a degree of overlap, leading to figures  
2 produced in the table on the facing page, the next page, which we can't see and  
3 can't comment on, and then at paragraph 22, it's said that this estimated overlap is of  
4 something of an order of magnitude higher and something rather than 2 per cent or  
5 5 per cent.

6 Now, it may be when we see those figures, we entirely agree with CityFibre,  
7 you know, they've got it absolutely right and we can't comment further. It may be  
8 that they haven't and that materially affects the figures which they arrive at. It may  
9 be that Ofcom is completely right, that even on CityFibre's figures, it makes no  
10 difference to their ultimate analysis but there must be a separate and prior point  
11 which is, is this point good in the first place? And, if that is to be relied upon by  
12 Mr Holmes, it is only fair that on the merits, BT has an opportunity, if it chooses,  
13 having seen it, to comment on it. And I can put the matter no higher at the moment,  
14 than we may be able to do so. Of course, it may turn out that we don't differ once  
15 we've seen the figures. Can't say either way.

16 But that's the first and most obvious point and it's relied upon by Mr Holmes to  
17 demonstrate the materiality of at least ground 1B.

18 Secondly, I've said that ground 2 proceeds on the basis of the test that the proposal  
19 clearly has no impact and that's been explained to be wrong. CityFibre's response is  
20 not yet clear and unless Mr Holmes now (audio cuts out).

21 THE CHAIRMAN: Sorry, Mr Pamer, we just lost you there. Would you mind  
22 repeating that.

23 MR PALMER: Just recapping what I've said already on this point, Sir, that unless he  
24 concedes that no impact is likely or material on the approach that Ofcom approached  
25 it, to the extent that he engages with that evidence from Ofcom, we need to be  
26 entitled to be heard.

1 Thirdly, as per our skeleton argument, paragraph 18, given that Equinox has  
2 an Openreach pricing structure and it is Openreach which is best placed to assist the  
3 Tribunal with understanding what it is, how it works, the reasons why Openreach  
4 developed it, including the commercial context from Openreach's perspective and  
5 the discussions that it has had with its ISP customers about their needs.

6 Now, there's reference to those discussions, just for your note, in Mr Holmes' notice  
7 of appeal at paragraph 12, which is on page 11, commented upon by CityFibre,  
8 explaining that it felt even those discussions were undermining Ofcom's efforts to  
9 support a vibrant wholesale full fibre market.

10 Now, in reality, that was -- I'm not going to get into the merits now -- discussions  
11 which led to Equinox which specifically directly informed BT (audio cuts out). It  
12 informed its calibration of the offer which was, of course, expressly designed to  
13 comply with the guidance that Ofcom had already given in the wholesale fixed  
14 telecoms market review, making clear that whatever BT Openreach came up with  
15 must not have a direct or indirect effect on volumes of FTTP orders which went to  
16 altnets and so it was discussions with the (audio cuts out) of altnets (audio cuts out).

17 THE CHAIRMAN: We've lost you again.

18 MR PALMER: I'm sorry. Those discussions being material. I'll try to be as brief as  
19 I can now, because I've been long enough and the connection is probably trying  
20 everyone's patience.

21 Paragraph 19:

22 "It will also be necessary for the Tribunal to understand the wider market into which  
23 Equinox has been introduced."

24 Now, Mr Holmes accepts the relevance of that evidence but he says but Ofcom is  
25 well placed to provide that evidence, why do you need BT? The answer's very  
26 straightforward. Ofcom, of course, has a very deep understanding of the market and

1 Ofcom's evidence as to how the market operates will, of course, be very important in  
2 informing the Tribunal, at least at the start of the hearing, the same expert position  
3 as Ofcom is in, as the central regulator. But Ofcom's understanding of the market is  
4 from its position as to the regulatory supervisor. It surveils the whole market from  
5 above. BT's understanding is informed by its commercial understanding of the  
6 market, its commercial relationships with ISPs in particular and the commercial  
7 competition it faces. In reality, the nature of those competitive pressures from its  
8 competitors, infrastructure competitors, such as altnets, it's a different perspective  
9 and an equally important one.

10 Fourthly, there is the point that if, and to the extent, the altnets' application to  
11 intervene is granted, there will be, inevitably, points which the altnets raise which  
12 may engage BT's interests and it will be necessary for it to respond to that as well.

13 So those are the broad points. They are not exhaustive but in my submission they  
14 are sufficient to make good my contention that given the centrality of BT's interests in  
15 this appeal, its commercial terms, you cannot be assumed to be able to fairly  
16 proceed in the absence of BT. If and to the extent that, having seen the confidential  
17 evidence, think there's nothing of value we can add, then we will hold back but we  
18 cannot be sure of that position at this stage, neither can the Tribunal. Mr Holmes'  
19 response to our submissions in his skeleton argument, relying repeatedly on  
20 statements such as: it is unclear how evidence (audio cuts out). Well, the fact that  
21 that matter is unclear to CityFibre now, is no reason to shut BT out to the extent that  
22 these issues on the merits do arise and there is important additional evidence that  
23 BT wishes to offer.

24 Should, later on down the line, CityFibre wish to object to the admissibility of any  
25 evidence produced by BT, it can of course do so, but it has no basis to say that BT is  
26 incapable of adding any value at this stage and no basis for saying that it's not

1 necessary in the interests of fairness, for BT to be heard on this matter.

2 Sir, members of the Tribunal, thank you for your patience with the connection, that's

3 my application.

4 THE CHAIRMAN: Thank you. Unless Dr Bell or Professor Waterson have anything

5 further, I think probably the sensible place to go is Mr Holmes, unless Ms Carss-Frisk

6 objects to that. That's probably the right next step.

7 MR HOLMES: I don't think that was Ms Carss-Frisk signalling her objection but we

8 should probably wait for her to --

9 THE CHAIRMAN: I think we should wait for her to come back.

10 MR HOLMES: Sir, I see the time. I don't know if you were planning to have a

11 mid-morning break for the transcriber?

12 THE CHAIRMAN: We don't have a transcriber.

13 MR HOLMES: Oh, do you not?

14 THE CHAIRMAN: Oh, we do. Oh, I'm told we do. I see. I'm sorry, I'm told we do

15 have a transcriber, in which case, my apologies to the transcriber, who probably

16 feels hard done by by that. I think we should take a break in that case, I'm sorry,

17 I hadn't appreciated that. Ms Carss-Frisk, we lost you for a minute.

18 MS CARSS-FRISK: I don't know how that happened, I was merely going to say we

19 don't object.

20 THE CHAIRMAN: I don't know whether you want to say anything further in relation

21 to this, you're welcome to, but I was going to ask Mr Holmes to go next, unless you

22 wanted to.

23 MS CARSS-FRISK: No, we're not going to engage with this particular debate, thank

24 you.

25 THE CHAIRMAN: That's helpful. In this case, I think we probably -- where are we?

26 Look, I think it would be helpful -- how long do you think you'll be, Mr Holmes?

1 MR HOLMES: It's hard to say. Mr Palmer has covered quite a lot of ground, but I  
2 think it could take up to half an hour to deal with all of the points that he has made.

3 THE CHAIRMAN: Yes. Okay, and then I expect that Mr Palmer may have  
4 something else to say in reply and then, of course, we've got to deal with two other  
5 applications. I'm just a little bit conscious of the time. It looks to me, if we're not  
6 careful, we may end up going past 1 o'clock at this rate.

7 MR RANDOLPH: If it helps, we will be -- well, depending on what Mr Holmes says,  
8 of course, but we will be as short as possible in terms of our application because the  
9 principles that Mr Palmer has very clearly outlined, essentially we'll coat tail to make  
10 it short and there will be wrinkles and there may be additions that we want to  
11 address you on, but we will not be reopening the whole position on the law and the  
12 legal position as set out so clearly by Mr Palmer, we'll simply be adding to it where  
13 necessary, so we won't be long.

14 THE CHAIRMAN: Thank you, Mr Randolph, I'm grateful for that.

15 MR WOOLFE: Sir, for Sky, we're in the same position. I am not actually going to  
16 say relatively little about the law, other than to adopt much of what Mr Palmer has  
17 said, and on the issue in quite a focused way on how our position relates to the  
18 reasoning in the decision notice of appeal. I will be much shorter than Mr Palmer  
19 has been able to be, given what he had to cover.

20 THE CHAIRMAN: So, look, why don't we take a break. Maybe if we could just  
21 confine that to ten minutes and then come back at ten to 12 and then we can see if  
22 we can get through all that. I don't want to constrain you, Mr Randolph or Mr Woolfe,  
23 if there are points you do want to make but that's very helpful. Thank you very much.  
24 We'll reconvene at 11.50. Thank you.

25 **(11.40 am)**

26 **(A short break)**

1 (11.50 am)

2 THE CHAIRMAN: Mr Holmes, if you're happy to start again.

3

4 **Submissions by MR HOLMES**

5 MR HOLMES: Thank you, Sir.

6 You correctly summarised our position at the outset when you said that we don't  
7 object to the interventions on the basis that any of the interveners lack a sufficient  
8 interest in the outcome of the proceedings.

9 You rightly apprehended, Sir, that we rely on the Tribunal's discretion. That is,  
10 of course, the sufficient interest test is, of course, just a threshold. There's no right  
11 for a person with a sufficient interest to intervene. The Tribunal has a discretion  
12 whether to permit an intervention.

13 On the question of sufficiency of interest, we accept BT and the other party's  
14 interests but to be clear, that isn't because the proceedings themselves will decide  
15 whether BT's commercial terms will continue in the market. The task of the Tribunal  
16 is, of course, to decide whether Ofcom's decision is flawed in one of the various  
17 ways alleged in the notice of appeal and, if it is, the relief will be a remittal of the  
18 matter to Ofcom for further investigation. So it's not correct for BT to say that  
19 CityFibre's challenge is squarely directed at BT's terms of business or that the  
20 proceedings directly or immediately impact upon BT's terms of dealing. The  
21 proceedings are directed at the decision and we would accept that the reopening of  
22 the investigation would itself affect the interests of BT and the other interveners but  
23 there's no question of this Tribunal ruling directly on the terms of dealing, to be clear.

24 As regards the exercise of discretion, we accept, as Mr Palmer submitted, that this is  
25 a context-specific inquiry. Our submission is that the circumstances of this case  
26 weigh against permitting any of the interventions and that the case law does provide

1 some assistance because analogous reasons have been weighed against permitting  
2 interventions in other previous cases and we rely on two main points.

3 The first is we say that the interventions are unnecessary and they would add no  
4 value. CityFibre has chosen to bring a streamlined appeal, based on traditional  
5 judicial review principles. So this isn't a broad based merits appeal, it's a focused  
6 and forensic challenge to a decision we believe to be unlawful, applying classic  
7 public law standards.

8 Now, this isn't just what CityFibre considers its appeal to consist of. Ofcom shares  
9 CityFibre's assessment as to the scope of the challenge and if I could just remind  
10 you of what Ofcom says in its skeleton argument. If we could just go to the  
11 skeletons bundle, which is I think bundle 4, and turn to page 23. You see at  
12 paragraph 27.1 that:

13 "Ofcom agrees with CityFibre's submission that the appeal is a streamlined one  
14 which relies on traditional grounds for judicial review which should enable it to be  
15 dealt with relatively speedily and efficiently."

16 So that's common ground between the parties. The issues relate squarely, in my  
17 submission, to the internal logic of the decision and to the fairness of Ofcom's  
18 consultation. So the issues are, is the decision rationally supported by the evidence  
19 which it cites? Did Ofcom adequately consult on its reasoning and could Ofcom  
20 rationally find no potential barrier based on its own ancillary findings? That's the  
21 nature of the challenge. CityFibre's factual evidence is similarly focused. It goes to  
22 the question of whether CityFibre would have had anything to say if Ofcom had  
23 consulted on its reasoning and that's how it shows prejudice resulting from the  
24 consultation point. So obviously on classic public law principles, it doesn't show  
25 unfairness if a public authority doesn't raise a question in consultation but that is a  
26 question on which the challenger would have had nothing to say. That would make

1 for a futile and formal challenge and that wouldn't be entertained. Our point that  
2 emerges from the evidence of Mr Dunn is that, if we had been asked about the  
3 overlap conclusion, we would have wished to make representations to Ofcom and to  
4 put in evidence about that question. We certainly won't be asking the Tribunal, on  
5 the basis of Mr Dunn's evidence, to conclude that the overlap conclusion was wrong.  
6 That wouldn't be something that the Tribunal, with great respect, could realistically  
7 assess, even if it were to commit all the various interveners to these proceedings.  
8 That would require a market-wide consultation in which everyone with relevant  
9 evidence to bring to bear could put it before Ofcom, as the decision-maker. So the  
10 role of this procedure isn't to run a kind of proxy consultation exercise.  
11 For its part, Ofcom doesn't appear to take issue with Mr Dunn's evidence and, in  
12 fact, claims that it corroborates Ofcom's own conclusions and we say that, given the  
13 nature of the appeal, a challenge to the internal logic of Ofcom's decision and to  
14 Ofcom's procedures, Ofcom is best placed to address the case advanced by  
15 CityFibre and the interveners don't have any obviously useful role to add. Ofcom  
16 can defend its own train of analysis in the decision and the procedures it adopted in  
17 reaching its decision. Ofcom, as the industry regulator, is also well placed to  
18 describe the relevant market context and the operation of the Equinox offer. Ofcom  
19 can and does address those matters in its pleadings and its evidence, the relevant  
20 parts of which BT has already seen and BT hasn't suggested that there's any error or  
21 omission in that material.

22 Mr Palmer stakes himself, really, on a speculative basis as to how CityFibre may  
23 respond to BT's evidence from -- I think it must be Mr Matthew that he's referring to.  
24 Mr Harries' statement is just a classic, as we read it, classic public law statement of a  
25 kind one regularly sees, exhibiting relevant materials and explaining the factual  
26 background to the decision making process. That's not a matter on which there is

1 likely to be anything contentious.

2 As regards Mr Matthew's evidence, that goes to matters which Ofcom says formed  
3 part of its assessment at the time of the decision and that is, of course, distinct from  
4 new evidence or inquiry by the interveners in an attempt to widen matters out and  
5 address matters at this stage of the process afresh. Now, we haven't seen a fully  
6 confidential version of Mr Matthew's evidence yet and we're not, therefore, in a  
7 position to give a final view as to how we'll address that. But where that takes  
8 Mr Palmer is that, at best, the Tribunal would allow an intervention on a provisional  
9 basis, that if CityFibre challenged the substance of Ofcom's assessment, thereby  
10 expanding the scope of the appeal beyond its current classic public law footing, BT  
11 could say something about that in response. It doesn't provide any present basis to  
12 justify an intervention on the apparently broad grounds that BT is proposing.

13 Now if I could address you on the question of a merits appeal. BT says this is a  
14 merits appeal and the submission appears to be that the Tribunal must therefore  
15 consider whether the decision was right or wrong on its merits, regardless of the  
16 scope of the appeal. It appears to contend that it should be allowed to intervene to  
17 argue that the decision is correct, even if it were shown to be flawed on traditional  
18 judicial review grounds. Now, with respect, that submission cannot be right. The  
19 Communications Act is very clear. The appeal is to be decided by reference to the  
20 grounds of appeal set out in the Notice of Appeal by applying judicial review  
21 principles. Now, it's true that article 31 of the European Electronic Communications  
22 Code requires that the merits of the case are duly taken into account but we say that  
23 allows an appellant to raise merit based grounds as part of a judicial review. What it  
24 doesn't mean is that the Tribunal is required to undertake an examination on the  
25 merits in each and every case, whenever a respondent or an intervener wishes to  
26 raise new material in support of a decision. That would turn the Tribunal into a

1 duplicate regulator and it would turn judicial review proceedings into roving  
2 regulatory inquiries which could never be an adequate substitute for Ofcom's  
3 process of market-wide consultation.

4 So --

5 THE CHAIRMAN: Sorry to interrupt you. I'd understood Mr Palmer to be saying two  
6 things, essentially. Firstly that, because of the question of the need to show  
7 materiality, which I think he says is a burden for you, I express no view on it at the  
8 moment, that's what I think he's saying, that inevitably gets you into questions of  
9 broader context. It's open to you and, indeed, possibly others to bring in evidence to  
10 substantiate that point and, secondly, the respective point, which is he's concerned  
11 about is how you might respond to the position that Ofcom's taken, which I think  
12 you've addressed. But I didn't understand him to say that it was effectively an open  
13 canvas on which he could run -- I don't think he's saying he could run a merits type  
14 case beyond the extent to which your case already engages that position.

15 MR HOLMES: That's very helpful, Sir, and let me deal with that point. The  
16 materiality point on which he hangs his application is, with respect, misdirected.  
17 Materiality in the context of a classic judicial review challenge is a limited issue.  
18 Insofar as it relates to ground 1A or ground 2, that's to say the internal logic of the  
19 decision and whether it rationally sustains Ofcom's conclusion, materiality arises in  
20 this way. The Tribunal will need to consider, we accept, whether Ofcom's decision  
21 could stand on the basis of some other aspect of its own reasoning, even if the  
22 aspect that we impugn did reveal a public law flaw. So, you know, just to offer a  
23 stylised example. Where a decision maker relies on, in a multi-factorial assessment,  
24 factors A, B and C, in support of a conclusion which are said to be of independent  
25 weight, the fact that there is a problem with point A doesn't necessarily mean that the  
26 decision should be set aside. That would depend upon whether B and C are

1 adequate on the (audio cuts out) if you look at the decision and how it's reasoned  
2 and what it says, to sustain the conclusion. If so, there wouldn't be a basis for a  
3 remittal. So we accept that materiality arises to that extent. And, similarly, in relation  
4 to a consultation challenge, we accept that it's not enough to come along and to say:  
5 this point was not the subject of consultation, if we haven't also said that we would  
6 need to have something to say about it. And that's what Mr Dunn's evidence goes  
7 to. But neither of those questions of materiality engage a wider question about  
8 whether Ofcom was right to conclude that there was no overlap -- that the overlap  
9 conclusion was correct or require the Tribunal to determine for itself what the  
10 competitive consequences of that were. Those are matters for Ofcom and we've  
11 brought a targeted judicial review which involves engaging with those underlying  
12 merits.

13 THE CHAIRMAN: So just to be clear, and I think you're saying that if it happens that  
14 Ofcom has run its process or reached a conclusion, both of which you say it has  
15 done, in a way that is fundamentally flawed, expressing no view on whether that's  
16 correct or not, but I think that's what you're saying, then you say it's not open to --  
17 I think the point you're making is it's not open for that decision to be supported on the  
18 merits in some other way. Is that what you're saying?

19 MR HOLMES: It is, Sir, exactly right.

20 THE CHAIRMAN: So neither Ofcom nor BT would be entitled to come along and  
21 say: we've got this completely wrong, but actually, if you look at it with all this other  
22 evidence, it is clear the answer is the right answer.

23 MR HOLMES: And in fairness to Ofcom, we do not understand them, with their  
24 evidence, to be saying they're relying on ex post reasons or new material. This is  
25 material that they took into account at the time of the decision and so you're  
26 absolutely right, Sir, this is not a case that turns on the correctness or otherwise of

1 Ofcom's assessment of the underlying questions. And when it comes to matters of  
2 consultation, of fair procedure and of the adequacy of the internal reasoning and  
3 analysis in the decision, those are matters that Ofcom should address and can  
4 perfectly adequately address without the need for a wide swathe of the industry to  
5 turn up and broaden matters out.

6 And you have my point, I think, on his argument that we may potentially respond to  
7 Mr Matthew in a way which opened up wider questions. We've taken no concluded  
8 view about how we respond to Mr Matthew and we'll consider it when we see it in  
9 full, which will only be after today. But all that that would provide a basis for would  
10 be a provisional intervention, subject to CityFibre broadening its challenge in  
11 response to that evidence and that's not where we are today and that kind of  
12 speculative basis doesn't provide a justification for admitting the interveners today.

13 So that's my first point. Given the nature of the appeal, the interventions wouldn't  
14 assist the Tribunal and for that reason, they should be refused.

15 The second point, and this is important as well, is that the interventions would add  
16 materially to the length, complexity and cost of the proceedings. Again, the main  
17 parties, currently, are agreed as to the appropriate case management of the  
18 proceedings.

19 If the Tribunal could open Ofcom's skeleton argument again, in the skeleton  
20 arguments bundle 4 at page 14 of the bundle numbering, you see at paragraph 3:

21 "In respect of the future conduct of the appeal, Ofcom agrees that this case should  
22 be treated on an appropriately expedited basis ... "

23 And then makes suggestions accordingly. And the existing parties have now agreed  
24 a timetable that would lead to a two day hearing in early May.

25 The reasons why expedition is appropriate are clear. The Equinox offer is in the  
26 market and CityFibre believes it risks causing serious harm to network competition in

1 this country and it follows that this is a case where justice delayed risks becoming  
2 justice denied. The case therefore requires active case management to ensure that  
3 it's kept on track. The interveners pose a serious threat to that. They all propose to  
4 put in fresh, additional evidence on a wide range of topics, much of which appears to  
5 go to the substance of the issues which Ofcom was considering in the consultation.  
6 BT, for example, wants to put in evidence on the underlying question of whether  
7 Equinox will create a potential barrier to ISPs using altnets that, for your note, Sir, is  
8 in BT's skeleton argument at paragraph 20B. Now, you have my point that this is  
9 misdirected. The Tribunal's task is not to re-run the consultation exercise to see  
10 whether Ofcom was right or wrong and it couldn't do so. But not only is the evidence  
11 misdirected, it would also significantly add to the length, cost and complexity of the  
12 proceedings and that provides a second and independent reason to refuse  
13 permission.

14 Looking at the Tribunal's case law, it is clear that these two considerations, lack of  
15 added value and increased complexity and cost, both weigh heavily against allowing  
16 the interventions to proceed.

17 I'd like to go back to the authorities that Mr Palmer took you to, to show you the  
18 points that we would rely upon and to make submissions by reference to them. If we  
19 could begin with the B&M case, which of course, we accept the fact situation is  
20 somewhat different, but it's in authorities bundle 3, volume 3B, at page 325.

21 If you turn to page 328, you can see that Tesco had applied for permission to  
22 intervene and both of the principal parties, this is at paragraph 6, were neutral on  
23 that question and then the Tribunal turns to consider the rules. At paragraph 8, it  
24 sets out rule 16 and at paragraph 9, we do rely upon the importance of the case  
25 being dealt with at proportionate cost, having regard to the Tribunal's governing  
26 principles. Over the page, again you see the emphasis from British Sky

1 Broadcasting on whether allowing the intervention would be consistent with the just,  
2 expeditious and economical conduct of the proceedings. And this question of case  
3 management is sufficiently important that the Tribunal may decide to exclude  
4 interventions, even when no objection is taken. It's part of the active case  
5 management which is important to the Tribunal's conduct of cases.

6 Turning on to page 330, you see at paragraph 13 the Tribunal's conclusion that  
7 Tesco did have sufficient interest and at paragraph 15, the Tribunal states its  
8 conclusion as to the exercise of discretion, that they weren't persuaded that it would  
9 be right to permit Tesco to intervene. And at paragraph 16, they give the reasons  
10 and they refer to Umbro, a previous Competition Act case, in which the Tribunal held  
11 that as a matter of discretion, there was no need for an interested party to intervene  
12 if the interests of that party are already adequately protected by the position taken by  
13 one of the principal parties. And the Tribunal pointed in the Umbro case to the fact  
14 that the proceedings were essentially between the appellants and the OFT, the  
15 authority in that case, and it was for the authority to establish its case and have the  
16 main carriage of the matter. It would complicate matters by introducing another party  
17 and moreover, Sports World could supply information to the OFT and assist with the  
18 presentation of the OFT's case and those principles are then applied by the Tribunal.  
19 The Tribunal had already, by this time, seen the CMA's case. It is clear, and it says  
20 in the third line of paragraph 17:

21 "It's clear from these that the matters on which Tesco has offered support are  
22 already within the scope of the material before the Tribunal and particularly the  
23 arguments and evidence put forward by the CMA, both for the hearing on jurisdiction  
24 and interim relief."

25 And then in the final sentence:

26 "The proceedings are essentially between B&M and the CMA and it is for the CMA to

1 defend its case and to have the main carriage of the matter."

2 And we say the same is true here. Ofcom is best placed to explain and defend its  
3 decision and consultation process. At paragraph 18, the Tribunal continues that it's  
4 not persuaded that Tesco will provide any material added value to the issues in this  
5 case. Like BT, Tesco wanted to provide evidence which supported the CMA's case  
6 but, as the Tribunal notes, starting in the fourth line, there's no objection to a party  
7 collaborating with the respondent authority and assisting with the presentation of the  
8 authority's case. The Tribunal notes that that approach, rather than intervention,  
9 would ensure that proceedings are dealt with justly and at proportionate cost. We  
10 say the same is true here. This is particularly true, given the function that BT  
11 proposes to fulfil at the hearing. It says in its skeleton argument, as the first reason  
12 for intervening, that it's important that BT participates in order to answer any  
13 questions that arise, to ensure that there are no misunderstandings, to provide the  
14 commercial context for Equinox. But it can inform Ofcom if there is any  
15 misunderstanding. It's seen what Ofcom says in its evidence on market context and  
16 on the operation of Equinox and it can correct any problem already. It's very telling  
17 that there's nothing in what BT has said which pinpoints any specific added value,  
18 any inaccuracy or lack of completeness in what Ofcom has said. And so we say that  
19 will be the more just and proportionate way of proceeding. BT can, of course, attend  
20 the hearing if it wants to, on a watching brief and it can make any points that it  
21 wishes to for Ofcom to put to the Tribunal. But the arguments that Mr Palmer has  
22 advanced really don't justify substantial additional evidential input on a speculative  
23 basis, depending only on what we might say in our reply.

24 So turning on to the next authority in the bundle, this is the Sabre case and it begins  
25 on page 352 and turning to page 354, we see at paragraph 2 that the application to  
26 intervene by the American Society of Travel Advisers was refused and the ruling sets

1 out the reasons.

2 If you turn on to page 357, paragraph 13, the reasons are set out and beginning at  
3 paragraph 14 on page 358, the Tribunal explains that:

4 "At the discretion stage, we're not persuaded that it will be right to exercise our  
5 discretion to permit ASTA to intervene ... "

6 And they apply the approach in B&M:

7 "... no added value to the issues of this case and no provision of assistance to the  
8 Tribunal in resolving the issues."

9 Paragraph 15, you see that ASTA had fairly accepted that it's not in a position,  
10 materially, to assist, either on the legal question of interpretation of the UK  
11 legislation, nor on the facts concerning the interline arrangements and in my  
12 submission, the same points could be made in this case. Ofcom will be making  
13 submissions as to the law and it can also describe the facts of the Equinox offer,  
14 having investigated them at the administrative stage and having already heard what  
15 BT had to say about that.

16 Moving on to paragraph 16, ASTA's initial written case for intervention was  
17 substantially based on its ability to present the Tribunal a broader evidence base  
18 than that provided to the CMA by individual travel agents but it accepted in oral  
19 argument that it would be most unlikely to offer new evidence, not least because of  
20 the strict rules on admissibility of such evidence. Now, we do say that there would  
21 be a real question as to admissibility for BT to bring forward fresh evidence in these  
22 proceedings. The fact that new evidence may be permitted in some circumstances  
23 in appeals of this nature, doesn't mean that BT could itself bring forward fresh  
24 evidence that goes beyond what either of the main parties have proposed. It's hard  
25 to judge what the outcome of that would be because BT is so vague as to exactly  
26 what value it would be adding. But we don't accept that this would be a case in

1 | which broad further evidence as to context or as to market conditions would be  
2 | appropriate.

3 | Turning over the page, you see the point in the third lines:

4 | "ASTA has not articulated to us how the different perspective it would offer would  
5 | affect the case and result in arguments that differed from those advanced by Sabre  
6 | or from those advanced by travel agents before the CMA."

7 | We say the same is true here. There's nothing to suggest, in the materials currently  
8 | before the Tribunal, that BT has anything new or helpful to say in relation to these  
9 | grounds of appeal and BT participated in the consultation. It's already made points  
10 | to Ofcom and Ofcom, as the main party, can deal with that before the Tribunal.

11 | So for that reason, we say that this case also provides a useful basis and analogous  
12 | reasons for rejecting the application before us today.

13 | Turning onto the next tab, JD Sports, beginning at page 61, this is another merger  
14 | JR in which a rival retailer applied to intervene in support of the CMA and it differs  
15 | from the other two cases, in that the Tribunal did have a doubt as to whether the  
16 | applicant even passed the sufficient interest test. But the Tribunal also considered  
17 | whether it would permit the intervention as a matter of discretion and it gave reasons  
18 | as to why it would not.

19 | If you turn to page 369. If I could ask you, please, to review what is said at  
20 | paragraph 27, which is a paragraph I think you referred to, Sir, at the beginning of  
21 | today's proceedings.

22 | THE CHAIRMAN: Yes.

23 | MR HOLMES: And we say that the same reasoning applies by analogy in this case.  
24 | The focus in this case, as in JD Sports, is on Ofcom's own assessment. This case,  
25 | like JD Sports, offers classic principles of judicial review and there is no reason in  
26 | this case, as in JD Sports, why Ofcom should require any assistance from any

1 intervening party in order to justify or defend the approach taken in its decision or the  
2 procedures which it followed.

3 Turning on to page 370, we would also note paragraph 29 of the ruling. The Tribunal  
4 notes there that in view of its conclusions, it:

5 " ... didn't need to consider whether to permit intervention on a limited basis but [it  
6 noted that] Frasers' participation, even if on a limited basis, would add complexity  
7 and cost to the proceedings which is undesirable in the context of a merger review  
8 proceeding on a tight timetable."

9 And we say that this reasoning applies also to this case. The principal parties agree  
10 that this case merits appropriate expedition and BT's involvement will obviously add  
11 to the complexity, the cost and the length of the proceedings and so my primary  
12 submission, for the two reasons I've developed, is that the application should be  
13 refused. But if the Tribunal is against me on that, my alternative submission is that  
14 any intervention should be tightly circumscribed. It should be confined to written  
15 submissions and should not include evidence which is inappropriate in a judicial  
16 review of this nature and will inevitably lengthen and complicate the case and if BT  
17 wishes, in due course, to make oral submissions, having seen Ofcom's skeleton  
18 argument, it should make a reasoned application to the Tribunal to do so, to be  
19 determined on the papers and that will protect the workability of the two day listing  
20 which the main parties regard as appropriate.

21 So, Sir, subject to any questions from the Tribunal, those are my submissions in  
22 response to Mr Palmer's application.

23 THE CHAIRMAN: Thank you. Unless Dr Bell or Professor Waterson have  
24 anything?

25 PROFESSOR WATERSON: No.

26 THE CHAIRMAN: Ms Carss-Frisk, do you want to say anything?

1 MS CARSS-FRISK: Not at this stage, Sir.

2 THE CHAIRMAN: Thank you. Mr Palmer, is there anything you wanted to say by  
3 way of reply?

4

5 **Submissions in reply by MR PALMER**

6 MR PALMER: Some brief points in reply, Sir. Notably absent from Mr Holmes'  
7 submissions was anything on the subject of fairness, preferring instead to focus on  
8 expedition and the length and complexity of proceedings. Those points are  
9 important as a subject of fairness. The closest Mr Holmes came to that issue was  
10 saying: well, of course this appeal doesn't directly affect BT's terms of its decision  
11 but only would require Ofcom to reconsider the acceptability of those terms of  
12 business being. That, with respect, Mr Holmes, is dancing on the head of a pin.

13 The date of this statement, as you will have seen, Sir, is 30 September of last year,  
14 the day before these terms of business came into operation and they are now in  
15 operation. So BT has entered into contracts with those who have taken up the  
16 Equinox offer and those contracts are possessions, if you like, by article 1, protocol 1  
17 terms and the effect of a successful appeal here would be to throw all of that into  
18 doubt, have a further round of consultation with Ofcom, leaving the business, BT's  
19 business and its customers in a state of uncertainty, to put it mildly and introduce  
20 real doubt into the market place at a critical time for the roll out of FTTP network. So  
21 to say that we're not directly affected by this is simply unviable.

22 Next point. He said that, for example, on ground 1A, the issue was whether the  
23 decision was rationally supported by evidence which the decision cites. That, as  
24 a matter of law, is wrong. I took you to the EE decision, the judgment, Court of  
25 Appeal. Mr Holmes did not go back to EE, did not contradict my submissions on  
26 that. As the Court of Appeal has made clear, this is a case which requires the

1 Tribunal to take into account the merits of the case which is distinct from the merits  
2 of the decision. That was Lord Justice Toulson in the BT case.

3 I entirely accept that that does not mean that BT as an intervener would have  
4 an open canvas upon which to make its own case, as if the Tribunal were a  
5 substitute regulator making a new decision de novo, but it does mean, as per EE,  
6 that any flaws which are identified in the reasons given by Ofcom would have to be  
7 demonstrated to be sufficient to be able to say the decision is wrong. Mr Holmes  
8 purported to disavow any suggestion that he would be arguing that the decision is  
9 wrong, but that is in tension and conflict with the very relief which I showed you that  
10 CityFibre is seeking which is, in effect, a positive answer to the question -- a negative  
11 answer, which is the answer that Ofcom gave.

12 It is in consideration of that question of whether the flaws make the decision wrong,  
13 that BT, as an intervener, is entitled to point to evidence which shows that any  
14 alleged error is not material and the evidence to which it can point is not confined to  
15 that which is referred to in the decision. It is not even confined to the evidence which  
16 was before Ofcom at the time. Again, the Court of Appeal has been clear about that  
17 and Mr Holmes may not like that outcome, but that is the law.

18 So then the criticism becomes: well, Mr Palmer cannot identify with any precision,  
19 exactly what this evidence will be and what the submissions will be. But that is  
20 simply a consequence of the fact that we are not yet in the confidential evidence and  
21 so can't assess the position as to what precisely we can say which has not already  
22 been said.

23 Then Mr Holmes floats as a fall back, the idea that what I've said can only really  
24 rationally support a conclusion that we should not be admitted as an intervener now  
25 but only on some provisional basis or at some later stage. The first point is that,  
26 unless we are a party and admitted now as an intervener, we cannot be admitted to

1 the confidentiality ring and we cannot, therefore, see exactly what the evidence is  
2 and assess the degree to which we can contribute. To interpose a further stage after  
3 that, where BT has to make a further application which will be no doubt opposed by  
4 Mr Holmes as to what it can or should say at appeal, will simply add further time and  
5 cost. The most that anyone has suggested that these interventions or at least  
6 certainly BT's intervention could add to the current two days time estimate, if it adds  
7 anything at all, would be a half a day and Mr Holmes bemoans the cost that that  
8 would incur but would happily spend half a day arguing whether we should be  
9 admitted in the first place, all of which could have been consented to, as BT's  
10 intervention has been the subject of consent in every other appeal against Ofcom  
11 involving BT's SNP(?) conditions and is entirely standard practice and instead of  
12 consenting to that, CityFibre has no compunction taking half a day to argue the point.  
13 Mr Holmes says there's nothing to stop, a la B&M or a la Sabre, staying behind the  
14 scenes and supplying evidence to Ofcom, helping Ofcom behind the scenes. That  
15 profoundly misunderstands Ofcom's relationship with BT. Unlike those case which  
16 were distinct merger decisions, BT has an ongoing regulatory relationship with  
17 Ofcom and Ofcom, in all fairness, is perspicacious in making sure that both in reality  
18 and as a matter of perception, that it is never seen getting into bed, so to speak, with  
19 BT, whether behind the scenes or in front of them. Note the way the Ms Carss-Frisk  
20 is studiously avoiding entering into this argument. Entirely consistent with Ofcom's  
21 traditional position in that regard, because Ofcom doesn't choose sides between  
22 market participants, doesn't get into bed with them, doesn't have secret  
23 conversations behind the scenes as to how they should be done and to suggest that  
24 we form some kind of cosy relationship behind the scenes and contribute that way,  
25 profoundly misunderstands Ofcom's status as independent. Of course, the CMA is  
26 independent too but the difference being that ongoing regulatory relationship and

1 responsibilities that Ofcom has.

2 It is true that BT participated in the consultation and Ofcom has the benefits of that  
3 consultation response and can deploy it if it chooses, but BT may have an interest in  
4 deploying evidence submitted to Ofcom which Ofcom doesn't choose to deploy in  
5 defence of this appeal. BT may also have an interest in deploying new evidence, as  
6 Lord Justice Toulson indicated it might, in particular updating the Tribunal on the  
7 current position and current roll out plans, whatever the position was last September.  
8 So for all these reasons, what (audio cuts out) the Tribunal is actually laying a further  
9 level of complexity and cost, in particular in its fall back arguments as to some kind  
10 of provisional intervention or some kind of conditional limited intervention in which BT  
11 will separately have to apply for admission of any evidence at all and any oral  
12 submissions at all. It will suit CityFibre, of course, if BT is not permitted to intervene  
13 by providing evidence and submissions but that, with respect to Mr Holmes, is not  
14 the test and it's not the approach, I'm confident, that the Tribunal will take.

15 If some kind of conditional permission of that kind were given, it is simply laying up,  
16 delaying the argument for later and we will have to have a similar argument again.

17 Of course, if in relation to ground 2, Mr Homes and CityFibre do not dispute any of  
18 the evidence that Mr Mathew has provided in particular and accepted, then we will  
19 not need to add anything further to that evidence, in particular as to the likelihood  
20 and materiality of impact. The fact that I say if there is a dispute, we all want to  
21 engage in that dispute, does not make my proposed intervention on that ground  
22 speculative. It is simply reassuring the Tribunal that we will not need to duplicate  
23 any evidence produced by Ofcom or address anything which is not in issue. But the  
24 fact that things might not be in issue later does not mean that BT should not be in the  
25 position now of being admitted into the confidentiality ring and permitted to produce  
26 any evidence which is non-duplicative and relevant to a matter which is in issue

1 before the Tribunal. And on all of the issues, whichever they are, there must at least  
2 be an issue of materiality which does engage some aspect of the merits and BT, as  
3 a matter of fairness, is required to be there, as it always has in the past. Thank you  
4 for your patience, Sir. I hope you can hear me. Those are my submission in reply.

5 MR HOLMES: If I may, I don't want to steal the last word from Mr Palmer. He just  
6 reminded me of a point I should draw to the Tribunal's attention, in case it's material.  
7 He fairly pointed to an issue with the relief that we seek at the conclusion of the  
8 notice of appeal. I should say, we saw what my learned friend Ms Carss-Frisk said  
9 about that in her defence and we do, on reflection, consider that the relief isn't quite  
10 right in the notice of appeal. The correct course, of course, should be remittal to  
11 reconsider question 1. It's not for the Tribunal to direct that Ofcom proceed directly  
12 to questions 2 and 3. It was a point that we were planning to pick up in our reply but,  
13 you know, given that it's become material today, to coin a phrase, I thought it was  
14 worth just pointing that out to the Tribunal so that they understood the basis of the  
15 relief that we were seeking and on HG3 and EE, the short point is that those were  
16 merits appeals and that explains the reasoning and language that one sees in the  
17 Court of Appeal judgment.

18 THE CHAIRMAN: Do you want to add anything to that?

19 MR PALMER: It's helpful to have that concession, even at this late stage, but it  
20 doesn't relieve Mr Holmes from establishing the materiality of any errors which he  
21 does manage to identify. And EE and H3G are still good authority for that  
22 proposition, regardless of the ground of appeal, as Mr Justice Green specifically  
23 made clear in the final paragraph which I took you to.

24 THE CHAIRMAN: Good. Thank you. So we'll move on. Mr Randolph, would you  
25 like to start off?

26

1 **Submissions by MR RANDOLPH**

2 MR RANDOLPH: Yes. Thank you very much and as I said before the short break,  
3 I can be brief. We adopt with gratitude Mr Palmer's description of the legal principles  
4 that will apply to the Tribunal and be applied by them in terms of these applications  
5 and we do not disagree with the analysis that he has made of those cases and we  
6 would urge, with respect, the Tribunal to adopt that approach. And we would say  
7 that Mr Holmes' response, albeit a response to Mr Palmer's application and not  
8 mine, one assumes that his response will be the same on the law as it was in  
9 respect to my application, as it was in relation to Mr Palmer's application and  
10 therefore, insofar as Mr Palmer has replied to those observations by Mr Holmes, we  
11 adopt that reply as well, all of which means, Sir, that I can be brief.

12 I wonder if I could pick up first on one of the last points that Mr Holmes made and  
13 that was with regard to the additional cost and time that would arise if the  
14 interventions were allowed. Now, I have, and I'm grateful, now been copied into the  
15 amended draft directions that you, Sir, referred to, I think, and the amendments in  
16 green and the deletions in red, insofar as interventions are permitted, that would  
17 allow for interveners to file our statements of intervention by 25 February and then  
18 there would be various other dates for trial bundles and then the suggested trial  
19 dates would be 11 and 12 May. Now, there's no suggestion in that amended draft  
20 amended order that somehow the evidence, any evidence from the interveners, if  
21 they be permitted to do that, would somehow impact on those two dates in May. In  
22 fact, they're part and parcel of the draft order. So that, with respect, is an argument  
23 that goes nowhere.

24 I think there may a discussion later, if our application is successful, as to exactly  
25 what happens thereafter, between filing of the statements of intervention and the trial  
26 itself. But suffice it to say, Sir, as we have said in our notice of application, and

1 indeed in our skeleton, we are simply not going to act in a manner that would impact  
2 adversely on the efficiency and the timing of the trial. We will be as efficient as  
3 possible. As I say, we can discuss, if we are allowed, permitted, to intervene, any  
4 role that we might play in the trial itself, but suffice it to say that insofar as we are  
5 entitled to have an active role, it will be very limited. It's not our appeal. We are here  
6 to help. We're here to, as Mr Palmer said, fit in the materiality issues and on that  
7 point, Sir, you will have picked up from our notice of application that, unlike CityFibre,  
8 we are mainly active -- I say, we -- our clients are mainly active in the area -- three --  
9 geographical location and some of my clients are vertically integrated rather than  
10 wholesalers. Again, it goes to the bigger picture. What can we bring -- I hesitate to  
11 use the word party, that seems to be used in other contexts but what can we bring to  
12 the determination of this case? And that, in very large picture, is that.

13 So any intervention permitted by or for ourselves and I'm not going to speak for  
14 Mr Palmer and Mr Woolfe but it would be wrong for me to suggest that my  
15 application should succeed and theirs shouldn't. I don't do that and I am sure that  
16 they, as I, will ensure that insofar as their applications are successful, that won't  
17 impinge or they won't impinge on the manner in which this trial is conducted.

18 Mr Holmes made the point: oh, well, there's a real issue in terms of effect and the  
19 Equinox offer came in at the end of September. I think it may have been Mr Holmes,  
20 it may have been Mr Palmer, but anyway, it's all there and it's impacted and it's come  
21 into operation and it's vital that it be determined urgently. Well, that's exactly the  
22 same for us. We're altnets. A major issue in this appeal is going to be the potential  
23 impact on the altnets. Not just one altnet, the special altnet that's called CityFibre, all  
24 altnets, Sir. And we're one of them and we can bring that additional evidence, if you  
25 will, that additional experience to your determination which, for the reasons  
26 Mr Palmer set out, should include that broader picture.

1 I'm not going to deal in great depth with the points that have been raised in relation  
2 to our proposed areas on which we can provide additional assistance, save to say  
3 this: Mr Holmes' client or Mr Holmes in his skeleton, points out somewhat obliquely --  
4 having gone through about six pages of why Sky and BT shouldn't be allowed to  
5 intervene, we get a couple of lines. Well, that's fine. The trouble is he's trying to tar  
6 us with their brush and that doesn't quite work because we are different. I make it  
7 clear I'm not making any submissions with regard to Sky's intervention, but I am not  
8 opposing them.

9 Insofar as any detailed commentary on our application to intervene is concerned,  
10 that comes from Ofcom, because Sky and BT, essentially, don't say much, save --  
11 and I'm grateful to Mr Palmer for this -- that they say at paragraph 23, as he pointed  
12 out at the end of his first round of oral submissions this morning, that if our  
13 application is to be granted, there are points that the altnets wish to raise which BT  
14 will be well placed to respond to. I don't have a quarrel with that. We'll not agree on  
15 the effect of those, necessarily, the effect of those submissions but I'm sure BT will  
16 be well placed to intervene and he mentions amongst other things, the Equinox  
17 pricing levels. BT will be well placed to respond to those two and, again, I'm sure  
18 they would be well placed. I'm not going to comment on their content because  
19 I don't know what they are and we may well disagree. But, again, that's another  
20 good reason to suggest that in terms of materiality and the manner in which this  
21 Tribunal wishes to determine this appeal, that sort of evidence should be allowed.  
22 But when it comes to the specifics, the only commentary on that is contained,  
23 usefully I might add, and helpfully, in Ofcom's skeleton. Ms Carss-Frisk and her  
24 colleagues set out in some detail the position but before going to the grounds of  
25 complaint, if you will, or the push back, it is clear, Sir, as you will have seen from  
26 paragraph 18, I think, of Ofcom's skeleton, that they, insofar as -- so this is

1 paragraph 18 of Ofcom's skeleton:

2 "In the event that the Tribunal considers that the altnets' application should be  
3 granted in principle, Ofcom requests a direction from the Tribunal that any such  
4 intervention be limited to matters set out in a notice of appeal. On the basis of what  
5 Ofcom has seen and understands to date, this would appear to require limiting any  
6 such interventions in the matters set out in 28.1, 28.2 and 29.1 and insofar as the  
7 latter is concerned, in relation ... limited to the 12 to 24-month period."

8 Well, Sir, we'll bank, if we may, with respect, that. So we have a sufficiency of  
9 interest, that's not disputed, and the only detailed commentary on our intervention is  
10 that contained in Ofcom's skeleton and they appear to be content that 28.1, 28.2 and  
11 29.1, insofar as it relates to the 12 to 24-month period, falls within the scope of the  
12 notice of appeal and, therefore, we would rely very strongly on that.

13 However, we would go beyond that and just on the timing issue, because the timing  
14 issue impacts on 28.3 -- I don't know, Sir, whether you have our application to hand  
15 which can be found in volume 2 at tab 3. Do you have that, Sir?

16 THE CHAIRMAN: Yes, I do, thank you.

17 MR RANDOLPH: Excellent. I hoped that this was obvious. The way in which this  
18 application was set out was at paragraphs 18 to 25, we set out the matters in the  
19 appeal which impact the applicants. So that goes to the sufficiency of interest.  
20 There's been some complaint in Ofcom's skeleton, referring to matters contained in  
21 that section but they don't go to the value added, insofar as that is the test. We  
22 obviously rely on the wider point Mr Palmer made, but insofar as value added is  
23 concerned, how that might be relevant to the Tribunal's discretion to allow our  
24 application. That added value, if you will, is set out at paragraphs 26 through to 31  
25 and in particular, 28 to 29, 30 and 31 and it's those paragraphs in the main that  
26 Ofcom goes to. So they've essentially agreed, insofar as we're allowed in in

1 principle, they've essentially agreed 28.1, 28.2 and 28.3, insofar as the 12 to  
2 24-month period is concerned. Just taking the 12 to 20-month period, Sir, you'll  
3 recall that Mr Palmer helpfully took you to Mr Dunn's witness statement which can be  
4 found in volume 1 at part 1, tab 4 and he took you to paragraphs 18 through 22. I'll  
5 just wait for you, Sir, because I appreciate that it may be a bit slower.

6 THE CHAIRMAN: I'm just about there. That's good, thank you.

7 MR RANDOLPH: I'm Jurassic and I have it in hard copy. Paragraph 18, there's  
8 reference in the penultimate line to the network at different points in the period up to  
9 Q4/2026. We don't know what's in -- sorry, paragraph 19, cross referenced back to  
10 covering this period, which is Q4/2026. Paragraph 20, anybody's guess at the  
11 moment, and I rely on, again, the comments made by Mr Palmer insofar as we need  
12 to be able to intervene to be able to ascertain what that says and then 21, two  
13 references to Q4/2026 and 22, or at least certainly in terms of the footnotes at the  
14 bottom of that page, footnote 27, Openreach's previous plans to build 20 million  
15 premises by Q4/2026 and Openreach's current announced plans to build 25 million  
16 premises by Q4/2026. So that is clear reference, multiple references to Q4/2026.  
17 Now, given the fact that the statement, which is the subject of this appeal, was taken  
18 on 31 September, if one goes forward 24 months, that is obviously well earlier, well  
19 earlier than Q4/2026 and so it seems to me, insofar as CityFibre is seeking to rely on  
20 evidence, that relates, amongst other things, to that period, ie post 12 to 24 months  
21 after 31 September 2021, then there should be no concern about any evidence that  
22 we may wish to adduce that may assist the Tribunal. In that regard it must be found  
23 to be in scope, we would suggest, with respect.

24 That deals with 28.3. So we've got 28.1, 28.2 and 28.3 is not mentioned by Ofcom,  
25 so therefore it falls outwith its presumed acceptance or assumed acceptance of  
26 those points that we say fall within scope. They say it's out of scope. And one of the

1 reasons, essentially the reason they say that it is out of scope and one can see that  
2 at 17.3a of their skeleton -- so it's 17.3a of their skeleton --

3 THE CHAIRMAN: Sorry, this is Ofcom's skeleton?

4 MR RANDOLPH: This is Ofcom's skeleton and the altnets' application at 28.3  
5 appears to complain that Ofcom erred in focussing on overlap within the initial 12  
6 month period, when it should instead have considered the impact on overlaps over  
7 the ten year duration. This falls outside the scope which alleges that the overlap  
8 conclusion has no sound evidential foundation and makes no complaint about the  
9 time period. In any event, it's clear that the consideration was given to overlap  
10 beyond the initial 12 to 12-month period and then there's a reference to the defence.  
11 The first point, Sir, which is in relation to the reliance by CityFibre on Mr Dunn's  
12 evidence, which clearly refers to a period after the 12 to 12-month period and  
13 secondly, Sir, you will have seen that in the end of that paragraph to which I've just  
14 referred, Ofcom itself says it is clear that consideration was given to overlap beyond  
15 the initial 12 to 12-month period. In that case, it seems to me, with respect, that  
16 looking at the picture in the manner in which Mr Palmer so eloquently described it in  
17 relation to the legal principles to be applied, that must be something that is within  
18 that scope.

19 So in a is 28.1, 28.2, 28.3.

20 Insofar as 28.4, it concerned and that doesn't form part of any concession, Sir, you  
21 can see this is dealt with at paragraph 17.2 of Ofcom's skeleton. So 17.2 on internal  
22 page 7. Altnets' application complains at 28.4 about what it refers to as Ofcom's  
23 mistaken view about the material and the number of commercially viable competitive  
24 premises in area 3. And then it says:

25 "Ofcom didn't separately assess area 3 or, indeed, the commercial viability off altnet  
26 bills, see the statement, nor was the overlap conclusion split into assessment of area

1 2. To the extent that the altnets' application seeks to impugn Ofcom's conclusions  
2 about materiality of area 3 build and/or the potential for overlaps in that area, these  
3 were conclusions reached in the WMTR and therefore are impermissible to  
4 challenge now."

5 And then they cross refer back to the statement.

6 We respectfully, Sir, say that that complaint is wholly misconceived. Paragraph 3.65,  
7 I won't take you to it because of time, but so you can see it over the short  
8 adjournment, it's paragraph 3.65 of the statement. It states that Ofcom didn't  
9 consider areas 2 and 3 separately. It doesn't say that the issue of area 3 is not  
10 relevant.

11 We say its relevance is made clear by the other paragraph on which Ofcom has  
12 referred in paragraph 17.2 of its skeleton, ie, paragraph 3.47 of the statement which  
13 recognises in terms that prohibiting the Equinox discounts in area 3 could encourage  
14 some altnet built. Now, they've decided not to prohibit because that would  
15 disaggregate, but it would have clearly an impact, because if you're not going to  
16 prohibit for discount, then there won't be, at the very least, an encouragement of  
17 some altnet build which is obviously of substantial interest to my clients but it also  
18 goes to the materiality of the area 3 build and the potential for overlaps. So that is  
19 28.4, Sir.

20 We dealt with, fortunately, paragraph 29.1, because Ofcom agree in principle that  
21 that's okay, save insofar as the time is concerned and we've looked at Mr Dunn on  
22 that. So 29.2, Sir, this goes to ground 1B on the notice of appeal dealing with the  
23 failings of consultation and, as you can see, Sir, that paragraph, 29.2, of our  
24 application, looks to the plans to offer wholesale services in the first 12 to 24 months  
25 or any point in time thereafter, resulting in Ofcom only having a partial view of the  
26 impact. So can you see, Sir, what it goes to and they say -- I say they, by that

1 I mean Ofcom, at 17.4 of their skeleton, they say that, in relation to our 29.2:  
2 "This forms no part of CityFibre's pleaded case on consultation which is restricted to  
3 the claim that Ofcom ought to have been consulted on its overlap conclusion."  
4 With respect, again, we submit that that is misconceived because ground 1B, Sir,  
5 goes to the failings of the consultation process in general.  
6 Now, CityFibre only provide wholesale services and so it must be implicit, at the very  
7 least, that their complaint about lack of consultation covers, generally, wholesale  
8 services because otherwise it wouldn't be of any relevance or interest to CityFibre.  
9 So we say that complaint doesn't go anywhere.  
10 And nearly finally, Sir, I have an eye on the time and I apologise for taking up time,  
11 but I needed to deal with the points raised by Ofcom. In relation to paragraph 30,  
12 which goes to ground 2, which as you know, Sir, challenges the rationale of Ofcom's  
13 conclusion, that the Equinox offer does not create a potential barrier to altnets,  
14 Ofcom complains at paragraph 17.5 of their skeleton that the evidence that we  
15 propose to put in, in particular in relation to the planned build of FTTP networks in  
16 area 3, at 17.5, they, Ofcom, complains that this goes well beyond that which is set  
17 out in the notice of appeal. Ground 2, they say, is "a narrowly defined ground  
18 relating only to the rationality of Ofcom's conclusion", and moreover, paragraph 31 of  
19 our application alleges Ofcom's formulation of question 1 is insufficiently broad.  
20 Insofar as paragraph 30 is concerned, Sir, that evidence that we have outlined there  
21 clearly goes to how we, altnets, other altnets, admittedly apart from CityFibre, but  
22 altnets all the same, altnets with an interest, altnets with a sufficient interest, how we  
23 see that the Equinox offer will create potential barriers to altnets. And that thereby,  
24 hopefully, helping to demonstrate the irrationality of the statement. That must, we  
25 say, be in scope.  
26 Finally, Sir, as to paragraph 31, that too goes to ground 2, irrationality, because it

1 looks at -- as pointed out there, CityFibre is focused on wholesale only. As I said to  
2 you earlier, Sir, some of my clients operate on a vertical scale as well.

3 At 31, we set out the position quite clearly. Ofcom's finding is being challenged on  
4 the basis that the Equinix offer didn't constitute a potential barrier to altnets in  
5 general, not just altnets who provide wholesale services. We can provide evidence  
6 in relation to vertical operations and therefore we would submit, with respect, that  
7 once again, that complaint is misconceived and, therefore, that my clients be given  
8 permission to intervene on the basis of the details set out in paragraphs 28, 29, and  
9 31 of our notice of application and on the clear understanding that we will do  
10 everything in our power to ensure that the process is done as efficiently as possible  
11 because it is in our interest, just as much as CityFibre's interest, to ensure that this  
12 appeal is determined as quickly as possible. So unless I can assist you any further,  
13 those are my submissions and I apologise for taking you past 1 o'clock.

14 THE CHAIRMAN: Not at all, Mr Randolph, that's very helpful. Can I just ask you  
15 one question. In their skeleton, BT, at paragraph 23, say they agree with Ofcom that  
16 no intervener may widen the scope of the grounds of appeal brought by CityFibre. Is  
17 that a position you accept as well?

18 MR RANDOLPH: Yes, Sir. We say that the general rule is that you can't come in as  
19 an intervener and make a brand new case. One is there to assist one of the parties  
20 one is seeking to intervene in support of. One can't widen it. But we say, for the  
21 reasons I've set out, Sir, that the matters that are detailed, and they are detailed,  
22 they're not just general wish lists, 28, 29, 30 and 31, fall squarely within the scope of  
23 the appeal, once one actually drills down into it and sees how it should be  
24 determined. And in that regard, Sir, we do pray-in-aid the legal points of principle  
25 that were analysed earlier by Mr Palmer.

26 THE CHAIRMAN: Yes. Okay. Thank you.

1 MR RANDOLPH: So it's not a tick box exercise.

2 THE CHAIRMAN: No, understood. Thank you. That's very helpful. I would like to  
3 keep going a little while if counsel are happy to do that. I think it would be really  
4 helpful if we can dispose of discussions about intervention and give us an  
5 opportunity to consider it over what remains of the lunch hour. So if people are  
6 content to do that, that's what I propose.

7 Next -- I'm not sure whether Mr Carss-Frisk, or Mr Holmes, but most of it seemed to  
8 be directed at you, Mr Carss-Frisk. I anticipate you might have something to say in  
9 relation to this one. Would you like to go through it?

10

11 **Submissions by MS CARSS-FRISK**

12 MS CARSS-FRISK: Yes, of course Sir. So as the Tribunal knows, we are  
13 essentially neutral in relation to the applications to intervene but we do have some  
14 observations to make about the altnets' application and, in particular, as to the scope  
15 of that proposed intervention, where Mr Randolph, certainly judging by his skeleton,  
16 paragraph 10, has helpfully accepted that an intervention cannot go beyond the  
17 scope of the appeal. We very much emphasise that point and we do say that in  
18 relation to a number of paragraphs in the application, that is in fact where the  
19 application is headed and we invite you to make a direction that makes it clear that  
20 certain issues just are outside the scope of the appeal. We've dealt with this in our  
21 letter of 7 January, probably no need to turn that up and, as you've seen, also  
22 elaborated on it in our skeleton.

23 There are a number of aspects that give rise to concern. First of all, references in  
24 the application to impact of the Equinox offer on the altnet pricing, both wholesale  
25 and retail. There's reference to this in paragraphs 23.2 of the application and also  
26 paragraph 24 and our simple point is that price levels are not raised within this

1 appeal, they are not relevant to any of the grounds of appeal.

2 Now, I appreciate that it's being said, essentially, what comes before paragraph 26 of  
3 the application refers to the question of sufficient interest and we don't dispute that  
4 the altnets have a sufficient interest and, of course, on that basis, we're not too  
5 concerned about what comes before paragraph 26.

6 But there was reference in Mr Randolph's skeleton to how evidence about impact on  
7 the altnets' pricing would go to the need for Ofcom's decision to be remitted, that is in  
8 paragraph 19 of his skeleton, and also at paragraph 20, he says something very  
9 similar, namely that in any event, price levels are clearly a relevant factor in  
10 understanding the potential for the Equinox offer to deter new network build and  
11 create potential barriers to use of alternative networks.

12 Well, insofar as those propositions are still being pursued, we do say that they show  
13 an intent to go beyond the scope of the appeal. In particular, the formulation in  
14 paragraph 20 of the skeleton does not reflect ground 2 of the appeal which  
15 specifically argues that the overlap conclusion does not rationally support the  
16 conclusion of no potential barrier to using altnets. So it's not a freestanding, open  
17 reference to there's no rational basis for the ultimate conclusion. It's specifically that  
18 the overlap conclusion provides no rational basis for Ofcom's answer to question 1.

19 So much about the reference to pricing.

20 The second area of concern for Ofcom are the references to assessment of area 3.

21 This is, in particular, paragraph 28.4 of the altnets' application, where it refers to how  
22 Ofcom's mistaken view about the number of commercially available competitive  
23 premises in area 3 has resulted in it incorrectly concluding that widespread altnet  
24 build activity is unlikely which, in turn, informs its perceptions to underpin the overlap  
25 conclusion.

26 Well, our simple point is that, for the purposes of its analysis on question 1, Ofcom

1 did not need to and did not set out separately to assess area 3 or, indeed, the  
2 commercial viability of altnet build in that area, when assessing the impact of the  
3 order mix targets. We refer in relation to that to paragraph 3.61 of the statement at  
4 volume 2, tab 9, page 54 and because Mr Randolph had some complaint to make  
5 about that reference, it may be worth turning it up now.

6 Paragraph 3.65, where Ofcom said:

7 "In response to the argument that we should analyse area 2 and area 3 separately,  
8 when assessing the order mix targets, we do not consider that this is necessary for  
9 the purposes of question 1 in this case. We have considered whether these targets  
10 potentially create barrier to using altnets. Whether those altnets operate in area 2 or  
11 area 3 or both is not crucial to the outcome."

12 And consistently with that, then the overlap conclusion that you have seen, referred  
13 to, of course, in the statement and, indeed, in Ofcom's evidence, that conclusion was  
14 not split and the analysis behind it was not split into a separate assessment of areas  
15 2 and 3 and absent any such separate analysis in the statement or in the analysis  
16 that Ofcom used to support its conclusion, there is no proper basis for the altnets to  
17 raise this particular point and it is not raised by CityFibre's case. CityFibre's case, of  
18 course, focusing on Ofcom's reasoning as set out in the statement.

19 Now, true it is that in the statement, we refer back to conclusions reached in the  
20 market review. In particular, I have in mind paragraph 3.47 and 3.42. But that was  
21 in a very different context to do with the question of whether wholesale prices should  
22 be set higher in area 3 and, to make that good, may I invite the Tribunal just to turn  
23 those paragraphs up briefly.

24 If you go first to tab 9 of volume 2, page 49, paragraph 3.42, and I should say, as  
25 one sees from page 47, that's under the heading of "Low Openreach FTTP prices  
26 act as a barrier to altnet entry and expansion." That was the argument considered

1 there and at 3.41 on page 49, Ofcom says:

2 "In any case, we do not consider that the level of prices in the Equinox offer is a  
3 concern, for the reasons set out below. Our approach to pricing regulation in the  
4 market review supported our overarching strategic objectives as follows ... "

5 And then one sees the references. If the Tribunal will be so kind as to read  
6 subparagraphs A and B.

7 Similarly, if one turns over the page to page 50, paragraph 3.47:

8 "We recognise that prohibiting the Equinox offer discounts in area 3 and effectively  
9 forcing geographically deaveraged pricing would lead to higher FTTP prices in area  
10 3 which could encourage some altnet build. However, in the market review, we do  
11 not pursue an approach of setting higher wholesale FTTP prices in area 3, given our  
12 conclusion that material and sustainable competition to Openreach in area 3 was  
13 unlikely. While we were aware of plans for rival network build in some locations in  
14 area 3, the relatively higher build cost per premises and the significant variation in  
15 these costs across area 3 means this is unlikely to occur on a widespread basis.  
16 Therefore, the benefits of such a policy are likely to be small, relative to the costs  
17 imposed on all consumers in area 3 who would face higher price."

18 So as I said, those observations that go back to and point back to conclusions  
19 reached in the market review have nothing to do with and are not part of the analysis  
20 that supported the overlap conclusion which, of course, is at the heart of this appeal.  
21 It would, of course, in any event, now be far too late to seek to challenge those  
22 conclusions as part of this appeal.

23 Turning then to the question of the time period of the overlap conclusion. That's our  
24 third area of concern in relation to this intervention. There are various paragraphs  
25 that focus on time periods beyond the 12 to 24-month period that is the focus of the  
26 overlap conclusion and we refer first to paragraphs 23.1 and 28.3, where one sees

1 that the complaint appears to be that Ofcom was wrong in the overlap conclusions to  
2 focus on that initial 12 to 24-month period. It should instead, it is being suggested,  
3 should have considered the impact on overlap over the ten year duration of the  
4 Equinox offer. But that falls outside ground 1A to which it purports to relate. There  
5 is no complaint in that ground about the focus of the overlap conclusions being on  
6 that initial 12 to 24-month period and there is nothing in the evidence of Mr Dunn to  
7 which Mr Randolph pointed that somehow seeks to expand the scope of the appeal  
8 in any way or expand the scope of the overlap conclusion which is the focus of the  
9 appeal.

10 The fact that, as we've pointed out in our skeleton, Ofcom did in fact give  
11 consideration to a period beyond the initial 12 to 24-month period, is nothing to the  
12 point. The question is whether the altnets' proposed intervention goes beyond the  
13 scope of the appeal in this respect, to which the answer is yes, resoundingly yes.

14 Then we also draw attention to paragraph 29.1 of the altnets' application which  
15 raises the issue of consultation by reference to ground 1B of the grounds of appeal.  
16 And it is said here that we should have consulted and sought evidence not just  
17 specifically on the overlap conclusion, with its focus on that initial 12 to 24 months  
18 period, but also on overlap beyond that period. Well, that is a very material  
19 expansion of ground 1B.

20 I noted Mr Randolph saying that our complaint was misconceived because ground  
21 1B goes to the failure of the consultation process in general. But that is, with  
22 respect, no answer at all to that point, because ground 1B is firmly anchored in  
23 an allegation that we did not consult as we should have done, specifically on the  
24 overlap conclusion and there's no escaping the fact that that conclusion refers to the  
25 12 to 24 months period.

26 Then if we turn to paragraph 29.2 of the application, here it is suggested, again by

1 reference to ground of appeal 1B, that we ought to have consulted on the altnets'  
2 plans to offer wholesale services in the first 12 to 24-month and beyond, of the  
3 Equinox offer. But, again, that forms no part of CityFibre's pleaded case on ground  
4 1B. That ground, as we've seen, is restricted to an alleged failure to consult about  
5 the overlap conclusion. It is not about a failure to consult as to the altnets' plans to  
6 offer wholesale services. That is a different matter and I know the Tribunal has the  
7 point that the overlap conclusion is confined to that 12 to 24-month period.

8 Well, then finally, the altnets in paragraphs 30 to 31 say that they have material that  
9 would assist in relation to ground 2. But again, I'm afraid what they seek to do is  
10 expand the scope of ground 2. In paragraph 30, they say that Ofcom's decision is  
11 irrational in relation to locations where there is no current overlap or where one may  
12 not arise for a number of years. So, again, albeit this time in relation to ground 2,  
13 there's an attempt to expand the inquiry to a period beyond that initial 12 to 24-month  
14 period because one mustn't forget that ground 2, like the other grounds, is firmly  
15 anchored in the overlap conclusion, in the sense that the argument being made is  
16 that accepting everything else about the overlap conclusion, as a conclusion, it does  
17 not rationally support the answer that was given by Ofcom to question 1. So it's all  
18 about the overlap conclusion.

19 Then in paragraph 31 of the application, the altnets complain that Ofcom's  
20 formulation of question 1 was insufficiently broad and ought to have included  
21 consideration of the impact on vertically integrated networks. But that, again, goes  
22 beyond ground 2 as formulated because that ground, relating to and focusing on the  
23 overlap conclusion, is by reference to wholesale altnet services and CityFibre itself  
24 does not complain about the formulation of the question. So, again, straying or  
25 seeking to stray significantly beyond the formulated grounds.

26 Yes, I am noting what I had scribbled down earlier myself about Mr Randolph's oral

1 submission here in relation to paragraph 30, that their evidence goes to how the  
2 altnets see that the offer will create barriers to competition and he sought to argue  
3 that that was within scope of the appeal but, as I hope I have explained, it simply  
4 isn't, if one looks at how the appeal is formulated.

5 If the altnets were to be permitted to stray into these areas that I have raised, then it  
6 is clear that Ofcom would need to respond and we are talking about a wholesale raft  
7 of further evidence which will certainly not be conducive, we would respectfully  
8 submit, to disposing of this appeal efficiently and proportionately or indeed fairly and  
9 within the timescale that the parties, as in CityFibre and Ofcom, are delighted to say  
10 that we have agreed, in terms of a hearing date in May. And, of course, we'll come  
11 on to that after lunch. But that is a very real issue about adding or allowing the  
12 altnets to add into these grounds.

13 Now, there is of course, some, if not much, that could be said in response to the  
14 detailed submissions that were made about the test to be applied on adducing new  
15 evidence and that kind of thing. I won't go into that in any detail, because, as I said,  
16 we're essentially neutral on the principle of whether to allow in any of the  
17 interventions beyond what I have just said. But I should just flag up in broad outline  
18 where we stand on the three questions that the Tribunal raised right at the beginning  
19 of this hearing.

20 The first one as to the limits on intervention. As I've said, the altnets accept,  
21 certainly BT accepts, CityFibre accepts, that an intervention must be limited to the  
22 grounds of appeal. It cannot be permitted to introduce fresh grounds or expand the  
23 existing grounds, and one really gets that from section 194A of the Communications  
24 Act which, of course, refers how an appeal is to be decided by reference to the  
25 grounds of appeal set out in the notice of appeal and then applying the same  
26 principles as would be applied by a court on an application for judicial review.

1 Then on the second question as to what evidence the Respondent can adduce, can I  
2 refer the Tribunal, that's probably the easiest way to get to it, to paragraphs 12 to 15  
3 of our defence in volume 1 at tab 5, pages 51 to 53. I don't propose to take the  
4 Tribunal through that in any detail, but that really summarises our position on these  
5 key points.

6 So far as broadly, as the question of what evidence a respondent can adduce is  
7 concerned, on a challenge of this kind, a judicial review challenge, then of course a  
8 respondent can adduce evidence going to context and evidence which elucidates  
9 and does not contradict its reasoning that is being challenged. Now, I don't think  
10 there's any dispute about that, but that is our fundamental position.

11 THE CHAIRMAN: Yes.

12 MS CARSS-FRISK: And thirdly then as to the question of merits, and going into the  
13 merits, we have dealt with that largely in paragraphs 13 and 14 of our defence but  
14 I would emphasise that, insofar as we accept that merits can be looked at even on  
15 an appeal of this kind, we do say that it depends very much on the nature of the  
16 appeal and we note in particular that the cases relied upon by Mr Palmer, in  
17 particular the EE case, was the sort of broader merits challenge that we do not have  
18 in this case. So we do agree with Mr Holmes that it is important to have in mind the  
19 nature of the challenge always.

20 More than that as to the merits, I would just flag up that of course we say that it's  
21 relevant to look at whether any error was material, as we set out in our defence and I  
22 don't think there's any dispute about that. So, for example, one would look at  
23 whether the evidence of Mr Dunn on which CityFibre relies is actually material  
24 insofar as it suggests that any error was made by us in relation to the overlap  
25 conclusion.

26 I don't think it's relevant for today's purposes but I should perhaps flag that we

1 wouldn't necessarily accept that evidence going to materiality in that sense could  
2 only ever be confined to evidence that was before the decision-maker at the time  
3 when the decision was made. I think that was one of the points that Mr Holmes  
4 made but it's certainly not necessary for the Tribunal to decide that at this point.  
5 I just wanted to flag that up as an area on which we reserve our position.

6 I should add, although we're not of course on to the timetable as yet, but, coming  
7 back to the altnets' potential intervention, certainly when that timetable was set, it  
8 was on the assumption that any intervention would be confined to the grounds of  
9 appeal.

10 May I just check with my team, Sir, for one moment whether there's anything I should  
11 add?

12 I think that is it so far as we are concerned at this stage. Thank you, Sir.

13 THE CHAIRMAN: Thank you. Very helpful.

14 MR RANDOLPH: Sir, I can be brief.

15 THE CHAIRMAN: Before you do, Mr Randolph, just to check -- sorry, there's an  
16 echo somewhere. Just before you do, Mr Randolph, I want to see if Mr Holmes has  
17 anything he wanted to add.

18 MR HOLMES: Well, I have some extremely short submissions, Sir. I'm conscious of  
19 the time but they will take at most, three minutes.

20 THE CHAIRMAN: Would you please then do that.

21

22 **Submissions by MR HOLMES**

23 MR HOLMES: I'm grateful. Thank you.

24 Firstly, I should say that there is a very broad alignment between Ofcom and  
25 CityFibre on the three points which the Tribunal raised. So we agree in particular in  
26 relation to the evidence that a respondent can adduce on a judicial review, the way

1 she put that, and we also agree with the point she makes about the merits and the  
2 caution that one needs in reading the Everything Everywhere case. Those earlier  
3 cases were very much conditioned by the fact that they were merits appeals in which  
4 broader questions of correctness of the decision were raised.

5 On Mr Randolph's submissions, four short points. First, he argued that fairness  
6 supported his intervention and suggested that CityFibre was inappropriately seeking  
7 to claim special status as the altnet. That's not at all our position, Sir. We are the  
8 Appellant in these proceedings. His clients could of course have appealed, had they  
9 wished to do so. They didn't, and the appeal is defined by the issues that we have  
10 raised in our notice of appeal.

11 The appeal is not a surrogate consultation exercise and that does not provide a good  
12 basis for an application to intervene. The second point is that Mr Randolph's  
13 submissions, in my submission, vividly illustrate the concerns about the impact of  
14 these interventions on the proceedings and the risk that they will distort the  
15 proceedings in ways that will make them less manageable, more costly and  
16 lengthier.

17 BT reserved its right to put in responsive evidence to the broad evidence that  
18 Mr Randolph's clients are seeking permission to adduce. Mr Randolph welcomed  
19 that indication but we say it illustrates exactly the problem. This will be a vicious  
20 circle in which the case spins away from the focused and streamlined issues of  
21 public law that we have raised and we understand entirely why Ofcom similarly  
22 reserved its position, but that illustrates the problem. It illustrates the risk that these  
23 interventions will lead us into a very disorderly and expensive process.

24 The third point was that Mr Randolph referred to the evidence of Mr Dunn. I would  
25 just refer the Tribunal to paragraph 17, which immediately precedes the passage that  
26 both Mr Randolph and Mr Palmer relied upon, section C of the statement. It starts at

1 the foot of page 41 of the first bundle and you see there the way in which section C  
2 is framed:

3 "Had Ofcom consulted on this issue, CityFibre would have sought to carry out the  
4 analysis described in section C below and included that analysis as part of its  
5 response to the consultation."

6 So that is the basis on which this evidence is advanced. It's to show that we had  
7 points that we would have made, had there been, as we say, a fair consultation.

8 The final point concerns the two day time estimate and the consequences of the  
9 intervention. Mr Randolph suggested that everything would be all right and that he  
10 could fit into the revised directions.

11 We have two concerns. The first is that there is a very real risk of a derailment which  
12 may affect the dates which Ofcom and CityFibre could both meet. Within two days it  
13 simply would not be possible to accommodate extensive submission and potentially  
14 oral examination by reference to factual evidence from the interveners and our  
15 concern is that the interveners will introduce a great deal of new evidence which may  
16 be controversial and will need to be dealt with and will lose the focus of these  
17 proceedings, greatly increasing their cost, complexity and length. And even if we  
18 could fit within the two days, the extensive evidence will still involve cost and time  
19 and burden on the parties to address it and so for that reason, we do rely on the  
20 second consideration that I identified in my submissions responding to Mr Palmer.

21 THE CHAIRMAN: Thank you. Mr Randolph, how long are you going to be, because  
22 we really are going to have to take a break? I'm sorry.

23 MR RANDOLPH: I'm in your hands, Sir. I can probably do it in Mr Holmes' three  
24 minutes or we can rise. Given the fact that we've got to hear from Mr Woolfe in any  
25 event and there are other matters, it may be sensible to rise now, but I'm in your  
26 hands, and then I can very quickly address you and probably with the benefit of the

1 short adjournment, I can be even shorter thereafter. But, as I say, I'm happy to  
2 address you now or later.

3 THE CHAIRMAN: I think we will rise and I'm sorry, Mr Woolfe, you've had to wait a  
4 long time and a bit longer to wait. But I'm concerned to make sure you have proper  
5 time to make your submissions as well.

6 So we'll rise and we'll start again at 2.15. Thank you.

7 **(1.35 pm)**

8 **(The luncheon adjournment)**

9 **(2.15 pm)**

10 THE CHAIRMAN: Mr Randolph.

11

12 Submissions by MR RANDOLPH

13 MR RANDOLPH: Thank you, Sir, I can be brief.

14 The first point is this. Ofcom said, and it's been said about Ofcom, that they would  
15 be neutral about the interventions. They've been neutral so far as concerns  
16 sufficiency of interest. They have not been neutral insofar as concerns scope and  
17 it's notable that, essentially, there are no comments in relation to scope despite  
18 references to pricing, which Ms Carss-Frisk seems to take exception to, which is  
19 specifically mentioned in BT's application. I'm not commenting on BT's application.  
20 So no comments about Sky's intervention in substance, no comment about BT's,  
21 loads of comments about ours. That's not neutral, in my respectful submission.  
22 That's not holding the ring. That's taking a position. They're entitled to, but insofar  
23 as the Tribunal wants to have a full picture, I would simply suggest, with respect, that  
24 listening to a substantial number of altnets who operate in an area that CityFibre  
25 does not operate in that are directly affected by Equinix and who will tailor their  
26 grounds of intervention to the notice of appeal, should be permitted. And it is

1 interesting, to say the least, that Ofcom have sought to exclude a substantial part of  
2 any intervention we may make which will obviously go against their decision, will not  
3 support their decision, whereas they don't do the same insofar as any interventions  
4 from Sky and BT are concerned, which obviously will. First point.

5 Second point, it was said in rather broad terms that extensive evidence, possible live  
6 evidence at trial. Absolutely no reference has been made by my clients and I don't  
7 believe by Mr Palmer and Mr Woolfe's clients as far as live evidence is concerned.  
8 That is an Aunt Sally. It's not there. All three interveners, if you will, have made it  
9 absolutely clear that they will fit in with the management and will not disrupt the  
10 management of the case. If it goes for two days, albeit with extended hearing days,  
11 that's fine and we'll be in the Tribunal's hands. We're not going to impact and it must  
12 not be forgotten, Sir, we are impacted just as much as Mr Holmes' client is. We are  
13 altnets. We're not just sitting here on the sidelines thinking: oh, well, wouldn't it be  
14 jolly nice to involve ourselves in an appeal. We're just as interested, we're just as  
15 affected, we're just as impacted as Mr Holmes' client. So the suggestion that  
16 somehow we are going to wholly disrupt the process is without any foundation  
17 whatsoever.

18 Dealing with the 12 to 24 period which has come round and round and round, you  
19 were taken, Sir, to paragraph 17 of Mr Dunn's witness statement. Obviously, the first  
20 three lines were redacted so we don't know what they say, but this is the point. Had  
21 the bit that's not redacted, had Ofcom consulted on this issue, CityFibre would have  
22 sought to carry out the analysis described in section C below and included that  
23 analysis as part of its response to the consultation.

24 Two points. First, clear that there was no consultation on this particular issue but,  
25 secondly, insofar -- if there had been any consultation on this issue, which must  
26 include the time limit of 12 to 24 months, so no consultation, so had -- CityFibre's

1 case through Mr Dunn is that had there been such a consultation, they would have  
2 put forward the analysis set out below. Title of section C, "The likely level of  
3 CityFibre Openreach overlap in the next 12 to 24 months." So smack on what is in  
4 the notice of appeal and as I pointed out. I'm not going to go through it again.  
5 Reference to quarter 4, 2026, paragraph 18. Paragraph 19, paragraph 21,  
6 paragraph 20, not at all, because it's been wholly redacted and then the footnotes to  
7 paragraph 21. So we say, Sir, that absolutely it is smack bang part of the appeal in  
8 relation both to ground 1A and in relation to the lack of consultation in ground 1B.  
9 And so we should be allowed to assist the Tribunal insofar as that period is  
10 concerned, obviously within the 12 to 24-month period in any event, but post it  
11 insofar as that is relevant --

12 THE CHAIRMAN: Mr Randolph, may I just interrupt you for a minute.

13 MR RANDOLPH: Of course you may.

14 THE CHAIRMAN: Let me understand what you're saying here. I don't believe that  
15 either Mr Holmes or Ms Carss-Frisk take the view that there is any period beyond 12  
16 to 24 months that's relevant to the appeal. I think that's the position and so I'm not  
17 entirely sure what you're saying about the relevance of it and why and particularly in  
18 relation to Mr Dunn's statement and I just wonder if we could --

19 MR RANDOLPH: Of course. You, Sir, have evidence from Mr Dunn. That  
20 evidence, which we can't see completely at the moment, includes matters which  
21 specifically go to the likely level of Openreach overlap in the next 12 to 24 months,  
22 so that's within the notice of appeal. But that evidence, according to the paragraphs  
23 I have set out, includes data up to quarter 4, 2026. So you, Sir, and the Tribunal, will  
24 have data, which we can't see at the moment, going up to quarter 4, 2026. Now, that  
25 is from CityFibre. But we are not CityFibre. CityFibre will have their own data in  
26 relation, essentially, to area 2.

1 THE CHAIRMAN: Sorry to interrupt you, but isn't the material you're talking about  
2 going up to 2026, isn't that relevant to an exercise in extrapolating back to -- maybe  
3 extrapolating is the wrong word but taking a view on what is going to happen in the  
4 next 12 to 24 months.

5 MR RANDOLPH: Absolutely, Sir, we're not saying anything different. What we're  
6 saying is, we should be entitled, just as Mr Dunn has adduced evidence up to  
7 quarter 4, 2026, in other words, beyond the 12 to 24-month period, in order to inform  
8 the Tribunal in relation to the specific findings in relation to overlap between 12 and  
9 24 months --

10 THE CHAIRMAN: So you're not saying that you think that the period is a wrong  
11 period or you should have been consulted on a different period or are you? That's  
12 the bit I'm not sure about --

13 MR RANDOLPH: Sorry?

14 THE CHAIRMAN: I thought you were saying a little bit earlier that there had been no  
15 consultation on the issue of the overlap and if there had been, that would have  
16 included the time limit which suggested you were interested in advancing a case that  
17 the time limit should have been outside the 12 to 24 months. That's the bit I'm just  
18 not sure about.

19 MR RANDOLPH: It's rather difficult because we're basing ourselves on  
20 paragraph 17, most of which has been redacted. But you were, Sir, taken to the last  
21 sentence which "had Ofcom been consulted on this issue, CityFibre would have  
22 sought to carry out the analysis described in section B below and included that  
23 analysis as part of its response." Then we go to section C. Then we see that:

24 "In order to inform CityFibre in relation to the title ... "

25 Which is the likely level of CityFibre's overlap in the next 12 to 24 months, which was  
26 the subject of the statement, of Ofcom's statement, they, CityFibre, worked with a

1 consultancy, Cartesian, to look at various data points up to quarter 4, 2026. We just  
2 want to do the same. We just want to provide our evidence in relation to the same  
3 period and we don't see why, actually, it should be restricted to 2026. They've gone  
4 to 2026. I don't know why, but insofar as they can go to 2026 -- the problem, Sir, is if  
5 we are not allowed to adduce this evidence, you will have evidence -- I'm not saying  
6 it's bad, I'm not saying it's wrong, I'm sure it isn't, it's partial, because CityFibre  
7 operate in a particular area and we operate in another area, which is important and  
8 we operate in a different fashion insofar as concerns at least some of my clients. In  
9 other words, vertical rather than wholesale. And so, Sir, insofar as you want to have  
10 the full picture so that you can determine the issue of, as Mr Dunn puts it, the local  
11 likely level of Openreach overlap in the next 12 to 24 months, which is critical to the  
12 notice of appeal, you, in our respectful submission, would be assisted by, sure,  
13 CityFibre's data on the material going up to, in their case, quarter 4/2026 but then  
14 what is sauce for the goose is sauce for the gander. We should be entitled -- as an  
15 interested party, we have a sufficiency of interest to put equivalent evidence in  
16 before you, Sir, because it may well be different. Well, we don't know, but it may well  
17 be different and if we have a sufficiency of interest and we can assist you in terms of  
18 this data which is available, then we submit that the proper approach to take, the just  
19 and fair approach, as Mr Palmer would put it, would be to allow us to put that in.  
20 Insofar as area 3 is concerned, Sir, you were taken to the statement at  
21 paragraph 3.42, internal page 11. I'm afraid I don't have it in hard copy -- sorry,  
22 I don't have the copy with the pagination, but 3.42, where -- and, Sir, it's worthwhile  
23 going back to the previous page, page 9. So this is the title, "Low Openreach FTTP  
24 prices act as a barrier to altnet entry." Critical issue on this appeal, barrier to altnet  
25 entry. Was there or was there not, would there or would there not be one? 3.42, this  
26 is Ofcom's analysis and conclusions:

1 "Our approach to pricing regulation in the WFTMR statement supported our  
2 overarching strategic objectives as follows. [Set it out in area 2]. In area 3, we did  
3 not believe the commercial deployment of gigabyte capable networks would result in  
4 material and sustainable competition to Openreach."

5 That is part of their analysis and conclusion within the section dealing with their  
6 approach to altnet entry and barrier thereto which forms part of the notice of appeal.  
7 CityFibre do not operate, at least not predominantly in any way at all, in area 3. We  
8 do. To the extent that it's specifically referred to there and is explicit in the  
9 statement, we would suggest that the Tribunal --

10 MR HOLMES: Just for the avoidance of doubt, CityFibre's appeal takes no issue  
11 with this part of Ofcom's analysis, just in case there was any doubt about that.

12 MR RANDOLPH: Well, I wasn't suggesting that it did and, obviously, it wouldn't  
13 because CityFibre doesn't have any activity in area 3. Whether or not -- that  
14 interjection is interesting, because the fact that it doesn't take issue with this part of  
15 the settlement does not mean that it is not relevant to or doesn't fall within the  
16 grounds of appeal. The grounds of appeal relate to, amongst other things, the  
17 potential -- the finding, the wrong finding, CityFibre assert, that there was no or no  
18 real potential impact on altnet entry through the clearing of the Equinox offer. This  
19 goes to that. It's written in black and white. We should, I respectfully submit, be  
20 entitled to respond to that so that the Tribunal can have the fullest picture it wishes to  
21 do.

22 Just for clarification, I made this point at the beginning of my submissions this  
23 morning, I'll make it at the end of them. What we seek, the manner in which we want  
24 to intervene, if we may, is set out in paragraphs 28, 29, 30 and 31 of our application.  
25 It does not go wider than that. We're content to be restricted to that. But insofar, Sir,  
26 as we are restricted back to that which Ofcom says we should be, which is

1 interesting, in inverted commas, given the fact that it is meant to be taking a neutral  
2 stance, we say that won't be worth the candle. To be frank, if that's all you ordered,  
3 Sir, my instructions are that we won't be able to assist the Tribunal in any meaningful  
4 sense.

5 So, Sir, those are my submissions, unless I can assist you any further.

6 THE CHAIRMAN: Thank you. I think unless Dr Bell or Professor Waterson have  
7 any questions --

8 MS CARSS-FRISK: Sir, I wonder if I could just for the record say one thing, in  
9 relation to the allegation of unequal treatment and lack of neutrality by Ofcom. The  
10 reason we decided to make the points we did about the altnets' proposed  
11 intervention is that unlike in the case of BT and Sky, there were these clear  
12 indications in our submission, that they were seeking to stray beyond the scope of  
13 the appeal. So there's an explanation for that choice. Thank you, Sir.

14 THE CHAIRMAN: Thank you.

15 Mr Woolfe, you've wait a long time, very patiently. Thank you. Would you like to  
16 make your application?

17

18 **Submissions by MR WOOLFE**

19 MR WOOLFE: Sir, thank you, yes, and just to reassure you, I know every advocate  
20 says this, but I genuinely believe I should be able to be fairly brief.

21 THE CHAIRMAN: Take as much time as you want. Everybody else has had a fair  
22 go and I don't want you to feel you haven't, so please take your time.

23 MR WOOLFE: I am going to deal first, very briefly, with the short points of law and  
24 then turn to what our intervention would bring to this appeal and then thirdly, turn to  
25 questions of proportionality.

26 On the law, I can be short, both because Mr Palmer very helpfully dealt with a lot of it

1 and we adopt what he said, but also because, actually, I think even if Mr Holmes was  
2 right on what he says about the law, Sky should still be granted permission to  
3 intervene when you understand what it is we propose to intervene on. So I will deal  
4 with it fairly shortly.

5 I simply adopt what Mr Palmer said, particularly under three heads. First as regards  
6 the basic test the Tribunal should apply in deciding whether or not to allow the  
7 intervention. Secondly, on the relevance of the merits and thirdly, as to the role of  
8 interveners. On that first point of the basic test, we agree that the test is that set out  
9 in rule 4. It's essentially whether it's just and proportionate, having regard to the  
10 factors set out in rule 4 and justice does import considerations of fairness that  
11 Mr Palmer adverted to.

12 As regards fairness, we are in one sense, although these are not terms offered by  
13 Sky, these are terms to which we have signed up. I think Mr Palmer said that article  
14 1, protocol 1 concerned this issue. It's the contractual terms we've signed up to and  
15 are commercially very important for us and just as for BT therefore, considerations of  
16 fairness are important that we should be able to have our say.

17 Now, Mr Holmes says it essentially comes down to what can interveners add and we  
18 agree it's a highly material consideration for the tribunal in deciding whether or not to  
19 exercise what is fundamentally a discretion to allow the intervention. And to a great  
20 extent that's fine, because as I'm going to explain, we are proposing to intervene  
21 because we think we do have things to add value to the Tribunal in considering this  
22 appeal. Therefore, I don't shy from -- I don't run away from that.

23 As regards to the merits, we say essentially it's the test set out in the Virgin case, as  
24 Mr Palmer said and we agree that that does make authority for the merger context  
25 somewhat irrelevant to this question. Now, Mr Holmes made an interesting  
26 concession as regards, I think, the merits or clarification perhaps, which is he did say

1 where you have a multi-valent decision, so a decision which rests on a consideration  
2 of a broad set of factors, he fully accepted that simply because an error was shown  
3 in respect of one of those factors, it doesn't necessarily mean that the decision  
4 overall was wrong and he accepted that in those circumstances, evidence or  
5 submissions to the effect that the other factors would be sufficient for the decision in  
6 any event, would be relevant to the merits and relevant to the appeal. We say that is  
7 important because when you understand the nature of the appeal, the nature of  
8 Ofcom's response and where we would stand on intervention, that is highly relevant.  
9 Thirdly, as regards the role of interveners, an intervention in a sense is something  
10 the Tribunal can decide how much it wants from the interveners. Under rule 16(6),  
11 rule 19(2), it can decide what it wants evidence on and how much evidence should  
12 be allowed, what submissions should be allowed and so forth. And to a great extent,  
13 therefore, questions of proportionality, the Tribunal can tailor the intervention to suit  
14 what it thinks will assist in the just disposal of the appeal.  
15 Now, turning to what our intervention would bring, if I can refer you, actually, to  
16 paragraph 8 of Mr Holmes' skeleton for CityFibre, where at paragraph 8(a), he points  
17 to section 194A of the Communications Act and points out that it requires the  
18 Tribunal to determine appeals by reference to the grounds of appeal set out in the  
19 notice of appeal, on JR principles. And at 8(f), he says that third parties cannot  
20 divert the Tribunal to a broader merits based review. The problem with this as  
21 an answer to Sky's application to intervene is that CityFibre is taking a very narrow  
22 view of what is meant in section 194A by determining the appeal by reference to the  
23 grounds of appeal and, indeed, is taking a very narrow view of Ofcom's reasoning in  
24 this case. I think the easiest way of illustrating that is to take you to the decision  
25 itself to begin with. So it's in bundle 2, tab 9, and it's page 47, using the bundle  
26 numbering.

1 On that page you see paragraph 3.78 which is what CityFibre particularly relies upon  
2 as setting out Ofcom's relevant reasoning.

3 THE CHAIRMAN: Yes.

4 MR WOOLFE: And essentially, I don't want to misrepresent my learned friend's  
5 case, but essentially, I think the case's starting point is that the various  
6 considerations set out at paragraphs A through to D but because at D, there may be  
7 some challenges for meeting the order mix targets in an initial period, Ofcom goes  
8 on to consider this question of overlap and CityFibre's appeal places a great deal of  
9 weight on 3.78E and essentially says, if Ofcom hadn't reached that conclusion, the  
10 decision would have been different. That is crucial, I think, is the word that is used.

11 Now, 3.78 is obviously only a summary of the reasoning that actually follows at 3.79  
12 through to 3.89 and I would make a couple of submissions. First of all, if you read  
13 through this, which I assume has been done at some point, it's all about how ISPs  
14 will respond commercially, both upstream and downstream, to the Equinox offer and  
15 if I could call your attention in particular to paragraph 3.81 which is Ofcom's finding  
16 that it is unlikely that ISPs that sign up to the Equinox offer will continue to widely  
17 offer legacy products for commercial reasons. And the end of 3.81, essentially this  
18 offer will accelerate a change that is happening in any event.

19 Then at 3.82, Ofcom's expectation is that ISPs will largely cease placing new orders.  
20 This refers to what the ISPs said they would do. And subparagraphs A, B and C, it's  
21 talking about the ISPs' changing commercial response as a result of the Equinox  
22 offer. And it says it considers the ISPs will change how they market and sell  
23 broadband within the Openreach footprint and reference to stop sell at paragraphs B  
24 and C.

25 I will, of course, refer you again to 3.85 and 3.86, where Ofcom is returning to  
26 consider the deterrents for using altnets in the short initial period. At 3.86, Ofcom

1 refers to the overlap question and then 3.87 is also quite significant. It says:  
2 "Even in locations where there is an overlap in the FTTP footprints, moving volumes  
3 to altnets will not necessarily result in the worsening performance against the order  
4 mix targets. If instances do arise where meeting the order mix targets is in the  
5 balance, ISPs are likely to have various responses available to them that, while  
6 possibly involving some cost, would avoid the cliff edge effect."  
7 So again, Ofcom is adverting to how ISPs will respond to the order mix targets being  
8 an important aspect of how it's setting up its decision.  
9 Having sort of set out what this part of the decision is about, albeit being about ISP  
10 response, if we turn to my learned friend's notice of appeal, both at paragraphs 30 --  
11 this is bundle 1, tab 2, paragraph 30, which is on page 15 -- perhaps paragraph 41  
12 on page 23 and you see the view that Mr Holmes is pushing, of the relevance of how  
13 the overlap conclusion fits into the broader scheme of the decision. And he says  
14 that.  
15 "Ofcom's conclusion that the ...(Reading to the words)... no potential barrier to using  
16 the altnets rested crucially on the overlap conclusion ... "  
17 Acknowledged this in the initial period of 1 to 2 years, so ISPs may struggle to meet  
18 the order mix targets:  
19 "However ... "  
20 And then he refers to the overlap conclusion. There is no mention of the other ways  
21 which ISPs may respond which is referred to in the decision at paragraph 3.87.  
22 Now, that's presenting a certain view of the Openreach position being critical. Ofcom  
23 don't agree with that and Ofcom present a different view of how the relevant parts of  
24 the decision here fit together. So if I can ask you to turn to Ofcom's defence in  
25 bundle 1, tab 5 at both paragraph 66 and 67. So if I can point you to paragraph 66  
26 on page 71, discussing the question of when there was a shift from consultation to

1 decision. But if I can point you to the bottom of page 72 of that bundle, at  
2 paragraph 66, to the last sentence, it says:

3 "It remained the case that its conclusion was the result of multiple factors."

4 So Ofcom is saying this was a multi-valent type of decision and, again, it's even  
5 clearer at 67 on page 73. Ofcom's case is that central to both the CityFibre's  
6 grounds of appeal is its contention that Ofcom's conclusion rested crucially on the  
7 overlap conclusion. And I'm quoting here from the middle of paragraph 67:

8 "But the first difficulty of CityFibre's case is that it overstates the significance of the  
9 overlap conclusion to Ofcom's decision. The overlap conclusion was but one of a  
10 number of factors which Ofcom took into account and the decision was not crucially  
11 contingent upon it."

12 So there's a difference of view between the existing parties to the appeal as to how  
13 the overlap conclusion fits into matters.

14 Now, under section 14A, the tribunal has to decide the appeal by reference to the  
15 grounds of appeal, but on any reasonable view, we would say, of that section, the  
16 Tribunal has to resolve this background question as between CityFibre and Ofcom  
17 as to how the decision falls to be understood, whether it is a multi-valent type of  
18 decision or whether there is a critical line of reasoning, as Mr Holmes contends.

19 Now, CityFibre can't insist that the Tribunal adopts its reading of the decision simply  
20 because it's positioned its argument as to the decision needs to be read like that in  
21 the sense of it being prior to the grounds of appeal. Clearly this is a matter set out  
22 on the pleadings the Tribunal has to grapple with.

23 Now, since that will be in issue, the issues are rather broader and the Tribunal will  
24 need to consider what if -- the Tribunal will need to consider CityFibre's grounds of  
25 appeal by reference to possible different interpretations of the decision. So what if it  
26 is right that the overlap conclusion is wrong but the other parts of Ofcom's reasoning

1 stand?

2 THE CHAIRMAN: Can I just understand that argument -- maybe just play it back to  
3 me and see whether I've got that right, Mr Woolfe. So the way you're putting this is  
4 that let's assume for argument's sake that the overlap conclusion set out in  
5 paragraph E turns out to be incorrect and then you say the question arises as to if it  
6 sits in a group of other -- you use the expression multi-valent -- it sits in a group of  
7 other findings which at least on one interpretation, are all self standing points as to  
8 why it's the right decision, a number of those other things are things which relate to  
9 the ISPs and the way they would approach altnets or the market or their customers  
10 or legacy products and so on. Is that where you're going with this?

11 MR WOOLFE: Yes, exactly, Sir. You can see -- certainly on any view, that some of  
12 this is, even on Mr Holmes' reading of the decision, highly material background to  
13 how important the overlap conclusion is. So for example, at 3.82 of the decision,  
14 there's this point that ISPs are likely to cease placing orders for legacy products in  
15 areas within the Equinox footprint and so, if they're only ordering fibre from  
16 Openreach, then it doesn't matter whether they're ordering a lot of it or a little of it, it  
17 won't affect whether they get the discount.

18 THE CHAIRMAN: So I suppose the question that follows from that, assuming that's  
19 all correct and your argument is right, then as I understand it, those other points are  
20 not an issue in the appeal in their own right as freestanding points and we do have  
21 the benefit of a significant amount of material from Ofcom, both in relation to the  
22 statement but also in relation to the market review and I suppose the question is,  
23 firstly, what sort of things do you think might be necessary to supplement what  
24 Ofcom already has in front of us, which is, as I say, quite compendious, but  
25 secondly, is it really right that if Ofcom had reached a conclusion on those things and  
26 recorded it very carefully in their decision, that in proceedings of this nature, you

1 should be bringing quite separate evidence which may or may not be consistent with  
2 what Ofcom's found.

3 MR WOOLFE: If you do have a multi-valent decision, a question does arise to some  
4 extent of the weighting of those considerations and understanding whether or not  
5 taking away one of them would make all the difference or not. That is not something  
6 we've done simply, I would submit, off the face of the decision itself and nothing else.  
7 We can read the words on the page. I submit the Tribunal would be assisted by  
8 having direct access to an ISP, the largest third party ISP as we put it, and if you  
9 look -- the other illustration I gave you, is this point. It's quite oblique in the Ofcom  
10 decision at 3.87 on page 60 of bundle 2, which is about whether or not the extent to  
11 which moving volumes to altnets would result in worsening performance against the  
12 order mix targets. What are the responses available to ISPs. It's something that  
13 Ofcom had regard to.

14 THE CHAIRMAN: Sorry, Mr Woolfe. I'm just catching up with you a bit. So 3.87 on  
15 what --

16 MR WOOLFE: Page 60 of bundle 2.

17 THE CHAIRMAN: Yes.

18 MR WOOLFE: So this is a point which very specifically says: even if we're wrong  
19 about overlap or even location where there is an overlap --

20 THE CHAIRMAN: Yes, exactly. In a way you can almost short cut this, can't you,  
21 because you don't necessarily need to go through the line of reasoning about the  
22 multi-valent decision to get to the point where -- it's the same point in a way, isn't it?  
23 If you have a lot of material that Ofcom have to justify the position they've taken in  
24 3.87, the question is where your further evidence, if you're talking about putting  
25 evidence in, where that fits into it. Is it supplemental to the decision, in which case,  
26 is it permissible, or does it merely repeat -- and perhaps give more colour and

1 context, but more or less repeat what Ofcom have already said. That's the bit I'm not  
2 really clear about.

3 MR WOOLFE: Two answers. First of all, as regards -- to the extent it does go over  
4 stuff that Ofcom already has in the decision, I would submit the Tribunal will be  
5 assisted by having us as a party before the Tribunal and it can interrogate us about  
6 its understanding of it, if need be. So we'll be there as a resource to the Tribunal and  
7 try and assist the Tribunal as best we can with any questions that arise. And correct  
8 any misapprehensions that are given by any of the other parties about matters  
9 relating to ISPs because we are the only ISP who is -- sorry, ISP that is not always  
10 an infrastructure provider that is coming forward.

11 As regards the question of putting forward fresh evidence, I would submit that  
12 interveners are in the same position as Ofcom in that regard which is the Tribunal  
13 can decide if it will be assisted -- merely the fact that evidence will be fresh evidence  
14 is not a bar on it. It's a matter of whether the Tribunal will be assisted by it, bearing  
15 in mind the matters it has to decide as disclosed by the notice of appeal and the  
16 defence to it. And what I would submit is that where what is being put in this case is:  
17 well, there's one part of this which is very critical and if you remove that, the whole  
18 thing goes and Ofcom and the other side say: actually, no, these factors all fit  
19 together in a more complex way. The consideration may be somewhat different for  
20 the Tribunal than it was for Ofcom and it may be assisted by having fresh evidence.  
21 We're not talking about anything extensive. Because I can --

22 THE CHAIRMAN: I'm really just keen to understand the principle, if you like, about  
23 where you say it fits in. I don't want to take you out of course --

24 MR WOOLFE: I'm close to the end of what I wanted to say. In our skeleton, at  
25 paragraph 6, we point out that:

26 "Understanding whether or not the Equinox offer gives rise to incentive effects of

1 ISPs depends upon understanding the structure of ISPs' commercial incentives and  
2 demand their operational planning ... "

3 And so forth and we set out at paragraph 7 what we proposed to provide. So just  
4 some background about the nature of our business. That would be context, unlikely  
5 to be controversial but it would -- inevitably to understand everything we go on to  
6 say.

7 Relevant commercial decisions as to the selling of legacy products in the retail  
8 market. We say that goes directly to the point at 3.82 of the decision as to whether  
9 or not, in fact, we would continue offering legacy products in an Equinox footprint.

10 Contextual evidence as to how Sky goes about operationally and commercially  
11 deciding whether or not to use altnets. Essentially, it may be relevant to the Tribunal  
12 to consider the kind of timescales over which the ISPs plan these kinds of matters.  
13 It's not simply a case of the cheapest product gets purchased and all being a very  
14 short term decision, it's actually a long term matter and the Tribunal may be assisted  
15 in understanding that. Again, stuff that may be well understood by Ofcom but the  
16 Tribunal will not have the same -- it's not embedded in the industry in the same way  
17 and we hope it will be helpful and we can set in the context, paragraph 7.3, of the  
18 overall transition that's going on in the market.

19 We do say that those matters will be of significant help to you in deciding whether or  
20 not the overlap conclusion itself really makes all the difference or not and we do say  
21 it is a matter which falls within the scope of the appeal, as disclosed by the notice of  
22 appeal and Ofcom's defence.

23 Finally on proportionality. So we're content to fit within the timetable that CityFibre  
24 and Ofcom have advanced. We can provide any statement of intervention within the  
25 timescale indicated and we're content to work towards it being a two day hearing in  
26 the timescale that is allowed and we also are fully aware that, if it's a tight hearing

1 timetable, the Tribunal will need to tailor this extent of intervention that is allowed.  
2 We would say it would make sense for us to attend the hearing and be able to make  
3 some oral submissions but they could be very short. It would be limited very shortly  
4 in time. It would be a matter of correcting misapprehensions, assisting the Tribunal  
5 with certain specific questions, not setting out some separate basis for defending the  
6 appeal or these other matters that are being suggested.

7 Finally, Mr Holmes did attempt to tar us with the same brush that had been used with  
8 other interventions. We are not seeking to step outside the notice of appeal. We are  
9 seeking to make a focussed and proportionate intervention to provide the Tribunal  
10 with evidence that we think will be of assistance to it in determining these matters.

11 Sir, unless those instructing me say I've missed anything, that's everything I wanted  
12 to say in support of the application.

13 THE CHAIRMAN: Thank you.

14 I think we're probably going to go back to Mr Holmes first. Ms Carss-Frisk, would  
15 you like to --

16 MS CARSS-FRISK: No, Sir, I'm staying out of this particular --

17 THE CHAIRMAN: I thought you might be. I thought it might be Mr Holmes.  
18 Mr Holmes.

19

20 **Submissions by MR HOLMES**

21 MR HOLMES: So, thank you, Sir. Mr Woolfe has pointed to disputes as to the  
22 interpretation of the decision and how the decision is to be read and whether  
23 particular factors are independent in the reasoning and sustain the decision,  
24 notwithstanding the overlap conclusion. Of course, CityFibre's reading of the  
25 decision isn't the last word. The Tribunal will hear argument from myself and from  
26 Ms Carss-Frisk from Ofcom about how the decision is to be read and how these

1 factors fit together in Ofcom's reasoning. In my submission, none of that supports  
2 a role for Mr Woolfe as an intervener in these proceedings. On the contrary, it  
3 highlights that on an appeal of the kind that we have brought, there is no additive  
4 role for Mr Woolfe's client and it's telling that the paragraphs in the decision that he  
5 relies upon are not ones that CityFibre has sought to challenge or to reopen in these  
6 proceedings. It appears that his client wishes to put in new evidence on aspects of  
7 the decision, Ofcom's decision, in order to provide an independent basis for a  
8 conclusion on the merits about whether the decision can stand and in my  
9 submission, that is not the correct approach in principle. Ofcom's decision stands  
10 unless and until challenged in a notice of appeal and the decision will stand or fall  
11 based on its own conclusions and findings, judged against the grounds of appeal in  
12 the notice of appeal and nothing that Mr Woolfe's client says in evidence can  
13 strengthen or alter or affect the findings that Ofcom has already made. And so, in  
14 substance, what he is proposing is to go beyond the scope of the issues as defined  
15 by the grounds of appeal in the notice of appeal and you see that very clearly from  
16 the application for permission to intervene and, indeed, from Mr Woolfe's skeleton  
17 argument.

18 If we turn in the intervention and supporting documents bundle, volume 2, to page 8,  
19 you see the matters on which Sky says that it is particularly well positioned to assist  
20 the Tribunal and in relation to ground 1A, Sky's proposing to give evidence on its  
21 commercial and/or operational view of the scope for overlapping networks. Now,  
22 that would be all well and good in a consultation before Ofcom, where the question  
23 for decision was: what is the scope for overlapping networks? But that is not a  
24 question which arises on CityFibre's appeal and that evidence is therefore neither  
25 here nor there. It will simply add to complexity and cost. It will not add to the  
26 Tribunal's useful consideration of the matters in dispute.

1 In relation to ground 1B, Sky offers to assist the Tribunal by providing evidence as to  
2 its understanding of both the underlying facts and the consultation process and as to  
3 the extent, if any, to which reference or otherwise to the overlap conclusion in the  
4 ConDoc would have influenced its responses to Ofcom. Really, that evidence will be  
5 of no assistance whatsoever to the Tribunal's assessment, no assistance at all to the  
6 question of fairness which the Tribunal will need to decide. That will depend on  
7 whether there was a material matter which wasn't the subject of consultation on  
8 which parties may have had something to say and you already have evidence from  
9 CityFibre that it would have had something to say.

10 Under ground 2, Mr Woolfe's client offers to provide evidence on the factors it takes  
11 into account when deciding whether or not to contract with altnets and use their  
12 services. Well, this appears, again, to go to the ISPs' incentives but that isn't the  
13 subject of this appeal. That's not a matter that is raised by any of the grounds of  
14 appeal and for that reason, this evidence again, would simply add to cost and  
15 complexity but it would not assist the Tribunal in addressing the hard-edged  
16 questions of public law which are raised in the notice of appeal and it is the  
17 Tribunal's task to determine.

18 Looking at the skeleton argument of Mr Woolfe, exactly the same points can be  
19 made. Turning to page 31 of the skeletons bundle, paragraph 6, you see that it's  
20 said that:

21 "As is evident from paragraphs 3.81 to 3.82 of the statement, paragraphs that are not  
22 under challenge in this appeal, understanding of whether the Equinox offer gives rise  
23 to any incentive effects for ISPs itself depends upon understanding the structure of  
24 ISPs' commercial incentives, the extent of continued demand from retail customers  
25 for new orders of legacy products and ISPs' operational planning."

26 We say this is affected by the same error that also was apparent in Mr Palmer's

1 submissions this morning, the idea that there is a broad question of whether the  
2 conclusions are right or wrong in the decision and whether the decision can be  
3 upheld on an alternative basis by reference to evidence provided by Mr Woolfe's  
4 client or Mr Palmer's client. That's just not how this process should work and on that  
5 basis my submission is that the Tribunal should exercise its discretion not to allow  
6 Mr Woolfe's client to intervene.

7 My alternative submission, which Mr Woolfe didn't address, is that any intervention  
8 should be confined to written submissions and that Mr Woolfe, if he wishes to make  
9 oral submissions, should make a reasoned application in due course when he has  
10 seen Ofcom's skeleton argument. But at this stage the Tribunal does not have any  
11 sound material before it which would justify granting the intervention and it should  
12 exercise its discretion to refuse it.

13 THE CHAIRMAN: Thank you, Mr Holmes.

14

15 **Submissions in reply by MR WOOLFE**

16 MR WOOLFE: Sir, if I can just reply very briefly.

17 Mr Holmes says, well, certain parts of the statement are not being challenged. Well,  
18 he says he's not challenging, I assume, 3.87 of the statement, where at 3.87, Ofcom  
19 says even if where there is some overlap, it doesn't matter because ISP responds. If  
20 he is accepting that that can stand and that that is a complete answer to his appeal,  
21 then there wouldn't be much of a problem, there wouldn't be an appeal in that  
22 situation. Clearly he must be putting in issue maybe not the correctness of what is  
23 said but its significance in terms of the overall decision, because otherwise his  
24 appeal is hopeless.

25 Going beyond that, he went to at some length, our application. That was at that  
26 time, the broadest things we said we thought we could assist on. Obviously, since

1 that time, we've had Ofcom's defence, albeit in non-confidential version. I would  
2 submit that paragraph 7 of my skeleton argument is a better place to look for what  
3 we would add.

4 In terms of the form of any intervention, if allowed, I'd submit that in a sense what's  
5 really critical is the chance for the Tribunal to receive written evidence from us, a  
6 witness statement explaining these matters, and that it will be more valuable to the  
7 Tribunal having that in the form of evidence than merely written submissions.  
8 I would also ask for the opportunity to make written submissions and oral  
9 submissions where we can assist, but it is in fact the evidence that we submit will be  
10 most crucial and critical.

11 So beyond that I simply rely on everything I said in my main submissions.

12 THE CHAIRMAN: Good. Thank you, Mr Woolfe. Does Professor Waterson or Dr  
13 Bell have anything further? I think we will take a break --

14 PROFESSOR WATERSON: Yes. I just wanted to ask, and this is a purely factual  
15 question, but does your client use any altnets currently?

16 MR WOOLFE: Sorry, I think that was a question that was directed to me.

17 PROFESSOR WATERSON: Yes.

18 MR WOOLFE: I'll be corrected if I'm wrong. I believe we don't at this present time,  
19 but it is something that has been actively considered. It's not something that it's  
20 never occurred to them to do, and so they have seriously considered it, but don't at  
21 the moment.

22 THE CHAIRMAN: Good, thank you. So we'll take a break to deliberate. What we'll  
23 try and do -- I hope we'll be able to come back and give you an answer. I'm sure  
24 you'll appreciate, given the submissions that have been made this morning,  
25 I anticipate we will want to produce a written ruling but we clearly aren't going to do  
26 that in the next short while, so that will have to follow. But we think it will be helpful if

1 we can tell you who's in and who's out.

2 So we will come back and try and do that. May I suggest that we aim to do that by  
3 half past three, if that's convenient to everybody, and hopefully we can then be fairly  
4 quick and wrap things up at that stage. We'll let you know if we need any longer  
5 than that, but I anticipate we can be back with you by then.

6 Thank you.

7 **(3.06 pm)**

8 **(A short break)**

9 **(3.30 pm)**

10 THE CHAIRMAN: Thank you very much everyone for your helpful arguments. We  
11 certainly found those very useful and interesting. We've reached a conclusion which  
12 is that we've decided to permit the intervention of BT and refuse the intervention of  
13 the altnets and Sky. Written reasons will follow for that.

14 Mr Palmer, we are concerned about expedition and efficiency of the proceedings and  
15 we're also very mindful that we've got limited hearing time on 11 and 12 May.  
16 Unfortunately, that's the restriction we have for the final hearing. So we did consider  
17 whether we should impose restrictions on you in terms of participation by BT and in  
18 the end, we settled on a direction which I suspect will come as no surprise, and  
19 indeed, no doubt isn't what you volunteered, which is that BT's intervention should  
20 be strictly limited to the grounds set out on the notice of appeal and to the extent that  
21 that's unclear, and I think it's possible as a result of the discussion this morning, that  
22 it may well not be a matter on which everybody has the same view. We hope that  
23 the written reasons we furnish will provide some guidance on that. But we would  
24 urge you and your client, please, to urge, as I'm sure you will, common sense and  
25 restraint in the scope of your intervention. And we do note that we have the power to  
26 rule evidence inadmissible on application and also to impose cost sanctions if the

1 intervention goes beyond scope and I'm sure you are fully aware of all that, it almost  
2 needs not to be said.

3 One other point, we do expect efforts to ensure no duplication and we hope you'll be  
4 able to work with Ofcom, bearing in mind the point you made earlier about the  
5 relationship with Ofcom but we hope you'll be able to use all best effort to ensure no  
6 duplication.

7 MR PALMER: Thank you, Sir. That is all noted and appreciated. There'll be one or  
8 two consequential matters when we get to the directions which I might raise at that  
9 time.

10 THE CHAIRMAN: Before we get on to that, I want to see if there's anything else on  
11 the subject of interventions before we move on.

12 MS CARSS-FRISK: I was going to venture to raise the question, although it might  
13 be sensible for BT then to actually be limited in their intervention to written  
14 submissions. We are acutely conscious at this end of how short two days can be  
15 and there is quite a lot to be gone through, even though we all accept there are  
16 perimeters, judicial review perimeters to the appeal and all the rest of it. But there is  
17 a lot and so it did seem to us that in these somewhat exceptional circumstances, it  
18 would be sensible to limit the intervention in that way. I see Mr Holmes nodding so it  
19 may be that I have a friend and ally on this topic at least.

20 MR HOLMES: Yes, it's very heartening to see how much common ground Ofcom  
21 and CityFibre have been able to make during the course of this hearing. It may not  
22 be the same, of course -- in fact, it won't at the final hearing. May I respectfully  
23 endorse what Ms Carss-Frisk says. We are similarly concerned that two days will be  
24 tight, even with extended hearing days. As a halfway house at the very least,  
25 I would again urge on the Tribunal my suggestion earlier today that Mr Palmer could,  
26 for now, be confined to written submissions and if needed, he could apply to make

1 oral submissions in the light of Ofcom's skeleton argument. He may well find that --

2 THE CHAIRMAN: Mr Holmes, sorry to interrupt you. We seem to have lost

3 Mr Palmer.

4 MR HOLMES: I hope it wasn't anything I said, Sir.

5 THE CHAIRMAN: I'm sure it wasn't, but we ought to make sure he's here, I think,

6 while you're making those submissions.

7 MR PALMER: I don't know if you can see me now?

8 THE CHAIRMAN: We can't see you. We can hear you.

9 MR PALMER: Oh. I'm sorry, my computer just froze and I've switched computer, so

10 I'm on Ms John's computer. But I think I heard most of what --

11 THE CHAIRMAN: Well, maybe Mr Holmes, it would be helpful to catch you up on

12 that.

13 MR HOLMES: Certainly Sir. I was agreeing with Ms Carss-Frisk's submission that

14 the intervention should be confined to written submissions and evidence, if so

15 advised, but that oral submissions would be inconsistent with the tight time frames

16 and short hearing period that is allowed. If Mr Palmer finds that he is concerned

17 about that in the light of skeleton arguments, the solution would at that stage be to

18 apply on the papers and the Tribunal could form a view. But we do agree with

19 Ms Carss-Frisk that to ensure discipline, and in the light, not least of experience

20 today, it would be sensible to limit oral submissions on the day.

21 MS CARSS-FRISK: If I could just add that we think that's a very sensible

22 suggestion. So if there is a concern that there should be the opportunity for

23 Mr Palmer and his clients to apply to do something more than written submissions in

24 due course, seeing how things shape up, then we think that's a very sensible

25 compromise solution.

26 THE CHAIRMAN: Mr Palmer, do you want to come back on that?

1 MR PALMER: Yes. Well, the starting point is I take it from my learned friends that  
2 there's no objection to us filing a statement of intervention in accordance with the  
3 directions plus written evidence, so that's the starting point. The only thing which  
4 then remains to be decided is what is the nature of our participation in the hearing --

5 THE CHAIRMAN: Sorry, just to pause you there for a minute, I think Ms Carss-Frisk  
6 was suggesting that you wouldn't put in any evidence at all. Have I got that right?

7 MS CARSS-FRISK: No, I wasn't suggesting that. I was really suggesting something  
8 in writing but not oral submissions. So I should have been clearer as to that.

9 THE CHAIRMAN: I'm sorry, that was me misunderstanding. Forgive me. So the  
10 position is that written submissions only and no oral submissions but limited if we  
11 permit them and you would therefore be permitted, Mr Palmer, to put in a notice of  
12 intervention and evidence, bearing in mind what we've already said about the scope  
13 of the appeal. Is that the proposition?

14 MR PALMER: That's the proposition. So I certainly agree that we should be  
15 permitted to file a statement of intervention and written evidence. What I have more  
16 difficulty with, in view of the requirements for a fair hearing, as a party, would be that  
17 we then wouldn't be able to orally respond to anything that anyone's said about the  
18 statement of intervention and evidence, which wouldn't be known in advance of the  
19 hearing itself, so wouldn't be a matter for prior application. What I would suggest  
20 instead is that we simply had a time limit so that you knew how much time we were  
21 intending to spend at the hearing. It may be that that be fixed at a later stage but  
22 what I have in mind at this stage is no more than 30 minutes and I would have  
23 thought --

24 MR HOLMES: BT will see reactions to the intervention because the timetable  
25 provides for us to respond to it prior to skeleton arguments and it will also see what  
26 is said in skeleton arguments and the suggestion is that, if there were anything that

1 required oral submissions, an application could be made explaining why they were  
2 needed. But it's not the case that this will be left at large until the hearing.

3 THE CHAIRMAN: Sorry, just -- perhaps it might be helpful, this was a subject that,  
4 actually, we had thought about and had planned to come to about the way in which  
5 the hearing works and maybe would you mind if we just got the timetable right before  
6 we did that, because I think that will help -- as you say, Mr Holmes, an understanding  
7 of who produces what and when, and then we can work out what happens at the  
8 hearing. So I just want to make sure that we've dealt with the interventions, nothing  
9 else to add from anybody before we move on to the future conduct.

10 So we have a hearing date fixed for 11 and 12 May. At the moment we will need to  
11 finish at 3.45 pm on the 11th and so it's even a bit shorter than two days. What we  
12 are willing to do, and we hope you would be happy to do as well, is start early on the  
13 11th and 12th, perhaps at 9.30, and finish late on the 12th, and it may be that we can  
14 release the time on the 11th and we could let you know about that in due course.  
15 But I would hope that by early starts and one late finish we could make up more than  
16 the time that we lose on the 11th and actually gain a bit of time that would allow us to  
17 get past, effectively, two days of full hearing time.

18 So just bearing that in mind, if we go back to the timetable that's set out in the draft  
19 order that was circulated last night, and which I think, Mr Palmer, you saw earlier  
20 today, I think the only thing we need to do, to add to that, if everybody else is happy  
21 with it, is to confirm that you, Mr Palmer, would file your skeleton argument on  
22 29 April at the same time as Ofcom and our preference would be that you and  
23 Ms Carss-Frisk would have had the opportunity to collaborate to ensure that any  
24 duplication was minimised or removed before those skeletons were filed.

25 MR PALMER: Sir, what I would suggest, so the only slight tweak to what is  
26 suggested, is that I would propose that we file our skeleton just 24, even 48, hours

1 after Ofcom, as my experience in previous cases is Ofcom has not always been in a  
2 position to share a finalised skeleton in advance or much in advance of the deadline  
3 and is understandably unwilling to share drafts which aren't finalised. So it may be  
4 more efficient if we are given just 24 to 48 hours to strip out of what we will have by  
5 then prepared, anything which is simply duplicatory, so that we can ensure that the  
6 Tribunal receives and the parties receive our skeleton in good order, already shorn  
7 of duplication.

8 PROFESSOR WATERSON: I'm just looking at the calendar and I noticed that  
9 29 April is a Friday and that the following Monday is a bank holiday. So I'm  
10 wondering whether filing of the skeletons on the 28th with BT's on the 29th would  
11 make more sense.

12 MR PALMER: Yes. No, that sounds very sensible, if I may say so. Thank you.  
13 I hadn't looked at the calendar. So 24 hours would be more than enough for us just  
14 to strip out anything that is duplicatory or unnecessary.

15 MS CARSS-FRISK: I'm sorry, I'm sure this isn't intended to be a total free for all  
16 ping pong but we would be rather concerned about cutting down the time that we  
17 have to respond even by one day. It is a big case and there's a lot to be done and  
18 we have the Easter weekend, of course, included in our time slot for our skeleton, so  
19 I would very much respectfully urge the Tribunal to the idea that we file on the 29th.

20 THE CHAIRMAN: And Mr Palmer is concerned that you might not be very  
21 collaborative with him in terms of allowing him access to what you're doing so he can  
22 strip out the duplication. Can you help us with that, because if we are going to do  
23 that and avoid, effectively, the skeleton from BT falling well into the following week,  
24 then really he does need to know what's in your skeleton before the 29th, doesn't  
25 he?

26 I'm sorry to interrupt, but even if you could commit to release a provisional draft to

1 Mr Palmer on the 28th, that would --

2 MS CARSS-FRISK: I believe, Sir, that there's a real concern about that not being  
3 the proper and right thing to do, however much one might in a sense want to  
4 collaborate, but we of course have our position as regulator. So if the choice were,  
5 as it were, between that and BT going a little bit later, then that would be the lesser  
6 of two evils, I'm afraid. This is not due to any desire to be awkward. It is simply  
7 about our position as regulator.

8 Now, of course one possibility would be for CityFibre to go a little bit earlier and  
9 perhaps go on the 13th or 12th April, in which case there would be no difficulty about  
10 us then going a little bit sooner with our skeleton and then, of course, Mr Palmer and  
11 his clients could also then go a little bit sooner because otherwise, given that there's  
12 a bank holiday, I think BT's skeleton would only be on 3 May, which brings it close to  
13 the hearing.

14 MR HOLMES: Sir, we'd be content to go back by a day to 13 April in order to  
15 accommodate Ofcom on the 28th and BT on the 29th. We'd much prefer that, Sir, to  
16 any suggestion that BT's skeleton argument would come after the May bank holiday  
17 weekend because that would take it too close to the hearing and we want to see it in  
18 good time before the start of the hearing.

19 THE CHAIRMAN: I think that's probably the right answer, isn't it, Ms Carss-Frisk.  
20 Are you happy with that?

21 MS CARSS-FRISK: We certainly think that is the right answer. Thank you.

22 THE CHAIRMAN: Good. Okay. Mr Palmer, are you happy with that?

23 MR PALMER: Yes. Thank you, Sir. That's extremely sensible, if I may so, and I'm  
24 grateful to the parties for accommodating that.

25 THE CHAIRMAN: Good. Excellent. Okay. So that's how that will then play out to  
26 the hearing and then back to this question of the hearing itself. We had certainly

1 anticipated that we would want from counsel a timetable for the hearing and,  
2 because it is so constrained, we would expect that timetable to be adhered to strictly  
3 and I'm afraid we will have to be quite brutal in relation to the time limits, and we  
4 don't want anybody to feel they haven't had sufficient time to present their case and  
5 so, if actually that is the position or you don't think you can do it within two days with  
6 a sensible division of time, then clearly we'll have to look at another date, which is  
7 going to be, as you will gather, later, which I think everybody is keen to avoid. So we  
8 would very much encourage you to find a way to fit within those two days, if you can.  
9 I think certainly if Mr Palmer is happy to restrict himself to something like half an hour  
10 in that timetable, it seems to me that's entirely manageable within the time frame  
11 we've got and as I say, we will be tough about it. So that would be our preference  
12 rather than having to have further discussions about whether or not Mr Palmer is  
13 entitled to make oral submissions.

14 MR HOLMES: Sir, for our part, that seems like an entirely sensible way through.  
15 We don't think anything longer than 30 minutes would be appropriate, given the  
16 shortened sitting time on the first day and given that there is a lot to get through. But  
17 30 minutes can be accommodated after Ofcom's opening submissions.

18 MS CARSS-FRISK: Yes. We agree, Sir, respectfully. That seems a sensible  
19 solution overall.

20 THE CHAIRMAN: Good. Thank you. That's very helpful.

21 So it would be helpful, I think, to have from you, and maybe it can come with the  
22 skeletons in some format, the round of the skeletons, it would be helpful to have from  
23 you that hearing outlined so we know what time you've allocated to each other and if  
24 we have any comments on that, we can let you know and at least we know what the  
25 rules are for the hearing.

26 MS CARSS-FRISK: Yes. Absolutely.

1 THE CHAIRMAN: Good. Is there anything else we need to deal with today?

2 MR HOLMES: Not from our perspective, Sir.

3 MS CARSS-FRISK: Happily, we can't think of anything.

4 MR PALMER: Just one thing from us, Sir. The date on the proposed directions  
5 which came round mid-hearing this morning for service of our statement of  
6 intervention, I think was 25 February and we had contended for 28 February. The  
7 difference is between a Friday and a Monday and we would just like, because of  
8 other commitments that week, the benefit of that weekend, which we hope can be  
9 granted without too much prejudice to any other party.

10 THE CHAIRMAN: I can't see it makes an awful lot of difference. What I'd like to  
11 think, Mr Palmer, is that you use the extra time to make it a more focused document,  
12 unless anybody objects to that.

13 MR PALMER: That's exactly what we intend to do, Sir.

14 MS CARSS-FRISK: I'm so sorry to throw a spanner in the works, but I'm afraid we  
15 do have a very real concern. Because of team availability, that time actually does  
16 matter significantly to us, so I would urge you to stick to the timetable that the main  
17 parties had agreed and therefore make it 25 February.

18 THE CHAIRMAN: I think in that case, Mr Palmer, if that's where we are, I'm afraid  
19 you might have to fit in.

20 MR PALMER: Well, that was agreed in our absence and we have team difficulties  
21 as well and I'm not sure Ofcom's team difficulties should necessarily trump ours. I'd  
22 be very happy to say Monday morning rather than Monday afternoon, just so we  
23 have the benefit of that afternoon.

24 MS CARSS-FRISK: Well, Sir, I don't think I can go further or elaborate much on  
25 what I've said.

26 THE CHAIRMAN: No, thank you, Ms Carss-Frisk. Mr Palmer, I think this is, I'm

1 afraid, where the rubber hits the road for the interveners. I'm afraid it is important  
2 that as an intervener, you fit into the timetable that works for the main parties and I'm  
3 sorry if that causes inconvenience, but if there's going to be a balance of  
4 inconvenience, I'm afraid you are in a subsidiary position as an intervener, so I'm  
5 afraid you will have to stick with the 25th.

6 MR PALMER: Thank you very much, Sir. That's entirely understood.

7 MR RANDOLPH: May I raise one very small point?

8 THE CHAIRMAN: Yes, Mr Randolph.

9 MR RANDOLPH: May I ask roughly, without tying you and the Tribunal down, to  
10 when you might be handing down your detailed reasons for the decision to refuse my  
11 application and that of Mr Woolfe. Obviously, my clients, and I'm sure Mr Woolfe's,  
12 are deeply disappointed and will want to read those detailed reasons as soon as  
13 possible to ensure that they know how to take matters forward in whichever way they  
14 may see fit.

15 Obviously, everyone's busy and I'm not asking for miracles but we would be grateful  
16 if the decision can be handed down as soon as possible in the light of -- well, in the  
17 light of the interests of the parties and the submissions that were made and the  
18 position taken by Ofcom in relation to the in principle agreement in relation to our  
19 application. But I just thought I'd raise that because they have asked me specifically  
20 to raise that point to you.

21 THE CHAIRMAN: Yes, of course, Mr Randolph and I absolutely understand that  
22 they're concerned to see the reasons and I hope they understand that, given the  
23 range of matters discussed this morning, we just need a little bit of time. But it's  
24 certainly at the top of the priority list.

25 MR RANDOLPH: I'm very grateful.

26 THE CHAIRMAN: So coming sooner rather later I can say.

1 MR RANDOLPH: Very grateful.

2 THE CHAIRMAN: Good. Thank you very much, everybody. That, I think,  
3 concludes -- I'm just being reminded, there is a question about bundles and whether  
4 or not they come in hard copy or soft copy, I think is the question, and --

5 MR HOLMES: It's probably one for me, Sir. What would you like? What would be  
6 more useful to the Tribunal?

7 THE CHAIRMAN: I'm not sure, is the answer.

8 MR HOLMES: Shall we liaise with the registry to see --

9 THE CHAIRMAN: I think if you would, please. Yes, that would be really helpful.  
10 Yes, if you could liaise with the registry about preferences. I imagine it's a  
11 combination of what the Tribunal -- I'm afraid I don't know the answer to that at the  
12 moment and also what the registry prefers, so that would be helpful. Thank you very  
13 much, Mr Holmes.

14 MR HOLMES: Thank you, Sir.

15 THE CHAIRMAN: Good. Thank you, all. I'm sorry that went a bit longer than it  
16 should have but thank you all for your helpful arguments. Enjoy the rest of your  
17 afternoon and your weekends. Thank you.

18 **(3.55 pm)**

19 **(Hearing concluded)**

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