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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29th January – Friday 22nd March 2024

Before:
The Honourable Mr Justice Waksman

Eamonn Doran

Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Le Patourel

Class Representative

v

BT Group PLC

Respondent

A P P E A R A N C E S

Ronit Kreisberger KC, Derek Spitz, Jack Williams, Matthew Barry and Michael Armitage
(On behalf of Justin Le Patourel)

Daniel Beard KC, Sarah Love, Daisy Mackersie, Natalie Nguyen and Ali Al-Karim
(On behalf of BT Group PLC)

1 Monday, 29 January 2024
 2 (10.30 am)
 3 THE CHAIRMAN: Good morning. Some of you are joining us
 4 live stream on our website, so I should start therefore
 5 with the customary warning: an official recording is
 6 being made and an authorised transcript will be
 7 produced, but it is strictly prohibited for anyone else
 8 to make an unauthorised recording, whether audio or
 9 visual, of the proceedings, and breach of that provision
 10 is punishable as a contempt of court.
 11 Yes, Ms Kreisberger.
 12 MS KREISBERGER: Good morning, sir.
 13 THE CHAIRMAN: Good morning.
 14 Housekeeping
 15 MS KREISBERGER: Thank you. Before I begin, I just have one
 16 short point of housekeeping, which is just to inform the
 17 tribunal that the hot tub agenda is still under
 18 discussion between the parties, so I am afraid it is
 19 late but it is coming.
 20 THE CHAIRMAN: No, that is all right. I hope I -- when
 21 I said "early this week", I was not going to hold you to
 22 today, and we have been having our own discussions about
 23 it.
 24 Before you start, can I just make one point of
 25 housekeeping. On Thursday of this week, 1 February,

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1 I have something to deal with in the Rolls Building
 2 until 10.45, so I would like to start at 11 am on
 3 Thursday and we will finish at 5.
 4 MS KREISBERGER: I am grateful.
 5 With that, with your permission, I will move to
 6 submissions.
 7 THE CHAIRMAN: Yes.
 8 Opening submissions by MS KREISBERGER
 9 MS KREISBERGER: As you know, I act for Mr Le Patourel who
 10 represents the Class in these proceedings. Based on the
 11 Class Representative's most recent estimates, the Class
 12 is made up of over 3 million BT landline customers who
 13 have purchased standalone fixed voice services during
 14 the claim period, which we refer to as SFV services.
 15 There is a roughly even split between the Class.
 16 According to the Class Representative's figures, it is
 17 made up of 52% voice only customers and 48% split
 18 purchase customers. Dr Jenkins has voice only customers
 19 at 56%, so there is some small difference there.
 20 Now, for convenience, just to foreshadow, I will
 21 refer to the two Sub-Classes as voice only and split
 22 purchasers, or VOs and SPCs, but I should, just for the
 23 sake of accuracy, note that there are estimated to be
 24 some business voice only customers. They sit in the
 25 split purchase group, because they do not receive the

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1 Carmen discount.
 2 So with that, that brings me to the Class
 3 Representative's claim. The claim is that BT has been
 4 charging these customers, the Class Members, excessive
 5 and unfair prices for standalone landlines and calls in
 6 violation of its special responsibility as a dominant
 7 firm under section 18 of the Competition Act.
 8 He claims compensation from the start of the claim
 9 period on 1 October 2015 in the order of £1.3 billion,
 10 that is with interest. For your note, that is at
 11 paragraph 202 of the claim form. That is at {A/1/84}.
 12 Without interest, that is 1.1 billion.
 13 Turning then to the structure of my opening
 14 submissions, with the Tribunal's permission, I would
 15 propose to start by giving Members of the Tribunal an
 16 overview of the Class Representative's case on abuse of
 17 prices. I will then make submissions on each of the
 18 four main disputed topics as set out in the list of
 19 issues. Those are: the economic markets on which SFV
 20 services are supplied; the extent of BT's market power
 21 in them; whether BT's SFV prices are excessive under
 22 limb 1 of the *United Brands* test; and whether they are
 23 unfair under limb 2. Mr Spitz will then address you
 24 tomorrow, during the course of the morning, on causation
 25 and quantum.

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1 THE CHAIRMAN: Thank you.
 2 MS KREISBERGER: So beginning with an overall synopsis of
 3 the Class Representative's case, I would like to zoom
 4 out and summarise some of the core elements of the case
 5 and spend some time introducing you to the principal
 6 pieces of evidence in this overview. So it is
 7 a reasonably detailed introduction which I hope will be
 8 helpful.
 9 Now, as you know, BT was for many years this
 10 incumbent statutory monopolist in telecoms in this
 11 country. BT accepts in its evidence, in Mr Bunt's
 12 evidence, that this puts BT in a unique position, and
 13 with that unique history comes a special responsibility
 14 to its customers.
 15 Now, one of the features of BT's singular position
 16 is that it inherited a legacy base of landline
 17 customers. Those are customers for whom BT did not have
 18 to compete to acquire them, they were a boon of its
 19 monopoly past.
 20 Now, as the incumbent, BT had been subject to
 21 a suite of regulatory constraints on its conduct, which
 22 included price control. Between 2006 and 2009, BT was
 23 freed from those regulatory shackles, and that had two
 24 important consequences for this case.
 25 The first consequence is that BT gained the freedom

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1 for the first time to set the prices which its landline
 2 customers had to pay for their SFV services. So from
 3 that point on, the amounts charged to them were within
 4 BT's gift. The second consequence was that BT was able
 5 to enter the bundles market and offer bundles at prices
 6 which were unconstrained by the prices BT was charging
 7 for the component parts of the bundle. So for dual play
 8 bundles, that is fixed voice and broadband,
 9 disconnected.

10 In BT's own words in the skeleton, footnote 49 for
 11 your note, they describe price competition in bundles as
 12 "fierce", and the deals being offered were "aggressive".
 13 This is common ground. Operating in the bundles market
 14 meant pricing low. BT would not have got very far if it
 15 priced its bundles by adding together the standalone
 16 prices for line rental and broadband; it had to price by
 17 reference to the lively conditions of competition in the
 18 bundles market.

19 The stage was then set for BT's abusive pricing
 20 practices which are the subject matter of the claim.
 21 Even as far back as 2006, Cassandra-like, Ofcom sounded
 22 the warning bell that certain consumer groups could be
 23 vulnerable to price rises by BT in the future, in
 24 particular in retail telephony markets.

25 In 2006, Ofcom's main concern was that BT could use

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1 its market power to push prices above competitive
 2 levels, and that warning proved prophetic. A decade
 3 later, in 2016, Ofcom was telling BT in no uncertain
 4 terms: look me in the eye; we are going to have to
 5 reregulate. The following year, in 2017, Ofcom opened
 6 its investigation into the prices that BT was charging
 7 for its SFV services.

8 Now, Ofcom carried out a deep and detailed scrutiny
 9 of BT's market power that it yields in the supply of SFV
 10 services and the impact of BT's high prices on
 11 customers.

12 Now, the Members of the Tribunal will of course be
 13 very familiar with the Ofcom material, that formed a key
 14 part of my submissions at certification, and as you
 15 know, Ofcom provisionally concluded that BT was
 16 exploiting its market power over all of its SFV
 17 customers, those with and those without broadband, by
 18 repeatedly ratcheting up their prices every year since
 19 deregulation to supra-competitive levels.

20 Now, Ofcom's explicit concerns, which you can see
 21 from the executive summary to the provisional
 22 conclusions which I know you are familiar with, were
 23 that while people who were buying bundles were getting
 24 more for their money than ever before, better value, SFV
 25 customers were being left behind, and Ofcom specifically

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1 singled out the loyalty of these customers to BT which
 2 Ofcom said was leading to ever higher prices. For your
 3 note, that is paragraph 1.6 of the provisional
 4 conclusions. That is at bundle {IR-C/1/5}.

5 Again, as well as their loyalty, Ofcom singled out
 6 their need for protection from BT's price increases in
 7 a market that was not serving them well. That is at the
 8 same passage.

9 Ofcom ultimately accepted BT's offer to settle.
 10 This took the form of a compromise with BT undertaking
 11 to cut prices to voice only customers, and promising
 12 transparency measures to address the detriment of split
 13 purchasers.

14 Now, that brings me to the Class Representative's
 15 claim, which is that BT has exploited its market power
 16 over SFV customers by extracting ever higher prices from
 17 them for their landlines and calls year after year,
 18 starting in 2009 when it had shrugged off the last of
 19 the regulatory constraints, except for that brief period
 20 when they were under investigation for excessive
 21 charging by Ofcom, because one can quite see that price
 22 rises at a time like that is not a good look. So this
 23 was all upside for BT, because at the same time as its
 24 prices were going up, costs were coming down.

25 By the time you get to the start of the claim period

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1 in 2015, six years later, the SFV prices charged by BT
 2 had soared far above competitive levels. Those are the
 3 prices we say are excessive and unfair.

4 Now, still by way of overview, I would like to turn
 5 to the categories of evidence which the Class
 6 Representative relies on to support the claim. This
 7 part of my submissions is based on the rule of three.
 8 I have three threes, in fact.

9 The first one is Mr Parker, Class Representative's
 10 economist, relies on three main pillars of evidence. It
 11 is not exclusive, but the three main pillars are: one,
 12 BT's pricing data; two, BT's internal documents, and
 13 three, the Ofcom material.

14 Each individual pillar of evidence supports the same
 15 conclusion that BT was exploiting its market power over
 16 SFV customers to drive the price way above competitive
 17 levels, and my submission is that, taken together, this
 18 evidence is overwhelming. All roads lead to Rome.

19 But the principal pillar of evidence is BT's
 20 empirical pricing data, and that is really the point
 21 I want to draw out for you. I am going to show you it
 22 is that pricing data which is really the keystone to the
 23 case. That is real world data based on BT's actual
 24 prices.

25 Now, focusing on that data, that is my next

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1 triptych. The data is determinative of the three key
 2 elements of the case: relevant markets, market power,
 3 pricing abuse. My final, third, triptych is that that
 4 pricing data is made up of three distinct SSNIP
 5 datasets. These three SSNIP datasets lie at the heart
 6 of the case. The Tribunal will know that SSNIP stands
 7 for small but significant non-transient increases in
 8 price, and it is understood to connote a price rise of
 9 between 5-10%.

10 So I am now going to, still by way of overview, hone
 11 any on these three SSNIP datasets, given their
 12 centrality.

13 Mr Le Patourel of course must satisfy you that BT is
 14 dominant in order that it be subject to the special
 15 responsibility not to charge unfair prices. The SSNIP
 16 data proves that over the period, BT has wielded
 17 significant market power in the economic markets on
 18 which SFV services are supplied to customers.

19 So at this stage I am going to set out the contours
 20 of this, if I may, for the Tribunal, and delve into some
 21 of the detail during the course of the day.

22 A good way of thinking about economic market
 23 definition is whether a product is worth monopolising.
 24 A product is worth monopolising if the hypothetical
 25 monopolist can profitably put up the price of the

1 product without being defeated by wholesale switching
 2 away by customers to a different product in response to
 3 a price increase above the competitive level. That is
 4 why the essence of market definition is to identify
 5 effective price constraints on the focal product.

6 Both sides' experts agree that the correct framework
 7 for analysing whether there are effective price
 8 constraints is the SSNIP test. Often the SSNIP test is
 9 a thought experiment, but here we have concrete SSNIP
 10 data, because BT actually put up its prices each year by
 11 around a SSNIP. So it is as robust a dataset as one
 12 could hope for when performing the SSNIP test.

13 Now, I would like to begin by showing you this data,
 14 so I would like you to turn up my skeleton. That is at
 15 {IR-A/12/10}. It may be helpful to keep the skeletons
 16 open, if that is convenient.

17 THE CHAIRMAN: Yes.

18 MS KREISBERGER: You see there the table on Opus page 10.

19 THE CHAIRMAN: What is the paragraph number?

20 MS KREISBERGER: It is just above paragraph 20 on Opus page
 21 {IR-A/12/10}.

22 THE CHAIRMAN: Thank you.

23 MS KREISBERGER: That is the one.

24 Now, you will probably be familiar with this table.
 25 It records BT's annual line rental increases. This is

1 the first category of pricing data which Mr Parker
 2 relies on, so this is access pricing. It is line
 3 rental. You can see the changes here in the table, both
 4 in absolute and relative terms. You see there -- so you
 5 have the pre-commitments table and the post-commitments
 6 table. For the post-commitments table you are looking
 7 at the "SPCs" column; voice only is then getting a
 8 discount under the commitments.

9 So if you follow through the right-hand column on
 10 the first table, you see price increases every year
 11 around the level of SSNIP with a couple of exceptions,
 12 going up to 9%. Then if you follow the "SPCs" column in
 13 the second table, you see again 5%, 1%, 4, 9, 14.

14 Those are the prices which Class Members were paying
 15 every month throughout their contract while BT's costs
 16 were decreasing, and you can see that on the previous
 17 page, so if we go to Opus page {IR-A/12/9}. This is
 18 Mr Parker's graph, Ofcom produced the same graph, and
 19 you see there wholesale, WLR, going down, while the
 20 three rental lines are going up.

21 THE CHAIRMAN: Yes.

22 MS KREISBERGER: Then if we could turn back to page 10 in
 23 the skeleton {IR-A/12/10} and go to paragraph 20, we see
 24 there the absolute amounts over the period. So standard
 25

1 line rental went up from £12.50 to £18.99 for VOC, so
 2 that is a 52% increase; from £12.50 to £26.35, that is
 3 a 111% increase, to 2023. The price of wholesale line
 4 rental decreased by 13.8%, increasing by only small
 5 increments thereafter. Then you see there the figures
 6 for Line Rental Plus and Line Rental Saver, 49% and 29%.
 7 So those are the increases over the period as a result
 8 of these annual SSNIPs.

9 Now, I will come to the fact that BT objects to the
 10 use of this SSNIP data because, as you can see, this
 11 already proves that SFV services, this is SFV line
 12 rental access, is a market worth monopolising, so of
 13 course it undermines BT's case, but I will come back to
 14 their objections.

15 The second category of SSNIP pricing data Mr Parker
 16 relies on is calls prices. The first was line rental
 17 access. If we turn to the next page, so Opus page
 18 {IR-A/12/11}, we have the calls pricing chart there, and
 19 you see that what is true of line rental is true of BT's
 20 calls prices, you see the upward movement. This same
 21 chart is annexed to the economists' joint expert
 22 statement. I am just going here for convenience, it is
 23 the same chart.

24 ARPM stands for average revenue per minute, and it
 25 is an effective proxy for the prices which customers

1 were paying for their calls . Dr Jenkins does not accept
 2 it is the right metric, she prefers list prices . I am
 3 not going to get into that dispute at this stage, but in
 4 any event, she concedes that her preferred metric of
 5 list prices were also going up over the period, year on
 6 year.
 7 Turning back to the ARPM chart. As I said, you see
 8 BT call prices going up every year, there is a blip in
 9 2021, while at the same time rivals' prices were
 10 decreasing. You see there at paragraph 21 of the
 11 skeleton on Opus page {IR-A/12/10}, you see the overall
 12 numbers. So BT's ARPMS increased by 46%, from 3.32 per
 13 minute to a figure which I cannot read out because it is
 14 confidential , between 2013 and 2022, whilst ARPMS for
 15 other providers declined by 32% over the same period.
 16 You have the absolute amounts there as well.
 17 So you can immediately see from these two datasets
 18 on line rental and calls that BT did profitably impose
 19 SSNIPs to its SFV prices, year on year, for a period of
 20 14 years. The SFV access and call SSNIPs hold, they
 21 accumulate over the years, and SFV customers keep paying
 22 ever higher prices . It follows from this evidence that
 23 BT's SFV prices were not defeated by customers switching
 24 away to bundles, and you will have seen from their
 25 skeleton that is BT's single main line of defence, that

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1 there was switching.
 2 But the price rises were not defeated because to
 3 this day, unless you are getting the Carmen discount
 4 thanks to Ofcom, if you are a BT customer who buys fixed
 5 voice as a standalone product, one of our Class Members,
 6 then you have been paying these high and increasing
 7 prices . Nothing that BT says about high levels of
 8 switching can get around that fact. I will come back to
 9 BT's rebuttal on switching but I would like to
 10 foreshadow the point now.
 11 I am certainly not saying that switching did not
 12 happen. You would be forgiven for getting that
 13 impression from their skeleton. On the contrary, it is
 14 an important part of my case that standalone fixed voice
 15 markets are in decline , as Ofcom observed back in 2017.
 16 That is because there is a strong general trend towards
 17 bundles with broadband. Both Ofcom and Mr Parker place
 18 emphasis on the existence of that trend in assessing
 19 BT's power to drive up SFV prices.
 20 Now, that is important context, because declining
 21 markets are apt for this sort of price abuse. They are
 22 often not attractive to rivals or potential rivals
 23 because they have an expiry date. They are just not
 24 worth the candle. So that shields the incumbent from
 25 competitive pressure so that, as long as customers

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1 continue to buy the old product, they have to swallow
 2 the high prices . In other words, the lazy monopolist
 3 can make hay while the sun still shines.
 4 The pricing evidence I have just shown you on line
 5 rental and on ARPMS proves that this is how it works if
 6 you are an SFV customer: if you buy your fixed voice on
 7 a standalone basis from BT you have to pay these high
 8 prices .
 9 Now, it is true that an SFV customer could choose to
 10 buy a bundle instead. On this point, you need to
 11 distinguish between the customer groups. So taking
 12 voice only first . That is unlikely to be a rational
 13 move, because all of the evidence shows that in general
 14 voice only customers have no interest in buying
 15 broadband and no one wants to pay more for an additional
 16 product that they do not want. I will come back to some
 17 of the evidence on that.
 18 An SPC, a split purchaser, can on the other hand
 19 make savings by buying the same two products, sticking
 20 with dual play, voice and broadband, in a bundle. That
 21 is common ground. But it does not help BT on market
 22 definition , and that is because the SSNIP test is
 23 designed to identify pricing constraints. That is --
 24 the experts are in agreement.
 25 Its basic intuition is that the hypothetical

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1 monopolist can raise the price of the product without
 2 being undermined by other products. That is the litmus
 3 test for a market. It is what makes a market worth
 4 monopolising.
 5 The ongoing trend of switching to bundles imposed no
 6 constraint whatsoever on BT's ability to charge
 7 supra-competitive SFV prices over many years in an
 8 upward spiral.
 9 That brings me to Mr Parker's third category of
 10 SSNIP data to complete the SSNIP triptych. That is
 11 the price differentials which have persisted between, on
 12 the one hand, high prices, which split purchasers pay to
 13 get standalone voice and standalone broadband, and, on
 14 the other hand, the low prices which dual play customers
 15 pay for a bundle of functioning equivalent services .
 16 Now, you can see that if we go to Mr Parker's third
 17 report. It is at {IR-E/3/83}. That is tables 8 and 9.
 18 THE CHAIRMAN: Just a moment, please. (Pause)
 19 Yes.
 20 MS KREISBERGER: Thank you, sir.
 21 So table 8 relates to standard broadband, and
 22 perhaps in a moment we will go over the page and see the
 23 same table for superfast broadband. They are two
 24 different products.
 25 If you cast your eye down the first table you see

16

1 the price differential , that is the percentage of
 2 the price which a split purchaser could save by
 3 switching to a dual play product.
 4 THE CHAIRMAN: Just to be clear, looking at the first set of
 5 columns under "Split Purchase ([including] BT
 6 broadband)", if they switched to a dual play, they would
 7 be saving 63% on what they would otherwise have been
 8 paying as SPCs for that quarter in 2015.
 9 MS KREISBERGER: That is right, and you have the list price
 10 and promotional price split out there.
 11 THE CHAIRMAN: Yes.
 12 MS KREISBERGER: If you go to page {IR-E/3/82}, you can see
 13 the average savings in absolute terms.
 14 If I could just perhaps ask you -- actually, it
 15 begins on {IR-E/3/81}. This is full of confidential
 16 figures so I cannot read them out. If I can ask you to
 17 read them to yourselves paragraph --
 18 THE CHAIRMAN: Can we have the EPE provider expand the pages
 19 that we can see here. Normally they are able to.
 20 MS KREISBERGER: That is better.
 21 THE CHAIRMAN: That is better, thank you.
 22 MS KREISBERGER: So if we begin on page 81. Then over the
 23 page you see there the amounts which I cannot read out.
 24 {IR-E/3/81} {IR-E/3/82}
 25 Then before we leave this, there is table 9 on page

1 {IR-E/3/84}. That is the superfast broadband numbers.
 2 You can see there the absolute amounts, the excess that
 3 split purchasers paid to buy these products on
 4 a standalone basis. (Pause)
 5 Now, these large differentials really give the lie
 6 to BT's case on switching. The fact that some SPC
 7 customers choose to stop splitting their purchase and
 8 buy a bundle instead has, to this day, not constrained
 9 BT from charging high prices to those who continue to
 10 split. So that completes the picture.
 11 I have shown you that line rental and call SSNIPs
 12 hold and have held over this long period of time. This
 13 differentials dataset confirms that bundles are not
 14 imposing any material constraint on the price of SFV
 15 services, and switching, which does not constrain price,
 16 has no relevance at all under the SSNIP test.
 17 So this evidence demonstrates that BT's wide market
 18 definition that includes bundles is built on sand. That
 19 is the SSNIP triptych. These datasets show that SFV
 20 services sold to voice only and split purchasers make up
 21 discrete markets. They are markets worth monopolising.
 22 Bundles exercise no material price constraint, they are
 23 outside the market.
 24 So that is market definition.
 25 Still staying with my overview, I would like to move

1 on to market power. Now, if the Tribunal is with me
 2 that the relevant product market is for SFV services
 3 only, the corollary of that is that BT has significant
 4 market power in the supply of SFV services to voice only
 5 and split purchase customers.
 6 There are three principal reasons that I would like
 7 to set out now. I will give a fuller account of the
 8 evidence in detailed submissions.
 9 The first one is market shares. Again, just to
 10 introduce the point, BT's share of supply of SFV
 11 services to voice only customers in the claim period has
 12 never dipped below 64%, that is well above the 50%
 13 threshold where a presumption of dominance arises; and
 14 BT has never supplied less than 95% of split purchasers
 15 during the claim period, at some points coming close to
 16 100%. BT is a close fit for the hypothetical monopolist
 17 in the real world.
 18 So that is market shares.
 19 In any event, the experts are agreed that the
 20 defining feature of significant market power is the
 21 ability to push prices above the competitive level for
 22 a sustained period of time. Economics 101.
 23 The 13 years of SSNIP pricing data in the three
 24 categories that I showed you is direct empirical
 25 evidence of just that. So the SSNIP data alone

1 demonstrates market power.
 2 The third reason is BT has not argued that it is not
 3 dominant on SFV only markets.
 4 So those are my submissions on the centrality of the
 5 SSNIP data. It is striking, when you read Mr Beard's
 6 skeleton, that BT barely engages with it, because it
 7 does not have an answer to it, because there is no
 8 getting around the hard evidence of the SSNIPs.
 9 Instead BT tries two different tacks. First, BT
 10 says that, look, there is all this switching from SFV to
 11 bundles. But essentially that is a diversion tactic.
 12 Do not worry about the price rises, look over here. But
 13 the switching over there does not matter if it is not
 14 exercising a constraint on SFV price. That is what the
 15 SSNIP data conclusively shows, that there is not
 16 a constraint.
 17 BT's second tactic is to say, well, these observed
 18 SSNIPs in the real world, they are not reliable, because
 19 BT supplies bundles as well as SFV services. Mr Beard
 20 goes as far as to say that Mr Parker's SSNIP analysis
 21 has no probative value at all.
 22 I am going to come on to this in my detailed
 23 submissions on market definition. I am going to show
 24 you that is, with respect, a hopeless argument.
 25 We have the SSNIP data, it exists in empirical form,

1 and it is unaffected, for my purposes, by the fact that
 2 BT is a multi-product firm.
 3 So that deals with markets and SMP.
 4 Just a brief word on limb 1 at this stage. Again,
 5 SSNIP data is relevant, it is illuminating. It shows BT
 6 has used its market power to do precisely that which is
 7 within the gift of a firm wielding significant market
 8 power, namely to raise price above the competitive
 9 level. So the SSNIP data raises the red flag.
 10 But the Class Representative now has Mr Duckworth's
 11 evidence. Mr Duckworth is an expert in telecoms
 12 modelling. His reports comprehensively set out the
 13 detailed data on the magnitude of the excess profits
 14 being enjoyed by BT above the competitive benchmark
 15 which are extremely significant, and that evidence forms
 16 the basis of Mr Parker's finding that BT's SFV prices
 17 were significantly above the competitive level.
 18 I am not allowed to say the figures out loud on the
 19 extent of the overcharges, but if we go to {IR-E/3/18},
 20 paragraph 2.8 of Mr Parker's third report.
 21 THE CHAIRMAN: Just pause there.
 22 That is the default size that will help us on the
 23 screen. If we can get to that on every one, that would
 24 be great.
 25 Right, 2.8. Did you say there is a bit that should

1 be marked in yellow or in green?
 2 MS KREISBERGER: I am just going to check mine. It may
 3 be -- yes, it is marked yellow in mine. It may be that
 4 has changed. I am not sure why.
 5 THE CHAIRMAN: It is not on our -- not on the ...
 6 Mr Beard?
 7 MR BEARD: It is not confidential. I think Ms Kreisberger
 8 may be working off an old version. I know there has
 9 been a process of ...
 10 THE CHAIRMAN: Right, so she can refer to these percentages.
 11 Yes.
 12 MS KREISBERGER: That is very helpful.
 13 So Mr Parker's finding is that SFV services were
 14 between 57 and 88% above the cost plus benchmark for
 15 standard line rental customers, above 72% in all but one
 16 year, and between 95% and 116% above the cost plus
 17 benchmark for Line Rental Plus customers throughout the
 18 claim period, and above 106% in all by one year.
 19 Then if we could go to the next page, please,
 20 {IR-E/3/19}, if that could be enlarged. Between 30 and
 21 43% for Line Rental Saver. That is the cheapest
 22 product.
 23 So coming back then to my three pillars of
 24 underlying evidence. The SSNIP data, if you like, is
 25 exhibit A. I have covered that.

1 Exhibit B is the internal BT documents. During the
 2 course of today I am going to take you through some of
 3 them, but I want to introduce their relevance. What you
 4 see in this corpus of documents is highly revealing
 5 because it confirms, in the spirit of Occam's razor,
 6 that the simplest explanation for these high prices is
 7 also the true explanation. The reason BT charged SFV
 8 customers higher prices is that BT knew it could. It is
 9 as simple as that. Pretty much everything you will hear
 10 from BT to try and justify the prices is smoke and
 11 mirrors. In private, away from the glare of the press,
 12 BT admitted to itself that these prices could not be
 13 justified.
 14 The documents paint a picture of a firm which
 15 understood the following six things. I am going to
 16 summarise my propositions and I will come back to the
 17 documents themselves today.
 18 The first is that BT has a legacy group of landline
 19 customers who are ripe for exploitation. Number one.
 20 Number two, price rises can be foisted on these
 21 customers without increasing customer churn away from BT
 22 SFV services in any material way.
 23 Third, and following on from that, the ones who keep
 24 buying fixed voice as a standalone product are
 25 a price-insensitive group. It is in the documents.

1 That is in stark contrast to bundle customers who
 2 benefit from deep deals, low prices, from rivals who BT
 3 needs to keep up with.
 4 Fourth, putting up SFV prices every year is a good
 5 way to generate revenue from this declining market, and
 6 that is revenue that can be used to fuel investments in
 7 competitive offerings like BT Sport that benefit other
 8 groups of customers, not SFV customers.
 9 Fifth, BT knew perfectly well that those who were
 10 hit hardest by these price rises were often the ones
 11 least able to bear them. Many, particularly in the
 12 voice only group, were vulnerable, older, come from
 13 lower socioeconomic groups.
 14 Lastly, BT's main concerns about its repeated SFV
 15 price rises were public opprobrium, bad press, showing
 16 up on Ofcom's radar.
 17 What I would ask Members of the Tribunal to keep in
 18 the forefront of your minds, as we go through the
 19 documents, is the absolute chasm that emerges between
 20 the narrative from these documents which tell the true
 21 story and the various economic theories advanced by
 22 Dr Jenkins on BT's behalf. What you will see is that
 23 these theories not only conflict with each other but
 24 they find no support whatsoever in BT's internal
 25 documents. They do not correspond with what BT said or

1 what BT thought at the time. The economic theories are
 2 what I call "made for litigation specials". In fact,
 3 they are in the Blue Peter tradition of: here is one
 4 I made earlier, because they are lines of argument that
 5 BT and its economist, Oxera, ran before Ofcom, and Ofcom
 6 rejected. You may remember some of this came up at
 7 certification when BT was already, at that stage,
 8 relying on Ofcom rejected lines of argument to quash
 9 these proceedings before they had even begun.

10 That brings me neatly to my final, third category of
 11 evidence, which I call exhibit C, the Ofcom material.

12 At certification, the Tribunal recorded in the
 13 judgment that this was, at that stage, the best evidence
 14 available to Mr Le Patourel. Now of course we have the
 15 underlying data, the documents from BT, which I have
 16 been addressing you on.

17 But the Class Representative continues to rely on
 18 Ofcom's assessment and asks the Tribunal to place weight
 19 on it, and that is for four principal reasons.

20 First, Ofcom's analysis and Ofcom's findings are
 21 directly relevant to the matters in dispute before you
 22 which the Tribunal must determine. Ofcom performed
 23 a deep, detailed, comprehensive assessment of the state
 24 of competition in SFV markets. Now, much of that
 25 substantive analysis is contained in the provisional

25

1 conclusions document. Ofcom provisionally concluded the
 2 following key three things.

3 First, the SFV services are supplied in their own
 4 markets. Bundles are outside those markets because
 5 Ofcom found they do not exert an effective price
 6 constraint on SFV prices and have not stopped the upward
 7 march.

8 Secondly, Ofcom provisionally concluded that BT has
 9 significant market power over SFV customers. In
 10 particular, Ofcom looked at a range of factors which
 11 prove market power. First of all, BT's ability to price
 12 significantly and persistently above the competitive
 13 level. Secondly, BT's high levels of profitability in
 14 its sales of SFV services. Thirdly, its high market
 15 shares. Fourthly, the barriers to entry and expansion
 16 which arise out of the difficulty of convincing SFV
 17 customers to switch away from BT and the fact that it is
 18 a declining market.

19 Then the third main area was that Ofcom
 20 provisionally concluded that BT's prices were £5-7 above
 21 competitive levels, causing consumer detriment running
 22 to hundreds of millions of pounds, and they estimated
 23 150-340 per annum. As I say, that is careful
 24 substantive analysis of the impact of BT's market power.

25 Now, we rely on that detailed analysis in the

26

1 provisional conclusions not least because Ofcom went on
 2 to confirm those provisional views in its 2017
 3 statement, and I do need to show you this to respond to
 4 an argument that BT make.

5 If I could ask you to turn up, please, the Ofcom
 6 statement. That is at {IR-C/3/1}. You see the
 7 executive summary which begins at page {IR-C/3/4}. That
 8 is instructive, we rely on it, but I would like to show
 9 you a handful of the substantive paragraphs.

10 If I could start with Opus page {IR-C/3/17}. You
 11 see there the heading "Dual-play services are also not
 12 in the same market as standalone fixed voice services
 13 bought by voice-only customers". So they are dealing
 14 here with voice only.

15 Over the page, please, {IR-C/3/18}, paragraph 3.28:
 16 "While BT argued that price increases for standalone
 17 fixed voice services were driven by the nature of
 18 dual-play pricing, it did not provide any evidence to
 19 contradict our assessment that the presence of dual-play
 20 offers had not constrained standalone fixed prices to
 21 competitive levels. We have updated our analysis of
 22 price trends for standalone fixed voice [price] ... and
 23 the updated figures continue to support our position."

24 They are referring there to the differential SSNIPs
 25 because it is fixed voice and ADSL.

27

1 So that preserves the analysis in the provisional
 2 conclusions.

3 Then, please move forward to page {IR-C/3/21},
 4 paragraph 3.48:

5 "Overall, BT enjoys a significant market share
 6 within the markets for voice-only access and calls which
 7 have persisted over time. While competition was more
 8 intense in the early part of the century. With the
 9 movement of the focus of the market to bundles the
 10 market has become significantly more static.
 11 Competitors face significant barriers to expansion
 12 within the market and BT has been able to increase
 13 prices above the competitive level. In these
 14 circumstances, we do not consider that BT faces any
 15 significant constraints on its ability to act
 16 independently within the markets for the purchase of
 17 voice-only access and calls."

18 So that is voice only, and that is dominance in
 19 voice only.

20 If we then see what they say about split purchase
 21 customers. Please go to the next page, 22, {IR-C/3/22},
 22 paragraph 3.51:

23 "Split-purchase customers pay materially more, for
 24 standalone voice and standalone broadband ... than they
 25 would pay for functionally equivalent dual-play

28

1 services .
 2 "These customers have also been highly profitable.
 3 We explained the outcomes and evidence supported our
 4 provisional conclusion that dual-play bundles do not
 5 competitively constrain standalone fixed voice prices to
 6 split purchasers. Therefore, we did not consider that
 7 standalone fixed voice services bought by split
 8 purchasers were in the same market as dual-play
 9 services. Consultation responses have not provided
 10 evidence or arguments to lead us to change our view."
 11 Finally, page {IR-C/3/23}, so that is the next page,
 12 Ofcom confirms that both voice only and split purchase
 13 customers suffered detriment caused by these high
 14 prices .
 15 4.2:
 16 "Our concerns for this market stem from the fact
 17 that line rental prices have been increasing in real
 18 terms since 2010, despite falling wholesale charges for
 19 products used to provide line rental. Price increases
 20 may be due in part to communications providers
 21 rebalancing prices as fixed voice call volumes and
 22 revenues fall. However, our assessment indicates that
 23 the price increases are generally not justified by cost
 24 increases and the provision of standalone fixed voice
 25 services has become more profitable over this period.

1 Our assessment also identifies a concern that the
 2 provision of standalone fixed voice services is not
 3 competitive."
 4 Then over the page, {IR-C/3/24}. Actually, if we
 5 move forward to page {IR-C 3/26}, paragraph 4.24, this
 6 is the paragraph on split purchase customers:
 7 "We recognise that split-purchase customers also
 8 suffer detriment arising from high prices for voice
 9 services, however it is clear that different supply-side
 10 conditions exist and there is greater scope for
 11 a positive outcome from encouraging this group to
 12 re-evaluate their buying choices than is the case with
 13 voice-only customers. In particular, the needs of many
 14 split-purchase customers could be met, at better value
 15 for money, by switching to dual-play packages. There are
 16 many ... competitive dual-play packages."
 17 So what you see here is Ofcom confirmed its analysis
 18 of market power and consumer detriment in the settlement
 19 decision that is contained in the provisional
 20 conclusions. The remedy to split purchasers differs,
 21 but the analysis is upheld, confirmed.
 22 In the light of what I have just shown you, I would
 23 like to show you what BT says about this in its
 24 skeleton. That is at paragraph 45, page 13. I will
 25 just give you the Opus reference. It is {OR-A/13/16}.

1 Halfway down the paragraph:
 2 "Further, and in any event, the findings [these were
 3 the Ofcom findings] were provisional: BT did not accept
 4 key elements of Ofcom's provisional conclusions for good
 5 reason and no final view was taken by Ofcom on those
 6 points. No weight should be given to Ofcom's 2017
 7 findings to the (limited) extent to which they overlap
 8 with the issues to be determined by this Tribunal."
 9 Mr Beard here is, I am afraid, mistaken. Ofcom did
 10 arrive at a final view, and its assessment is
 11 coterminous with the matters which arise for
 12 determination by the Tribunal. The submission that
 13 there is only a limited overlap I am afraid is just not
 14 right.
 15 So that is my first principal point why Ofcom
 16 material is relevant and should be given weight.
 17 Going to my second point. As Mr Matthew points
 18 out -- Mr Matthew, BT's expert -- Ofcom is the expert in
 19 telecoms. That is why the Class Representative relies
 20 on each of the principal elements of Ofcom's substantive
 21 analysis. Mr Parker has conducted his own review of
 22 these issues, but it is relevant to note that
 23 Mr Parker's main conclusions have the regulator's seal
 24 of approval.
 25 The Class Representative also relies on the fact

1 that Ofcom overcame its bias against intervention --
 2 that is something Mr Matthew highlights -- to threaten
 3 direct price control of all SFV services. Now, that is
 4 not something Ofcom does lightly. It is a reflection of
 5 how serious Ofcom thought the consumer detriment caused
 6 by BT's prices was. In my submission to you, that is
 7 evidence which is relevant to the Tribunal's assessment
 8 of whether BT's margin was excessive under limb 1 and
 9 unfair under limb 2. The regulator's opinion should be
 10 given weight and its findings.
 11 The fact that the specialist regulator was primed to
 12 reregulate, avoided only by voluntary voice caps to one
 13 group, and price caps which remain in place to this day,
 14 in my submission that is compelling evidence to which
 15 the Tribunal should give weight. Put another way, it is
 16 inconceivable that Ofcom would be prepared to
 17 reintroduce price control if it thought that SFV prices
 18 were fair.
 19 My third point on the Ofcom material is, as we set
 20 out in our skeleton, BT's approach is rather
 21 Janus-faced. On the one hand, they repudiate the Class
 22 Representative's claim as some sort of challenge to
 23 Ofcom's competence as the telecoms regulator, but at the
 24 same time it is necessarily BT's case that Ofcom got
 25 every single stage of its analysis completely wrong.

1 Now, the Class Representative does not suggest for
 2 a moment that Ofcom was "asleep at the wheel", as
 3 Mr Matthew puts it. I need not dwell on the point.
 4 Ofcom threatened price control for all SFV customers.
 5 It settled matters by agreeing to voluntary price
 6 control for one group. Ofcom hoped, and it stated its
 7 hope in the section I took you to in the statement, that
 8 these other measures would encourage SPCs to stop paying
 9 these high standalone prices. Now, so far, that has
 10 proven to be a triumph of hope over experience, because
 11 BT is still getting away with charging excessive prices
 12 to split purchase customers who continue to pay them.
 13 Now, my fourth and final point on Ofcom and to
 14 complete my introduction. Mr Beard uses Lord Hoffmann's
 15 colourful expression that you need more compelling
 16 evidence to prove you saw a lioness in Regent's Park
 17 than an Alsatian, and he says this case is a lioness.
 18 Well, if she is, then she is a lioness that has already
 19 been poached by Ofcom. She can be found in Opus
 20 bundle C which contains the Ofcom materials. That is
 21 exhibit C, our stuffed lion.
 22 Finally, then, I do not intend to say anything
 23 further on unfairness by way of introduction -- I will
 24 in my detailed submissions -- except to say it should be
 25 apparent from everything I have said so far that the

1 manner in which BT foisted these prices on SFV customers
 2 and ratcheted them up was profoundly unfair, as was
 3 their impact on Class Members, the consumer detriment
 4 identified by Ofcom as well. So I will develop that in
 5 detailed submissions.
 6 Now, with that, I was proposing to move to my
 7 submissions on the issues arising, my detailed
 8 submissions. I do not know whether that would be
 9 a convenient moment for a break, sir?
 10 THE CHAIRMAN: It is a little earlier than we would normally
 11 do it, but I think, given that you are now about to
 12 embark on the substance, it would make sense to do it
 13 there. So we will have a break for about ten minutes
 14 for the transcribers.
 15 MS KREISBERGER: I am grateful.
 16 (11.33 am)
 17 (A short break)
 18 (11.47 am)
 19 MS KREISBERGER: If we could turn up the list of issues.
 20 That is at bundle {A/10/1}. I will deal with market
 21 definition, dominance and abuse -- abuse I will deal
 22 with in three parts -- legal principles on excessive
 23 pricing, on unfair pricing, and then limb 1 and limb 2.
 24 So that is the list of issues going over the page.
 25 Before I tackle these topics, I just remind Members

1 of the Tribunal that our skeleton has a section on the
 2 factual background and we rely on that chronological
 3 narrative of events. I obviously do not have time to go
 4 through that today. I will not repeat it, but I will
 5 pick up key events as I go through, topic by topic.
 6 I should also say, as I hope is appropriate in
 7 opening submissions, that I will not attempt to pick up
 8 every disputed point, but I rely on all the points in my
 9 skeleton, and certain matters will perhaps be more apt
 10 for the hot tub process.
 11 So starting with market definition. You see from
 12 page 1, if we could go back {A/10/1}, the only issue
 13 arising for determination is whether bundles are in the
 14 same market as SFV services. That is 2(e) on the list
 15 of issues.
 16 You will recall the parties are agreed that it is
 17 appropriate to distinguish between the pre-commitments
 18 period and the post-commitments period. The
 19 pre-commitments period includes both voice only and
 20 split purchasers; there was no price discrimination.
 21 Post-commitments, split purchasers only, given the
 22 commitments gave rise to price discrimination between
 23 the two groups.
 24 Now, I have already set out the contours of why
 25 I say that bundles are outside the relevant market, and

1 that is obviously the pivotal issue and determines
 2 dominance as well.
 3 I propose to structure my submissions on market
 4 definition in three parts. I will begin with the
 5 framework for market definition. Then turn to
 6 Mr Parker's assessment that the economic markets are
 7 confined to SFV services. Thirdly, I will deal with
 8 Dr Jenkins' criticisms of Mr Parker's assessment, and
 9 I will respond to her arguments on the inclusion of
 10 bundles in the market.
 11 So beginning with the economic framework for
 12 defining the market. The purpose of the exercise is to
 13 identify competitive constraints. The principals and
 14 relevant authorities are set out in the skeleton. But
 15 I will take you now just to the CMA's Guidelines on
 16 market definition. It is an excellent encapsulation of
 17 the correct approach to market definition. That is at
 18 {G/137/5}, beginning at paragraph 2.1:
 19 "Market definition is not an end in itself but a key
 20 step in identifying the competitive constraints acting
 21 on a supplier of a given product or service. Market
 22 definition provides a framework for competition
 23 analysis. For example, market shares can be calculated
 24 only after the market has been defined and, when
 25 considering the potential for new entry, it is necessary

1 to identify the market that might be entered ... [It] is
 2 usually the first step in the assessment of market
 3 power."
 4 If we could go down to 2.5 on the following page,
 5 {G/137/6}, that provides that the SSNIP test is the
 6 usual approach. If I could just let you read that.
 7 (Pause)
 8 The experts are agreed that in the circumstances of
 9 this case it is a useful approach. Just for your note,
 10 that is the joint statement at {IR-E/49/42}.
 11 Now, this is not in dispute, but the CMA sets out
 12 the mechanics of the SSNIP test. I think to save time,
 13 if I could ask you now to cast your eye over
 14 paragraphs 2.7-2.13 on the mechanics of the SSNIP test.
 15 It will not be news to anyone on the panel. It is not
 16 controversial. (Pause). {G/137/6-7}.
 17 THE CHAIRMAN: Yes.
 18 MS KREISBERGER: Then, please, go down to page {G/137/9}
 19 under the heading "The product market", and then "The
 20 demand side". If you could focus on paragraph 3.4:
 21 "Following the price rise, customers may switch some
 22 of their purchases from the focal product to other
 23 substitute products ... It is not necessary for all
 24 customers, or even the majority, to switch. The
 25 important factor is whether the volume of purchases

1 likely to be switched is large enough to prevent
 2 a hypothetical monopolist profitably sustaining prices 5
 3 to 10 per cent above competitive levels."
 4 Then please go down to paragraph 3.5, which goes
 5 over the page:
 6 "Substitute products do not have to be identical to
 7 be included in the same market. For example, in ...
 8 *Matches and Disposable Lighters*, the ... Monopolies and
 9 Mergers Commission included matches and ... lighters in
 10 the same market because customers viewed them as close
 11 substitutes. Similarly, the products' prices do not
 12 have to be identical. For example, if two products
 13 perform the same purchase, but one is of a higher price
 14 and quality, they might be included in the same market."
 15 {G/137/10}
 16 Then if I could emphasise these words:
 17 "The question is whether the price of one
 18 sufficiently constrains the price of the other.
 19 Although one is of a lower quality, customers might
 20 still switch ... if the price of the more expensive
 21 product rose such that they no longer felt that the
 22 higher quality justified the price differential."
 23 Then down to the next paragraph, first sentence:
 24 "The important issue is whether the undertaking
 25 could sustain prices sufficiently above competitive

1 levels."
 2 That is our case.
 3 Then paragraph 3.7 merits reading in full:
 4 "Evidence on substitution from a number of different
 5 sources may be considered. Although the information
 6 used will vary from case to case and will be considered
 7 in the round the following evidence and issues are often
 8 likely to be important ..."
 9 Number one:
 10 "Evidence from the undertakings active in the market
 11 and their commercial strategies may be useful. For
 12 example, company documents may indicate which products
 13 the undertakings under investigation believe to be the
 14 closest substitute to their own products. Company
 15 documents such as internal communications, public
 16 statements, studies on consumer preferences or business
 17 plans may provide other useful evidence."
 18 You have heard that I will be relying heavily on
 19 that type of evidence.
 20 The second is:
 21 "Customers and competitors will often be
 22 interviewed. [They will] sometimes be asked directly
 23 how they would react to a hypothetical price rise ...
 24 Survey evidence might also provide information ..."
 25 If we could go down, please {G/137/11}:

1 "A significant factor in determining whether
 2 substitution takes place is whether customers would
 3 incur costs in substituting products. High switching
 4 costs relevant to the value of the product will make
 5 substitution less likely."
 6 Going down:
 7 "Evidence on product characteristics may provide
 8 useful information where customer substitution patterns
 9 are likely to be influenced significantly by those
 10 characteristics."
 11 I will let you just read to the end of that
 12 paragraph. (Pause)
 13 Then at the bottom of the page:
 14 "Patterns in price changes can be informative. For
 15 example, two products showing the same pattern of price
 16 changes, for reasons not connected to costs or general
 17 price inflation, would be consistent with (although not
 18 proof of) these two products being close substitutes.
 19 Customer reactions to price changes in the past may also
 20 be relevant. Evidence that a relatively large
 21 proportion of customers had switched to a rival product
 22 in response to a relatively small price rise in the
 23 focal product would provide evidence that these two
 24 goods are close substitutes."
 25 It is responsive to price increases, a small price

1 increase above a significant level.
 2 "Equally price divergence over time, without
 3 significant levels of substitution, would be consistent
 4 with the two products being in separate markets."
 5 If we could go down {G/137/12}, there is reference
 6 there to critical loss analysis. We will come back to
 7 that.
 8 Then I would like you to read paragraph 3.8, if we
 9 could expand there:
 10 "The test [the SSNIP test] ... assumes that the
 11 hypothetical monopolist charges all customers the same
 12 price for the focal product. However, in some cases the
 13 [HM] may be able to charge some customers a higher price
 14 than others, where the price difference is not related
 15 to higher costs of serving those customers. This is
 16 called price discrimination. Price discrimination
 17 requires that customers cannot arbitrage."
 18 If you could just note there, footnote 27 defines
 19 arbitrage, essentially customers buying at low prices
 20 selling to customers who would otherwise pay the high
 21 price.
 22 "The undertaking could be able to discriminate
 23 between customers due to a variety of reasons, for
 24 example:
 25 "Some customers may face such high switching costs

1 that they might be locked in ...
 2 "Customer demand may differ according to time ...
 3 "... [or] to ... purpose ..."
 4 Then 3.9:
 5 "Where a hypothetical monopolist would (or would be
 6 likely to) price discriminate significantly between
 7 groups of customer, each of these groups may form
 8 a separate market. If so, a relevant market might be
 9 defined as sales of the relevant product in the relevant
 10 geographic area to a particular customer group."
 11 Then it gives the example of peak and off peak
 12 fares, a classic example.
 13 Then finally, as we are in the Guidelines, if
 14 I could just show you paragraph 5.4 on page 20, under
 15 the heading "The competitive price versus the current
 16 price". {G137/20} This introduces the problem of the
 17 cellophane fallacy.
 18 "Throughout this guideline, the test has been
 19 couched in terms of a hypothetical monopolist profitably
 20 sustaining prices above competitive levels. However,
 21 where an undertaking has market power, it may operate in
 22 a market where the current price is substantially
 23 different from the competitive price.
 24 "For example, an undertaking with market power may
 25 well have already raised prices above competitive levels

1 to its profit maximising level. If so, the undertaking
 2 would not profitably sustain prices above current
 3 levels. If it tried to sustain higher prices, consumers
 4 would switch to ... other products. However, it would
 5 be wrong to argue that these products prevented the
 6 undertaking from exercising market power and so it would
 7 usually be inappropriate to include them in the relevant
 8 market. This problem is sometimes known as the
 9 cellophane fallacy ..."
 10 Then 5.6:
 11 "The possibility that market conditions are
 12 distorted by ... market power ... will be accounted for
 13 when all the evidence on market definition is weighed in
 14 the round. For example, where prices are likely to
 15 differ substantially from their competitive levels,
 16 caution must be exercised when dealing with the evidence
 17 on switching patterns as such evidence may not be
 18 a reliable guide to what would occur in normal
 19 competitive conditions."
 20 I rely on all of that, and I am going to show you
 21 that Mr Parker's assessment follows this standard
 22 orthodoxy, the standard approach to market definition.
 23 With that, I turn to Mr Parker's assessment. As
 24 I say, the orthodox approach, relying on the three
 25 pillars of evidence, underlying evidence, that I set out

1 in my introduction, I would like to structure my
 2 submissions on this part as follows: first of all, to
 3 develop my submissions on the SSNIP data; secondly, to
 4 show you Ofcom's assessment of the SSNIP data; and then
 5 show you the non-price evidence that Mr Parker relies
 6 on. I will turn to that last.
 7 You have my point that the triptych of SSNIP data
 8 formed really the centrepiece of Mr Parker's market
 9 assessment. The data shows that the market is confined
 10 to SFV services because it provides direct empirical
 11 evidence that BT's SFV prices were not constrained by
 12 the low prices on offer for bundles. You have seen it:
 13 SSNIPs on line rental, SSNIPs on call prices, price
 14 differential SSNIPs between dual play and standalone
 15 broadband and fixed voice. The three datasets.
 16 Again, it bears emphasis, the strength of this data.
 17 As I said, often the SSNIP test provides a thought
 18 experiment, but its steps -- the steps that the CMA sets
 19 out there, they cannot actually be followed if there are
 20 not any 5-10% price increases in the real world.
 21 Not so here. The subject matter of the pricing
 22 abuse is a series of annual price rises over a roughly
 23 14-year period, most of them are SSNIP in their own
 24 right, cumulatively far more, because BT boiled the SFV
 25 frog by incrementally ratcheting up the temperature of

1 the water every year.
 2 If we just go back to table 1 and table 2 on page 7,
 3 that is internal page 7 of my skeleton, {IR-A/12/10}.
 4 I have shown you this. But what you see there is that
 5 not one of these SSNIPs were defeated because BT went
 6 ahead and did the same again the following year, and the
 7 same goes for the ARPM analysis for cause.
 8 Now, I have just shown you that the CMA includes in
 9 its list of the evidence that is relevant evidence of
 10 patterns in price changes and price divergence over
 11 time. It is common ground that over the period that the
 12 standalone prices were going up for line rental, dual
 13 play bundle prices in the market were either stable or
 14 declining. That is at {IR-E/49/8}. That is the joint
 15 statement. It is on page 8 of Dr Jenkins' second bullet
 16 point. (Pause)
 17 Is it {OR-E/49/8}?
 18 THE CHAIRMAN: OR?
 19 MS KREISBERGER: It could be, just for your note. So it is
 20 {OR-E/49}. But really just to record that Dr Jenkins
 21 accepts there on page 8 {OR-E/49/8} ... I understand
 22 there has been movement in page numbering on Opus, so it
 23 is internal 8. Is that the right one? Second bullet
 24 point.
 25 THE CHAIRMAN: Just a moment. (Pause)

1 MS KREISBERGER: You see there -- yes.
 2 THE CHAIRMAN: Which is the bullet point?
 3 MS KREISBERGER: So it begins "I disagree with the
 4 claim ..."
 5 THE CHAIRMAN: Yes.
 6 MS KREISBERGER: Then you see in parentheses:
 7 "... the structure of pricing observed (namely,
 8 increasing line rental prices, declining incremental
 9 broadband prices [we will come back to those], and
 10 declining or stable total Dual Play bundle prices) ..."
 11 So that is common ground.
 12 THE CHAIRMAN: Yes.
 13 MS KREISBERGER: Dr Parker illustrates this point. If we
 14 could just turn up {IR-E/5/27}, and that figure 2, if we
 15 could expand that. There you see he has graphically
 16 represented that. You see the full lines are the dual
 17 play prices which go on a downwards slope over time, and
 18 the dotted line is the BT standard line rental price.
 19 That is based on Dr Jenkins' analysis in her first
 20 report. So that is common ground.
 21 MR RIDYARD: Ms Kreisberger, when we are talking about
 22 pricing and price comparisons, here you are talking
 23 about the line rental in particular? Because there are
 24 different ways of thinking about price, are there not,
 25 in this market.

1 MS KREISBERGER: Yes. Yes. So this is access only, and
 2 that is why I showed you the ARPMs for calls separately.
 3 This is the line rental price.
 4 MR RIDYARD: But when -- and no doubt you will come to this,
 5 in which case just tell me so, when we are talking about
 6 the SSNIP test, which price are we talking about?
 7 MS KREISBERGER: We have to perform the SSNIP test on the
 8 line rental prices and then separately on the calls
 9 prices. But the important point is that it is actually
 10 common ground that whatever metric you use for call
 11 prices, we say ARPMs, the call prices go up over time,
 12 so there is no offsetting.
 13 MR RIDYARD: So you think the best way to think about call
 14 prices is the average revenue per minute, rather than
 15 the average revenue per user?
 16 MS KREISBERGER: Correct. The ARPU, which covers line
 17 rental and calls prices, is the basis for the limb 1
 18 assessment that Mr Duckworth performs for overall
 19 revenue. But for the SSNIP test, we say the right
 20 approach is: look at line rental separately, look at
 21 calls on the ARPM basis.
 22 MR RIDYARD: Why is that, then? I mean, if the ARPU is the
 23 right way to look at the limb 1 question: are prices
 24 excessive or not? I mean, the SSNIP test is trying to
 25 get to the substance of something worth monopolising, so

1 why would you not also then focus in on the ARPU at that
 2 point?
 3 MS KREISBERGER: I am going to check, if I might. I do not
 4 want to mis-speak. (Pause)
 5 I just want to encapsulate this simply. Essentially
 6 ARPU will get you to the same place, but if you want
 7 to -- this is a crystallised dataset. If you want to
 8 compare bundle prices with standalone prices, the bundle
 9 price is line rental and broadband without calls. So
 10 the cleanest comparison of dual play with standalone is
 11 to take line rental and broadband prices and compare
 12 them with the bundle price.
 13 MR RIDYARD: Okay.
 14 MS KREISBERGER: Now, calls ought to be a neutral factor
 15 across the two. There is no reason to think that call
 16 prices vary between dual play and standalone, so that
 17 should net off, as it were. Which is why the best
 18 metric at market definition stage is line rental plus
 19 broadband versus bundle prices.
 20 But of course ARPU gets you to the same place, so,
 21 in a sense, that is the sort of -- that is the full
 22 monty which you get in Mr Duckworth's analysis.
 23 MR RIDYARD: Thanks.
 24 MS KREISBERGER: I was just going to -- I think, just for
 25 your note, the joint statement at page 81 on this common

1 ground point about bundles prices, Dr Jenkins makes
 2 a point that it is true of BT's own prices as well as
 3 general prices in the market. My point is bundles are
 4 not moving in step with line rental and standalone
 5 broadband.
 6 Coming back then to the CMA's guidance that price
 7 divergence over time is also compelling evidence of
 8 products being in separate markets, that is the function
 9 of Mr Parker's analysis of the price differential
 10 between dual play prices and the standalone component
 11 prices.
 12 If we could pick up Mr Parker's report at page
 13 {IR-E/3/97}, paragraph 4.130:
 14 "In the period since the introduction of the
 15 Commitments, BT has been able to continue to increase
 16 prices for the SFV Services bought by Split Purchase
 17 customers (see ... Figure 6 above) ... these price
 18 increases have been over and above any cost increases by
 19 a considerable margin.
 20 "BT (and other providers) have ... been able to
 21 sustain a considerable price differential between
 22 the price of a SFV Service and separate standalone
 23 broadband service for Split Purchase Customers and
 24 the price of a functionally equivalent Dual Play bundle.
 25 This is shown in Figure 10 and ... 11 below, which

1 present a comparison of the total monthly cost paid by
 2 Split Purchase Customers with the average total monthly
 3 cost of an equivalent Dual Play bundle, following the
 4 same analytical approach as set out in Figure 7 and
 5 Figure 8 above."
 6 You can see that. I did not show you figures 10 and
 7 11 earlier. So that is a useful graphical
 8 representation of the gulf in prices.
 9 I did show you earlier the absolute average amounts,
 10 which are no longer confidential, at 4.132 under
 11 figure 11 and going over the page. I have shown you
 12 that {IR-E/3/99}.
 13 Then if we go to 4.133 {IR-E/3/100}:
 14 "Table 10 and Table 11 report the differential (in %
 15 terms) of the prices paid for fixed voice and fixed
 16 broadband ... by Split Purchase ... and Dual Play
 17 Customers in each month of the Claim Period covered by
 18 the analysis. As was the case for the period prior to
 19 the Commitments, these results show that the prices paid
 20 by Split Purchase Customers for fixed voice and
 21 broadband services were considerably – well in excess of
 22 10% in any given month – and persistently above
 23 the prices paid by Dual Play Customers for
 24 a functionally equivalent bundle of services throughout
 25 the period since the Commitments."

1 Then you have seen the tables.
 2 Mr Parker's conclusion is at 4.134 on page
 3 {IR-E/3/102}:
 4 "If Dual Play had operated as a sufficient
 5 competitive constraint on prices paid by Split Purchase
 6 Customers so as to justify including Dual Play in the
 7 same market as SFV Services to Split Purchase Customers,
 8 the observed price differences would not have been
 9 sustainable."
 10 If we could just note the joint experts' statement.
 11 That is at {OR-E/49/54}. If we focus in there on 5.2.5,
 12 "HJ", Dr Jenkins. Sorry, I will start with the
 13 proposition:
 14 "The amount paid by BT Split Purchase Customers for
 15 SFV access and separate standalone broadband is larger
 16 than the amount paid by customers who purchased
 17 functionally equivalent Dual Play bundles by an amount
 18 greater than a SSNIP."
 19 So that is Mr Parker's conclusion that I just showed
 20 you.
 21 Dr Jenkins says:
 22 "I have no reason to doubt the numbers reported by
 23 Mr Parker, but note that his data does not cover every
 24 provider of standalone broadband. [Then] price list
 25 comparison may not capture the actual pricing

1 offers ..."
 2 So she does not do her own analysis but she has no
 3 reason to doubt Mr Parker's.
 4 Can I just show you in Mr Parker's report, that is
 5 at {IR-E/3/78}, footnote 280. This is in answer to
 6 Mr Ridyard's question.
 7 THE CHAIRMAN: Sorry, which footnote?
 8 MS KREISBERGER: I am sorry, footnote 280. It is the first
 9 one there.
 10 I do not know if that could be inflated any further?
 11 "In each case, the total costs of fixed voice and
 12 broadband services for Split Purchase ... and Dual Play
 13 Customers exclude calls."
 14 So that is Mr Ridyard's question.
 15 "This should not affect the estimated price
 16 differentials, as I assume that for a given individual,
 17 there would be no change in the volume of calls made by
 18 the individual were they to switch from being a Split
 19 Purchase Customer to a Dual Play Customer. For Split
 20 Purchase Customers switching to a ... Dual Play bundle,
 21 I would expect this to hold by virtue of the fact that
 22 BT did not vary calls prices between Split Purchase
 23 Customers and Dual Play Customers, as a result of which
 24 I would not expect an individual to increase/decrease
 25 the volumes of calls they make in response to

1 switching.”
 2 THE CHAIRMAN: Sorry, just to be clear about that, you mean
 3 that that comparison excludes particular call charges
 4 which any given customer would be paying, whether on
 5 a per call basis or whether on a calling package basis?
 6 MS KREISBERGER: Yes, it excludes calls charges altogether.
 7 THE CHAIRMAN: However they are made?
 8 MS KREISBERGER: Yes.
 9 THE CHAIRMAN: Thank you.
 10 MS KREISBERGER: It is purely the line rental price and the
 11 standalone broadband price, because that is what the
 12 dual play price represents, line rental and broadband.
 13 It does not include calls. So neither side has calls
 14 in.
 15 THE CHAIRMAN: It does include calls, but you are not
 16 including them for these purposes.
 17 MS KREISBERGER: Exactly.
 18 THE CHAIRMAN: Thank you.
 19 MR RIDYARD: I can see at a point in time when you are
 20 comparing the price of a bundle versus buying the two
 21 elements separately, that all -- I can see the logic of
 22 that and how it works. But when you are asking other
 23 questions about changing pricing over time, it might not
 24 be so simple or appropriate to abstract away from the
 25 call price charges, because over time I think there has

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1 been a change in the balance, has there not, between the
 2 fixed element and the --
 3 MS KREISBERGER: There has.
 4 MR RIDYARD: -- element. So that is where -- I think it is
 5 a different set of questions then, a different set of
 6 issues, where you would be --
 7 MS KREISBERGER: Yes, and I think that is something we
 8 will ...
 9 MR RIDYARD: Yes.
 10 MS KREISBERGER: Yes, that is something that I think
 11 Mr Parker would be happy to address in the hot tub. But
 12 the analysis stands, is the overall submission for
 13 the --
 14 MR RIDYARD: For comparing at a point in time the two
 15 prices.
 16 MS KREISBERGER: Yes.
 17 MR RIDYARD: I understand that point.
 18 MS KREISBERGER: Then stepping back, the evidence on these
 19 large price differentials, and they are differentials
 20 well in excess of a SSNIP between standalone and bundle
 21 prices, is important for this reason: it shows that BT
 22 is successfully price discriminating between, on the one
 23 hand, dual play customers who buy their fixed voice
 24 rolled up in a bundle with broadband, and on the other,
 25 customers who split into two separate contracts.

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1 So the third category of SSNIP data I took you to is
 2 evidence of price discrimination markets, and I showed
 3 you the CMA Guidelines on that. In other words, you
 4 could think of the third category of SSNIP data as
 5 providing an explanation for the line rental and calls
 6 prices SSNIPs. You see the global view.
 7 Because the first two SSNIPs, line rental and calls,
 8 show that SSNIPs can be applied to SFV services. So one
 9 could just stop there, because you have established that
 10 the hypothetical monopolist test is met. But the price
 11 differential SSNIP data shows that at the same time as
 12 these high and increasing prices to SFV customers are
 13 being charged, BT is charging low prices to this other
 14 bundle customer base.
 15 If I could just develop that submission on price
 16 discrimination. If we could turn up Dr Jenkins' first
 17 report at {IR-E/17/66}.
 18 THE CHAIRMAN: Sorry, can you just give me the tab number
 19 again?
 20 MS KREISBERGER: The tab is 17.
 21 THE CHAIRMAN: Yes, thank you.
 22 MS KREISBERGER: It is under the heading "Price
 23 differentiation", if we can expand from there.
 24 Here, Dr Jenkins is addressing the fact that BT
 25 could price discriminate between voice only and split

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1 purchase customers after the commitments, not before.
 2 So she is not talking about bundles, but she is
 3 addressing price discrimination.
 4 She says:
 5 "I next consider whether, notwithstanding that SFV
 6 services to VOCs and SPCs are the same from a functional
 7 characteristics perspective ... [they] nevertheless give
 8 rise to distinct product markets on the basis that
 9 a hypothetical monopolist may be able to price
 10 differentiate between the two groups. It is evident
 11 from BT's price list that prior to the BT Commitments,
 12 BT did not ... price differentiate between the two
 13 groups."
 14 Common ground.
 15 "However, the relevant question is whether
 16 a hypothetical monopolist could have price
 17 differentiated prior to the ... Commitments."
 18 It is not just actual price differentiation that you
 19 look for, you look for ability.
 20 She goes on:
 21 "In order to be able to price differentiate a firm
 22 must be able to both:
 23 "(a) identify which group a customer belongs to at
 24 the point of sale; and
 25 "(b) prevent arbitrage between the two groups so

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1 that those offered a low price cannot turn a profit by
 2 selling the good on to those only offered high prices.”
 3 I showed you the same condition in the CMA
 4 Guidelines. Preventing arbitrage is not an issue here
 5 because an SFV service is tied to an address, so you
 6 cannot have trading between customer groups.
 7 Her first condition must be right at 4.25(a). You
 8 have to be able to identify which group a customer
 9 belongs to at the point of sale if you want to charge
 10 them different prices, and you have to be able to
 11 prevent arbitrage. So her second condition is right and
 12 the CMA takes that approach.
 13 It is worth just illustrating the point with the
 14 usual widgets example. If I run a website selling
 15 widgets to consumers, to end consumers, I will probably
 16 have to offer them all the same price for my widgets,
 17 because I cannot tell which of my customers will be
 18 willing to pay more than other customers. That is the
 19 usual position: you have to sell your product at the
 20 same price.
 21 The same is not true of BT. Because at the point of
 22 sale, Dr Jenkins' condition, BT knows exactly whether
 23 the customer is someone from whom it can extract a high
 24 or a low price. If the customer is signing up to
 25 a bundle, BT knows it faces aggressive price competition

1 to acquire or retain her. That is why dual play
 2 customers get good deals, low price offers. But if the
 3 customer is buying a standalone fixed voice service, BT
 4 knows, and this is borne out by the documents, that it
 5 can extract a high price from that customer. Buying
 6 a fixed voice service on a standalone basis from BT is
 7 tantamount to waving the flag of price insensitivity
 8 Mr Parker explains this in his third report at
 9 paragraph 6.89(d). That is {IRE/3/185}. It is
 10 paragraph 6.89(d), "Role of regulation". It is under
 11 "Significance and persistence" in relation to limb 1,
 12 but it is relevant to this topic:
 13 "BT's position meant that it had historically been
 14 subject to various forms of price regulation, and its
 15 ability to raise prices above the competitive level is
 16 linked to the removal of those regulations. Prior to
 17 2006, BT SFV Services were subject to direct price
 18 control regulation and prior to 2009, BT was prohibited
 19 from offering bundled services. As a result, BT was, to
 20 some extent, constrained from raising the price it
 21 charged to standalone fixed voice only customers due to
 22 the fact that it also had to serve more price-sensitive
 23 multi-play customers that would go on to purchase
 24 bundled products. It was the removal of this regulation
 25 in 2009 that meant that SFV Customers formed a distinct

1 and separate set of BT customers to which BT could set
 2 separate prices, and so engage in price discrimination
 3 in relation to SFV Customers.”
 4 Then if we could go to his fifth report at page
 5 {IR-E/3/115} -- sorry, I am adding a ...
 6 THE CHAIRMAN: His fourth report.
 7 MS KREISBERGER: We look forward to his fifth.
 8 Page {IR-E/3/115}, paragraph 6.2(ii):
 9 "... Dr Jenkins may instead be positing that BT has
 10 an incentive to discount the price level at which it
 11 offers bundles below the combined level of the
 12 standalone prices of the individual components of the
 13 bundle, in order to make greater bundle sales. I agree
 14 that BT may have such an incentive. However, this
 15 simply reflects the fact that offering a bundle is
 16 a method of price discrimination, which allows the firm
 17 to raise the price of the standalone services (as
 18 customers who continue to purchase those services at the
 19 higher price reveal that they have a strong preference
 20 for doing so). This model therefore shows that it is
 21 profit maximising for BT to increase the price of SFV
 22 services in the presence of bundles. However, I do not
 23 think that this means that the resulting price ...
 24 cannot be unfair in itself -- it just means that BT has
 25 found a mechanism by which it can price discriminate to

1 take advantage of those customers who do not switch away
 2 from purchasing SFV Services.”
 3 Just for your note, I think he makes a similar point
 4 at 6.2(v). That is at {IR-E/5/122}.
 5 THE CHAIRMAN: Can I just ask, how does what you have just
 6 said now tie back into the bits of Dr Jenkins' report?
 7 Are you coming back to look at that? Because you read
 8 part of her report, and then she says at 4.27 that if
 9 this statement is accurate because they could not get
 10 information from open reach:
 11 "... BT Consumer could not set different prices for
 12 SFV ..."
 13 {IR-E/17/67}
 14 But you are saying they could?
 15 MS KREISBERGER: No, she is talking about a different point
 16 there, she is talking about whether ... So Dr Jenkins --
 17 I am grateful for the question, just to clarify this.
 18 Dr Jenkins raises price discrimination markets herself
 19 in her first report in relation to a completely
 20 different issue, that is in relation to whether
 21 voice only and split purchasers are in the same market.
 22 THE CHAIRMAN: Right.
 23 MS KREISBERGER: Fortunately, that is not in dispute before
 24 you.
 25 THE CHAIRMAN: No. I just wondered, because you took us to

1 this bit of the report, and I was not quite sure ...
 2 MS KREISBERGER: Yes, absolutely. The reason I took you to
 3 it is to show you that there, Dr Jenkins follows the
 4 correct approach on price discrimination. When she is
 5 thinking about voice only and split purchasers, which is
 6 not a contentious issue at all, she applies the CMA
 7 approach. I will come on to show you --
 8 THE CHAIRMAN: But you are talking about price
 9 discrimination between --
 10 MS KREISBERGER: I am talking about bundles, between bundles
 11 and SFV customers, split purchasers and bundles. So
 12 I am applying her framework to a different point.
 13 THE CHAIRMAN: Yes, thank you.
 14 MS KREISBERGER: She changes her approach in the joint
 15 statement in trying to arrive at a different answer on
 16 the dual play price discrimination point. I will come
 17 back to that.
 18 So to sum up -- as I say, there is also
 19 paragraph 6.25, I do not think we need go there, in the
 20 fourth report. But to sum up, split purchasers who buy
 21 standalone fixed voice reveal their preference for
 22 splitting their purchase. In doing so, they show BT
 23 they are apt to be overcharged. A dual play customer
 24 benefits from the fierce competitive pressures on BT to
 25 attract and retain customers, gets the low price. So

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1 that is why these are price discrimination markets as
 2 between bundles and SFV customers.
 3 BT's ability to target different prices at them
 4 explains the SSNIP triptych, how it can maintain the
 5 highest SFV prices. In other words, why it is that SFV
 6 prices have been pushed so far above the competitive
 7 level for so long, and the origin story for BT's
 8 bifurcated price structure is the removal of regulation
 9 in 2009. That is where I began this morning.
 10 So this is really the fulcrum of the Class
 11 Representative's case. Bundles place no effective
 12 constraint whatsoever on SFV services. The reason they
 13 place no effective constraint is that BT can maintain
 14 different prices to these different customer groups.
 15 Now, I just want to note that back in 2017, Oxera,
 16 acting on behalf of BT, conceded that BT was price
 17 discriminating between bundle and SFV customers.
 18 Please turn up the Ofcom materials bundle. That is
 19 {C/6/23}. You see there the heading "Price
 20 discrimination as a migration strategy, not
 21 a segmentation strategy". I am just going to show you
 22 the conclusion, in the interests of time, at the bottom
 23 of the page:
 24 "In summary, Ofcom correctly identifies that price
 25 discrimination is ongoing between SFV customers and dual

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1 play customers. However, a careful analysis of this
 2 pricing strategy reveals that it is evidence of a broad
 3 market, rather than separate narrow markets."
 4 I will come back to that submission they were
 5 making. But they, Oxera, accepted, conceded, that this
 6 was price discrimination.
 7 I just want to show you what Dr Jenkins says in
 8 comparison to that. Joint statement, IR-E -- I am so
 9 sorry, {OR-E/49/48}, and it is proposition 5.1.6:
 10 "Where a hypothetical monopolist can price
 11 discriminate between customers, it may be appropriate to
 12 define separate focal products for the products
 13 purchased by each customer group."
 14 If you could go down to the bottom of the page under
 15 "HJ", beginning "This is the first time".
 16 "This is the first time that Mr Parker has also
 17 explicitly framed the market definition question as one
 18 of price discrimination ..."
 19 We do not accept that, and I showed you some
 20 passages in the report. But in any event, his entire
 21 price differential SSNIP analysis is based on price
 22 discrimination.
 23 "I do not consider that BT was, or was even able to,
 24 price discriminate in this way."
 25 That is not what her consultancy said back in 2017.

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1 THE CHAIRMAN: Just a moment, please. (Pause)
 2 MS KREISBERGER: I am being nudged just to check that you
 3 have the point that the Oxera submission was a response
 4 to Ofcom's --
 5 THE CHAIRMAN: Yes, where it says "BT responds" at the top
 6 of the thing, yes.
 7 MS KREISBERGER: She rather changes there the conditions of
 8 price discrimination. I will come back to that.
 9 THE CHAIRMAN: Yes.
 10 MS KREISBERGER: So that is the SSNIP data. With that,
 11 I would like to just show you Ofcom's analysis,
 12 consistent with Mr Parker's analysis, of the price
 13 differentials. I am staying with the price
 14 discrimination point.
 15 If you could turn up the provisional conclusions,
 16 that is {IR-C/1/1} is where they begin. If you could go
 17 forward to page {IR-C/1/23}, please. Paragraph ... Ah,
 18 it is actually Opus page 23, paragraph 3.30, heading,
 19 "Dual-play services are not in the same market as SFV
 20 services bought by voice-only ..." So this is
 21 voice only.
 22 "[Communication providers] offer fixed voice
 23 services bundled with other communication services ...
 24 These multi-play bundles are usually sold at a discount
 25 compared to the price of purchasing the individual

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1 components separately from different ... (or the same
 2 provider) ... We focus on dual-play as the closest
 3 candidate substitute ..."
 4 That is what Mr Parker does.
 5 "We consider whether the availability of dual-play
 6 bundles imposes competitive constraints on the provision
 7 of voice-only access. The strength of any such
 8 constraint will depend on whether enough voice-only
 9 customers are likely to switch to dual-play in response
 10 to a SSNIP to make the SSNIP unprofitable.
 11 "As set out in Annex 7 the relevant question for the
 12 SSNIP ... is whether a price increase could be sustained
 13 above competitive levels. Our analysis is that current
 14 SFV access prices [so that is line rental] are in fact
 15 substantially above competitive levels ..."
 16 They set out their analysis there. They refer to
 17 price increases and increasing profitability .
 18 Then at 3.33:
 19 "... the application of a SSNIP test ... from ...
 20 current ... prices does not provide a reliable indicator
 21 as to whether dual play services are in the same ...
 22 market ... because, a SSNIP applied to the current
 23 prices ... could be unprofitable if such prices are
 24 substantially above competitive levels, whereas it could
 25 be profitable if the SSNIP were applied to competitive

1 prices ."
 2 Then if we move forward to page {IR-C/1/26}. So
 3 I have shown you voice only. Then on page 26, 3.33,
 4 sorry, 3.39, you see the heading. Now Ofcom is looking
 5 at whether "Dual-play services are not in the same
 6 market as SFV services bought by split purchase
 7 customers". That is their conclusion.
 8 They say halfway down:
 9 "Although split purchasers buy the same ... access
 10 product as voice only ... the combination of products
 11 that they purchase ... could be considered as
 12 functionally equivalent to dual-play services. We have
 13 ... considered these two services in reaching our view
 14 on the boundaries of the relevant ... market."
 15 At 3.40, Ofcom notes that split purchasers are
 16 generally better informed than voice only customers.
 17 Then 3.41:
 18 "However, we consider that observed outcomes are not
 19 consistent with the existence of a competitive
 20 constraint from dual play services to the prices for
 21 standalone services paid by split purchasers ..."
 22 Can I ask you to read there the subparagraph that
 23 sets out their findings. (Pause)
 24 THE CHAIRMAN: Yes.
 25 MS KREISBERGER: Then 3.42. Again, if I could ask you to

1 cast your eye over that. (Pause) {IR-C/1/27}
 2 Then if I could just refer you to the second
 3 subparagraph:
 4 "We would not expect providers of SFV services to
 5 split purchasers to be able to sustain such a high level
 6 of profitability if they were facing competitive
 7 constraints from dual-play ..."
 8 Then 3.42.3:
 9 "There is no evidence from BT's internal pricing
 10 documents that BT, in its decisions to increase line
 11 rental in recent years, was concerned that a price rise
 12 would drive split-purchase customers who buy SFV
 13 services from BT to switch to dual play services from
 14 other providers. Nor do these pricing documents include
 15 any consideration of whether SFV customers may switch to
 16 dual play with BT as a response to line rental price
 17 increases."
 18 I am going to show you that Mr Parker reaches the
 19 same view and, in my submission, that is the correct
 20 understanding of the documents.
 21 That is in fact a neat segue for me to go to those
 22 documents. Just before I do, perhaps just to pause to
 23 situate my submissions. I have now addressed you on the
 24 SSNIP data, all three versions, which show that bundles
 25 are not an effective constraint on SFV price, and that

1 BT can price discriminate between the two groups, and
 2 I have shown you that Ofcom conducted the same analysis
 3 of price differentials and reached the same conclusions
 4 as Mr Parker.
 5 So with that, I would like to turn to the
 6 non-pricing evidence which Mr Parker took into account
 7 in his assessment in line with the CMA guidance. You
 8 will remember the first point was internal documents.
 9 There are two categories of non-price data which
 10 Mr Parker relies on. The first is that there is no
 11 functional interchangeability for voice only customers
 12 with bundles. I can take this -- it is an obvious
 13 truth, so I can take this one quite crisply. The second
 14 non-pricing evidence are the BT documents.
 15 So a straightforward fact: bundles are not
 16 interchangeable with standalone fixed voice for this
 17 group because they do not want to buy broadband, and BT
 18 knew this to be true.
 19 Please turn up {OR-F/631/1}. You can see from that
 20 first page this is an internal BT customer insights
 21 document from 2019. It is looking at the VOC
 22 experience, that is true solus.
 23 If you go down to page 7 {OR-F/631/7}, the heading
 24 there is "Broadband could be relevant to some, but there
 25 is little interest".

1 Then if you look at the third column:
 2 "However, there is near universal lack of interest
 3 in Broadband, with 4 in 5 saying they are 'not at all
 4 interested'."
 5 This is just one document I have selected. There
 6 are others to the same effect. So BT knew that
 7 voice only customers did not want to buy broadband.
 8 Mr Parker addresses the lack of functional
 9 interchangeability at {IR-E/3/75}. He refers to Ofcom's
 10 finding that dual play is not a substitute for
 11 voice only customers. That is at 4.85:
 12 "In my view Dual Play is not and would not be seen
 13 as a material substitute ... for [VOCs], [because] it
 14 includes broadband. Ofcom found that '68% of voice-only
 15 respondents said that the reason they did not take
 16 a bundle which includes broadband is that they do not
 17 use broadband. A much smaller proportion ... said they
 18 did not take a bundle including broadband due to
 19 the price of fixed broadband'. This suggests that the
 20 most important factor for not taking broadband is not
 21 the price, but rather the fact that Voice Only Customers
 22 do not need broadband."
 23 Mr Parker then looks at some of the BT documents.
 24 He cites a number of them. The last one he cites at (d)
 25 on page {IR-E/3/76} is the one I just showed you.

1 Then if you cast your eye down to 4.86 on page
 2 {IR-E/3/75} that evidence is consistent in my view with
 3 the BT evidence and internal documents which suggests
 4 that throughout the claim period BT believed that
 5 voice only customers had little interest in buying
 6 broadband.
 7 I would just like to show you what Dr Jenkins says
 8 about voice only substitutability with broadband in
 9 contrast. That is at {IR-E/17/73}. This is Dr Jenkins'
 10 first report at paragraph 4.42.
 11 "For VOCs, the motivation for switching to fixed
 12 voice services in a bundle is different. At the point
 13 of potential switching, they are only purchasing voice
 14 services. When they switch to a bundle they continue to
 15 purchase voice services, but augment them with the
 16 additional communication features and benefits that come
 17 from the broadband element. The customer will take
 18 these additional features and benefits into account, as
 19 well as their relative prices, when choosing the
 20 services to adopt."
 21 She does not cite any of the documents that
 22 Mr Parker cites. I showed you one. In fact she does
 23 not cite any evidence at all. This appears to be her
 24 view as to the benefits of broadband for voice only
 25 customers.

1 That completes functional interchangeability for
 2 voice only customers. Now, my next category are the
 3 internal BT documents. I am happy to make a start or
 4 pick this up after the ---
 5 THE CHAIRMAN: No, let us make a start, thank you.
 6 MS KREISBERGER: Make a start, I am grateful.
 7 In line with the CMA guidance on what is useful
 8 evidence I turn to the documents and as a body of
 9 documents I have given you a number of propositions.
 10 They show that BT was able to profitably drive SFV
 11 prices up beyond the competitive level and that bundles
 12 exerted no effective constraint on BT's ability to do
 13 so.
 14 Just for your note, I have shown you
 15 paragraph 3.42.3 of the provisional conclusions. That
 16 is at {IR-C/1/27}. That is where Ofcom found there was
 17 no evidence from BT's internal pricing documents that BT
 18 was concerned that its SFV price rises would drive split
 19 purchase customers away. That was the submission BT
 20 made to Ofcom. It was rejected. The same finding in
 21 relation to voice only. For your note that is at
 22 3.36.3, {C/1/24}.
 23 So Ofcom rejected BT's claims that it had a genuine
 24 concern about switching. Of course BT's protestations
 25 always had the air of unreality because at the end of

1 the day, whether BT experienced any angst about hiking
 2 SFV prices, it did not stop it from doing it, from
 3 pushing the price up. Just to note, Dr Jenkins is I am
 4 afraid flogging the same dead horse. She claims that BT
 5 was worried about customer churn. That is at
 6 Dr Jenkins' second report, paragraph 4.28, {IR-E/18/79}.
 7 BT's concerns about customer churn.
 8 I am going to show you the documents. You do not
 9 see any angst at all. You see a firm with strong market
 10 power deliberately extracting maximum revenue from
 11 a declining customer base knowing it can get away with
 12 it. I am going to take you to a handful of them now.
 13 Please turn up {OR-F/180/17}. This is
 14 a 2012, March 2012 board strategy document. Perhaps
 15 just in the interests of time I am not going to go back
 16 to the cover page but the cover page shows you that. On
 17 this page, page 17, it begins. So this is BT board
 18 strategy document:
 19 "We will maximise value from our legacy fixed voice
 20 business and build new personal communications offers."
 21 Then on the left-hand, the bullet points:
 22 "Overall the fixed voice market is in decline.
 23 "We are managing revenue and margin via price rises
 24 and migration to unlimited plans."
 25 This is 2012, BT has had a few line rental price

1 increases under its belt already since 2009 and it has
 2 settled on a strategy of pricing high to SFV customers.
 3 "We will maximise value from our legacy fixed voice
 4 business ..."
 5 Please go forward to {F/310/2}. This is an annual
 6 price change paper from May 2015 prepared by Mr Bunt.
 7 Mr Bunt was pursuing that same strategy a few years
 8 later. Under the heading "Pricing Strategy" you see
 9 there under "Introduction":
 10 "This will raise line rental pricing by £1."
 11 MR BEARD: Most of the prices by 9.46%.
 12 MS KREISBERGER: 6.94% actually.
 13 Then under "Background" he says this:
 14 "Each year BT changes its prices. Historically this
 15 has been approximately inflationary, but increasingly
 16 super-inflationary price rises on largely inelastic
 17 products has provided significant upside for our
 18 business. This capital provides the oxygen for our
 19 business in the sense of its investment in content,
 20 spectrum etc."
 21 Largely inelastic refers of course to products where
 22 demand does not decrease in response to price rises.
 23 BT was proactively targeting its price increases at
 24 those customers who were least likely to switch away,
 25 the price-insensitive group. That is the price

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1 discrimination strategy.
 2 Now, that strategy was proving successful. If you
 3 could go to {F/286/6}. Perhaps I should just show you
 4 page 1 first. {F/286/1}. So that is the 15/16 pricing
 5 plan, 15 January 2015.
 6 If you could go forward to page {F/286/6}, please.
 7 "Is our current approach to pricing hurting the
 8 business?"
 9 "Recent price changes demonstrate:
 10 "Churn driven by price change is low ([roughly] 2.5k
 11 GC9 ceases in Window -- measured separately for the
 12 first time this year)."
 13 Now Windows, it is in the table I showed you from my
 14 skeleton, Windows was the 2014 price increase which
 15 included £1 on line rental. GC9 refers to the
 16 requirement to notify customers of price changes and
 17 waive early termination charges if the customer calls in
 18 to cancel because of the price changes.
 19 So churn driven by the Window price change is low.
 20 Bottom part of this section under that third bullet:
 21 "Based on this we can conclude that price changes
 22 are sustainable with increasing subtlety."
 23 You have my submission that the simplest explanation
 24 for the price rises is also the true one.
 25 THE CHAIRMAN: Just a moment, please. (Pause)

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1 Is that a convenient moment?
 2 MS KREISBERGER: It is.
 3 THE CHAIRMAN: Thank you. Thank you very much indeed.
 4 Right, 2 o'clock then.
 5 (1.02 pm)
 6 (Luncheon Adjournment)
 7 (2.00 pm)
 8 THE CHAIRMAN: Yes.
 9 MS KREISBERGER: Thank you, sir. I am carrying on with my
 10 canter through the documents. I should say this is just
 11 a selection of the documents and of course we will be
 12 looking at further documents in cross-examination and
 13 the hot tubs.
 14 Now, you have my submission that the simplest
 15 explanation for the price rises is the true one. Please
 16 turn up {F/478/2}. If I could ask you to look at,
 17 halfway down the page, the bullet point that begins "We
 18 have seen greater churn":
 19 "We have seen greater churn than in previous years
 20 (7k) -- however this is dwarfed in comparison to the
 21 additional revenue driven by the higher % increases. It
 22 is not clear how much this churn was driven by us or
 23 competitors (free fibre) [that is a reference to
 24 broadband]. But for 17/18 we should be careful to not
 25 to over-tip the balance by repeating all of the higher %

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1 increases from 16/17."
 2 As you know, after the Ofcom hiatus the price
 3 increases carry on stacking up for SPCs.
 4 So there you see that the upside -- low churn, huge
 5 upside is dwarfed. It is right that these prices were
 6 in fact all upside for BT.
 7 If you could please go to {F/469/13}. I will just
 8 show you the heading in this document. Now, this
 9 document is called "Financial Factbook". That is at
 10 page 1 of the document {F/469/1}. "BT Consumer". It is
 11 dated 5 July 2016.
 12 The heading says this:
 13 "Voice is our largest and most margin-rich product,
 14 benefiting in recent years from significant annual price
 15 increases and the fact that price competition is focused
 16 on headline Broadband prices. However, declining
 17 volumes in both lines and call minutes limit the scope
 18 for future growth from this product."
 19 You see there on the right-hand side, the first item
 20 under "Key Dynamics":
 21 "Long-term decline in line volumes, offset through
 22 annual pricing of £1 on standard line rental."
 23 MR RIDYARD: That suggests there is a trade-off here, does
 24 not it, between losing volume, which is a bad thing, and
 25 increasing prices, which is there to try and offset it.

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1 That does not show that -- well, there is a trade-off in
 2 those two factors, is there not?
 3 MS KREISBERGER: What it shows, and we have the SSNIP data
 4 to see that the price increases hold, but what it shows
 5 is BT knows this is a declining market and it is pushing
 6 up the price to, as I said, make hay while the sun
 7 shines, not justified by cost increases. They are doing
 8 it because they can, because these customers are
 9 price-insensitive.
 10 There is an argument I will come back to, which
 11 is --
 12 MR BEARD: Sorry, can I just clarify, which are "these
 13 customers" which Ms Kreisberger is referring to?
 14 MR RIDYARD: I was going to ask that myself, actually.
 15 Because the previous slide said "voice customers", but
 16 that is not voice only, is it? Or is it?
 17 MR KREISBERGER: Well, it is not. But what is right, and
 18 I am going to address you on this in detail this
 19 afternoon, when you see reference in the documents to £1
 20 on line rental, that is the list price. The only
 21 customers who are paying that price increase are the
 22 standalone fixed voice customers, because I showed you
 23 bundle prices stable or decreasing, line rental prices
 24 going up.
 25 So when you talk about voice as a whole, you have

1 got those who buy their line rental as a standalone
 2 product and you have got those who buy their line rental
 3 in a bundle. The people buying the bundles are not
 4 paying the £1 increase on line rental. Only the
 5 standalone customers are paying the £1 on line rental.
 6 THE CHAIRMAN: I thought the evidence was from the BT
 7 witnesses that when they did their £1 a year, or
 8 whatever it was, increase, that was across the board for
 9 all the voice customers, whether SFVs or within the
 10 bundles.
 11 MS KREISBERGER: So it is an entirely notional, fictional --
 12 this is the bundle pricing fallacy. So I am going to
 13 come to this when I deal with Dr Jenkins' evidence, but
 14 let me foreshadow it now.
 15 Essentially what happens is -- it is very simple,
 16 and this was well ventilated before Ofcom -- undoubtedly
 17 standalone customers pay the line rental price, 15.99 or
 18 17.99 a month. The bundle customers -- let us say BT
 19 charges £20 for a bundle, and line rental goes up that
 20 year by £1, let us say line rental has gone up from,
 21 I am going to drop the 99p just for my own simplicity.
 22 So let us say the line rental price has gone up from £17
 23 to £18. The standalone line rental customers pay £18
 24 now. No discounts. They pay that price.
 25 THE CHAIRMAN: Yes.

1 MS KREISBERGER: What does BT do for the bundle customers?
 2 We know bundle prices do not go up, or in fact, at some
 3 points, decrease. So BT says, okay, we will say that
 4 you are now paying the £18 on the line rental, you were
 5 paying £17. We will drop our incremental broadband
 6 price, the bit of the bundle price that we are going to
 7 call the broadband component. You were paying £3, so
 8 you were paying £17 for line rental and £3 for
 9 broadband. You are now paying £18 for line rental and
 10 £2 for broadband.
 11 It is totally fictional because a bundle customer
 12 pays £20.
 13 So before the price increase, the bundle customer
 14 paid £20. After the line rental price increase, the
 15 bundle customer paid £20. The bundle price has not
 16 shifted, it is just how they present it. Dr Jenkins
 17 says that herself, I will show you. They just played
 18 with what they called the incremental broadband price.
 19 What is actually happening is they are just keeping
 20 the price of the bundle steady, or they are bringing it
 21 down with these very deep discounts, aggressive price
 22 competition. Who is paying the £1 on line rental? Only
 23 the standalone customers.
 24 THE CHAIRMAN: Yes, thank you.
 25 MS KREISBERGER: Yes, as Mr Armitage points out to me, hence

1 we come back -- that explains this headline:
 2 "Voice is our largest and most margin-rich product,
 3 benefiting in recent years from significant annual price
 4 increases and the fact that price competition is focused
 5 on headline Broadband prices."
 6 They are talking there about the broadband
 7 component. If line rental goes up, the bundle customer
 8 is not paying it. They say, oh, you are getting your
 9 broadband for £1 cheaper now.
 10 THE CHAIRMAN: Yes.
 11 MS KREISBERGER: So moving on. So as I say, that
 12 perfectly -- that is why this document is helpful, and
 13 you see this phraseology in other documents actually.
 14 It perfectly captures the overt price discrimination
 15 strategy between bundle customers and standalone voice
 16 customers. This is the lazy monopolist making hay while
 17 the sun shines.
 18 This is also reflected in the next document,
 19 {F/833/9}.
 20 Is it helpful -- I am conscious that I am trying to
 21 save time by going to the relevant page -- to see the
 22 front cover on page 1, perhaps? {F/833/1}. That is the
 23 one. That is the front page. That is a strategic
 24 review of the 2018/2019 price change.
 25 If we could go forward to page {F/833/9} in this

1 document, please.
 2 It begins "Strategic Considerations and Key
 3 Principles".
 4 "Strategic Considerations:
 5 "The base of customers from which we can price
 6 change has decreased.
 7 "Carmen is likely to remove limit truly Solus
 8 customers to CPI rises."
 9 So this is a reference to the commitments. We
 10 cannot increase prices, BT is saying, to our voice only
 11 customers. They are the true solus base.
 12 "This means we have an even greater challenge to
 13 using price change to meet MTP – we need an intelligent
 14 approach to pricing what remains in our control."
 15 Then they say "Key Principles", and I just want to
 16 show you the penultimate bullet:
 17 "We should recognise declining markets and price
 18 accordingly to maximise value (eg split purchase
 19 Solus)."
 20 So we cannot impose the price increases on
 21 voice only any more. Split purchase is a declining
 22 market. We will maximise the value from then going
 23 forward. That is a much more recent statement.
 24 I next would like to show you one of the documents
 25 that shows that BT was under no illusions at all that

1 its strategy was harming the most vulnerable. That is
 2 {F/351/1}. Could we go to the first page. We see there
 3 "Consumer Voice Strategy 15/16 onwards", 19 March 2015.
 4 Could you please go forward to page {F351/8}. You
 5 see there the heading at the top of the page, "Consumer
 6 Voice Strategy – Positive Brand".
 7 Then second, let us read under "Context":
 8 "BT's Brand has 5 personality traits and
 9 acknowledges a dichotomy:
 10 "'As your trusted guide we're dedicated, bold and
 11 ingenious.
 12 "'But we're warm and down to earth too.'
 13 "Using core products to drive revenue to enable our
 14 bold and ingenious developments can undermine our
 15 warmth, care and honesty."
 16 Next bullet point:
 17 "Open to criticism that we exploit the vulnerable to
 18 subsidise new customers (eg caller display, increases to
 19 line rental, especially on true solus)."
 20 That is voice only.
 21 Now, while BT was clearly untroubled by price
 22 related churn, no sign of competitive constraints that
 23 worried them, it was fixated with the risk of bad press.
 24 There are myriad examples of this in the documentary
 25 record. I will show you one.

1 Please turn up F/379/13. Sorry, I am misreading it.
 2 I am sorry, it is {F/374/1}. If we go to the first
 3 page, "Project Window". So that is the 2014/2015 price
 4 increase. Execution update in June 2014.
 5 Please go forward to page {F/374/13}. You see
 6 there:
 7 "Announce 22nd August ..."
 8 So they are talking about when they are going to
 9 announce the line rental price increase.
 10 "Announce 22nd August to avoid Sport and spring and
 11 use the bank holiday weekend to buffer and fracture
 12 criticism .
 13 "Story will be seeded to journalists on late 21st so
 14 the print comms don't appear until 22 August."
 15 Now, BT also knew that these price rises, which were
 16 hurting the most vulnerable, were unjustified, they knew
 17 there was no justification for them.
 18 Please turn up {F/826/4}. Sorry, let us start on
 19 page {F/826/3}. Now, Mr James Tickel, he was at the
 20 time BT's head of regulation, and he sent an email to
 21 Mr Stuart Murray and Mark Shurmer, and it attaches
 22 a draft slide deck for the meeting with Ofcom,
 23 Sharon White:
 24 "Trickiest Q:
 25 "Why have you/others been focussing price increases

1 on line rental and calls charges?"
 2 Mr Murray ... yes, Mr Murray, who was director of
 3 regulatory affairs, replied:
 4 "Whatever the answer, it's unlikely to be
 5 attractive ...
 6 "Story is probably not that there is a focus on
 7 increasing line charges, rather there has been a focus
 8 on the vast majority of customers who buy dual/triple
 9 play and getting the pricing right for those customers.
 10 Solus has been a secondary consideration, rather than
 11 the primary focus?"
 12 They are trying to come up with a story for Ofcom's
 13 benefit .
 14 Then please go forward to F/833/9. So this is
 15 another -- sorry, have I given the wrong -- sorry, let
 16 me start again. It is {F/472/1}. This is another email
 17 exchange with Stuart Murray and he says this, you see at
 18 the end of the first paragraph -- and this email went to
 19 Meg Blight, James Tickel and Ms Cheek:
 20 "I'm not sure how we get round this? I don't see an
 21 obvious argument to justify (in a way that would satisfy
 22 Jonathan [at Ofcom]) why line rental has increased at
 23 the rate that it has (leaving aside the justification
 24 this year created by the change in care level)?"
 25 No obvious argument to justify line rental, and that

1 just sums it up.
 2 THE CHAIRMAN: Yes.
 3 MS KREISBERGER: To bring the strands together, where
 4 I started this morning. The categories of evidence that
 5 Mr Parker relies on to find that bundles do not present
 6 an effective constraint on the price of SFV services.
 7 Three sets of SSNIP data, they show price
 8 discrimination. Lack of functional interchangeability
 9 for voice only customers, they do not want broadband.
 10 The documentary record from BT that I just showed you
 11 which really tells you what is going on: no
 12 justification for the price increases, no mention of
 13 a concern that price increases will drive churn, a
 14 desire and motive to increase revenue from
 15 the price-insensitive customer base, no worries about
 16 churn.
 17 In respect of each of those three strands, Ofcom
 18 arrived at the same conclusion, consistent with
 19 Mr Parker. So each of these categories of evidence is
 20 consistent with and reinforces the other. You have here
 21 a compelling corpus of evidence which shows that bundles
 22 impose no material constraint on these upwardly
 23 spiraling SFV prices.
 24 Now, with that, I would like to move -- unless the
 25 Tribunal has any questions?

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1 MR RIDYARD: I am just looking at this last document that
 2 you took us to about the no justification, or cannot see
 3 an obvious justification. Because earlier on, they are
 4 saying that whilst we can argue that revenue and profit
 5 made on calls has reduced because of call volume
 6 reducing and customers moving to packages ... So what is
 7 the point you are making about this no obvious
 8 justification? What is our takeaway from this?
 9 MS KREISBERGER: I am going to show you, in the next part of
 10 my submissions, various theories that Dr Jenkins is
 11 advancing to justify the price increases. She comes out
 12 with a number of different ideas, theses. You do not
 13 see any of them in the documentary record. You see BT
 14 worrying: we are about to head into a meeting with Ofcom
 15 and we do not have anything to justify the line rental
 16 price increases.
 17 MR RIDYARD: What would justify it? What --
 18 MS KREISBERGER: Well, nothing. Because what you see in the
 19 documents is that BT was raising the price to one group
 20 because it knew that they would not churn away in
 21 response to a price rise. They say in the documents we
 22 want to maximise -- it is a declining base; let us
 23 extract what we can from them, maximise value. Because
 24 in bundles they are constrained, there are price
 25 constraints in the bundles.

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1 MR RIDYARD: I understand that. So are you saying this is
 2 evidence of showing that BT must have been making more
 3 and more profit from those customers?
 4 MS KREISBERGER: Of course, which we show on the evidence,
 5 the excess margin under limb 1. They are making more
 6 and more money on SFV customers because they are
 7 price-insensitive. BT can identify them at the point of
 8 sale and charge them the higher price whilst maintaining
 9 these competitive prices to bundle customers. They have
 10 got no -- what he is saying here is: I have got to go
 11 into Ofcom and I need a story, because I have got no
 12 economic justification because costs are coming down.
 13 MR RIDYARD: Volumes are falling as well, so ...
 14 MS KREISBERGER: But he is saying volumes falling does not
 15 justify.
 16 MR RIDYARD: Is that what this says then?
 17 MS KREISBERGER: That is the obvious implication of "there
 18 is no obvious argument to justify".
 19 If your volumes are falling, your costs are going
 20 down.
 21 MR RIDYARD: So when it says we can argue that call volumes
 22 have reduced, is that saying we can argue that it is not
 23 true or it is true?
 24 MS KREISBERGER: No, call volumes are falling, but that
 25 simply means the costs are going down. It is not --

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1 MR RIDYARD: It does not. It means if your volume is
 2 falling in the business, then it may be that a given
 3 price cost margin is not going to be enough to keep
 4 covering your costs, is it not?
 5 MS KREISBERGER: We have the analysis under limb 1. What
 6 you see is the enormous excess that was above cost, so
 7 that --
 8 THE CHAIRMAN: Yes. I think what it might be saying is:
 9 while we can argue that revenue and profit made on calls
 10 has reduced, because call volumes, etc; nonetheless,
 11 despite all of that, the high profitability does
 12 persist, and there is no obvious justification for that.
 13 MS KREISBERGER: Yes. I am not sure how we get round this.
 14 THE CHAIRMAN: In other words, I think what is being said,
 15 but we will be corrected, no doubt, is that yes, we are
 16 losing money because of the decrease in call volumes and
 17 that has to be offset somehow. Nonetheless, there is
 18 still this high rate of return despite that, and that
 19 cannot be justified. I think that is what they are
 20 saying.
 21 MS KREISBERGER: Yes, I am grateful for that. Just to be
 22 clear, he is referring to "the high profitability
 23 persists", so the margin is large, high profitability,
 24 and he says:
 25 "I don't see an obvious argument to justify ... why

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1 line rental has increased at the rate that it has ...”
 2 They cannot justify the steep incline to the price.
 3 MR RIDYARD: Yes, okay.
 4 MS KREISBERGER: So if I may then turn to Dr Jenkins’
 5 criticisms of Mr Parker’s approach. She has three main
 6 criticisms. This is on market definition. The first
 7 one I foreshadowed. She says Mr Parker has ignored the
 8 substantial evidence of switching. This is BT’s main
 9 line of attack. Now, the error lies with Dr Jenkins
 10 because her analysis of switching is based on a false
 11 assumption that switching from standalone voice to
 12 bundles is price-responsive switching, switching which
 13 constrains the price of standalone voice.
 14 Now, her assumption is wrong for three principal
 15 reasons. Firstly, it is contradicted by all of the
 16 evidence that I have shown you: the pricing evidence,
 17 the non-pricing evidence. All of that tells you that
 18 bundles do not effectively constrain SFV prices and BT
 19 did not think that they constrained SFV prices. Whereas
 20 Dr Jenkins makes the mistake, and I am going to show it
 21 to you in her report, of conflating the mere existence
 22 of switching with a price constraint.
 23 So let me show you that. If you could please turn
 24 up her first report, {IR-E/17/79}. Paragraph 4.51 at
 25 the bottom of the page:

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1 "Overall, the evidence from 'within-BT' switching
 2 ..."
 3 So this is switches from SFV to BT bundles within
 4 BT.
 5 "... shows that, over the relevant period, there was
 6 a substantial move from SFV services towards fixed voice
 7 services supplied as part of a bundle alongside
 8 broadband. Hence [she says] bundled voice services
 9 would have been a significant constraint on pricing for
 10 a hypothetical month list of SFV services, as households
 11 consuming those services clearly considered voice as
 12 part of a bundle as a sufficiently close substitute that
 13 they were frequently switching to that method of
 14 purchasing fixed voice services in the face of
 15 prevailing market conditions."
 16 So you see there she says: I observed lots of
 17 switching. Hence, she says: because I observed
 18 switching, I assume ... She does not spell out it is an
 19 assumption. Hence, bundles would have been
 20 a significant constraint on price. So she has
 21 seamlessly moved from switching to the assumption of
 22 a price constraint. Her reasoning is that households
 23 who switched clearly, she says, regarded bundles as
 24 a substitute for SFV. In other words, she ends up
 25 assuming precisely that which she wants to prove.

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1 In Dr Jenkins' world, switching is equivalent to
 2 substitutability and therefore a price constraint. She
 3 moves from switching, substitutability, price
 4 constraint. She has her reasoning backwards. She
 5 observes switching and concludes there is a price
 6 constraint.
 7 I showed you paragraph 3.5 of the CMA Guidelines.
 8 The question, it says, is whether the price of one
 9 product constrains the price of another. She does not
 10 ask that question. That is her conclusion.
 11 She refuses to acknowledge the SSNIP data. I showed
 12 you she agrees that the SSNIP framework is the right
 13 approach but then she utterly disregards its central
 14 premise.
 15 Just for your note, joint expert statement, 5.1.2,
 16 page 44, per Jenkins, {IR-E/49/44}. What matters for
 17 the purposes of market definition is that all of the
 18 goods that exert a significant economic constraint on
 19 focal products are included in the relevant market.
 20 That is the right question.
 21 Dr Jenkins also devotes an awful lot of effort to
 22 identifying the numbers who switched. Once again she is
 23 asking herself the wrong question. The question is not
 24 how much switching there was, but whether the switching
 25 which took place constrained BT from putting up its SFV

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1 prices.
 2 Perhaps I could illustrate the point this way.
 3 I see Mr Ridyard has a question.
 4 MR RIDYARD: It should be to see whether the switching would
 5 constraint a hypothetical monopolist.
 6 MS KREISBERGER: Yes, and I will come on to that point.
 7 Yes, I am grateful.
 8 Just on the question of constraint, it is not
 9 inconceivable that if the decline in the SFV market
 10 continues, at some point in the future BT will no longer
 11 find it profitable to charge these high prices to this
 12 customer base. It is possible the market will collapse.
 13 If that happens at that stage, BT’s price discrimination
 14 strategy will have finally had its day. But for so long
 15 as there is a rump of SFV customers from whom BT is
 16 demanding high prices and who still pay them, then we
 17 see that bundles have not constrained the price that
 18 they pay.
 19 As I stand here today, I have around 3 million SFV
 20 customers in the Class who have paid these high prices
 21 for standalone voice services. They are not helped by
 22 BT’s competitive price offerings to its bundle customer
 23 base for so long as they pay the high prices.
 24 In fact, to date, the only material constraint on
 25 BT’s SFV price has been Ofcom’s threat to impose price

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1 caps. That is what prompted BT to offer up the Carmen
2 discount for VOCs only, not split purchasers.

3 My third criticism of Dr Jenkins is that she ignores
4 the general trend towards bundles. Mr Parker explains
5 that the high levels of switching indicate a secular
6 trend towards bundles which is not responsive to price.

7 If you could please turn up Mr Parker's fourth
8 report. That is at {IR-E/5/37}; paragraph 3.61.

9 Mr Parker says this:

10 "I have considered the evidence on the extent to
11 which switching took place in relation to price changes
12 compared to other factors. I consider that the
13 existence of a secular trend is clear when considering
14 the change in the number of BT SFV Customers over the
15 periods covered by Dr Jenkins' CLA ..."

16 I will come back to the CLA.

17 "The decline in the number of BT SFV Customers is
18 gradual and consistent, with no obvious increase in
19 switching in the periods immediately prior to or
20 following an increase in the price of BT SFV Services
21 (proxied by the ... access [price for] Standard Line
22 Rental). Instead, Figure 3 shows that the rate of
23 switching away from BT by ... SFV Customers during
24 periods in which the prices of ... SFV Services were
25 frozen is comparable to the rate of switching away

1 during periods in which a price increase was
2 implemented. For example, the price of the access
3 component ... Standard Line Rental (and Line Rental
4 Plus) remained frozen over the period July 2016 to
5 September 2018, during which time the number of BT SFV
6 Customers continued to decline at a comparable rate to
7 earlier periods. This suggests that the switching
8 Dr Jenkins identifies is substantially driven by
9 non-price factors (rather than price factors), ie the
10 secular trend."

11 If we go over the page there, you see Figure 3. The
12 line shows a smooth, curved descent plotted against
13 movements in the price. {IR-E/5/38} This graph shows
14 there is no evidence at all to suggest the decline in
15 the SFV customer base was in any way responsive to price
16 changes.

17 That deals with switching. That is her first
18 challenge to Mr Parker's market definition.

19 Moving on then. Her second criticism -- now we get
20 into some of Dr Jenkins' economic theories. Her second
21 criticism is Mr Parker has not taken account of what we
22 call the migration intent theory. This is where we get
23 to Mr Ridyard's point about whether BT is different from
24 the hypothetical monopolist, so I will address that
25 point now.

1 Dr Jenkins says, and I will just give you the
2 reference for your note. It is her second report,
3 paragraph 3.62, {IR-E/18/53}. She says she rejects
4 Mr Parker's SSNIP analysis on the basis that BT's data
5 is not a reliable basis for drawing conclusions about
6 market definition.

7 As I mentioned in my introduction, on the back of
8 that evidence, Mr Beard's specific submission in his
9 skeleton is Mr Parker's SSNIP analysis has no probative
10 value at all.

11 Now, the reason for this wholesale attack on the
12 conventional SSNIP analysis is said to be that BT is
13 a multi-product firm. It is set out at Jenkins' second
14 report. I will give you the reference but I am going to
15 paraphrase the points in the interests of time. It is
16 paragraphs 3.59 to 3.68. It is at {IR-E/18/52}.

17 So this is Dr Jenkins' migration intent hypothesis
18 and it runs as follows: she says BT sells bundles as
19 well as SFV services. If BT loses SFV customers as
20 a result of the price rises to the standalone product,
21 it will recapture some of those lost SFV customers and
22 sell them bundles. So it will capture them as bundle
23 customers.

24 According to Dr Jenkins, BT has a substantial
25 recapture incentive, she says because a substantial

1 proportion of departing BT SFV customers will return to
2 the BT fold by way of bundles, and she says that means
3 that BT has an incentive to set high prices to SFV
4 customers and low prices to bundle customers.

5 Please turn up now Dr Jenkins' second report,
6 paragraph 3.64. That is {IR-E/18/55}.

7 At paragraph 3.64 she says this:

8 "In fact, BT -- like ... other operators -- derived
9 economies of scope from supplying multiple services at
10 the same address. They therefore had an incentive to
11 structure their pricing so as to encourage consumers to
12 take up more services over the same line. It is
13 therefore not surprising that such cost savings would
14 have been passed on to consumers in the competitive
15 bundles market in the form of lower prices, which would
16 have led to lower incremental prices for consumers from
17 including more services in their bundle. In essence, BT
18 had incentives to price SFV and bundled services so as
19 to encourage switching from SFV to fixed voice services
20 sold in a bundle. The hypothetical monopolist's pricing
21 incentives would be to increase the price by enough to
22 raise profits, but not so much as to drive switching to
23 other products."

24 Now, you will notice she does not quite spell it
25 out, but her hypothesis is that BT has an incentive to

1 set SFV prices which are even higher than the
 2 hypothetical monopolist's prices, because it has this
 3 added incentive to drive bundle sales. So the HM is
 4 just doing enough to raise profits.
 5 I want to show you as well, before I address the
 6 point, the joint economists' statement, {OR-E/49/62}.
 7 It is proposition 5.2.14.
 8 The statement is:
 9 "Mr Parker's reliance on BT having 'raised prices by
 10 a SSNIP', or 'maintained a price difference larger than
 11 a SSNIP' conflates BT and the [hypothetical
 12 monopolist]."
 13 Dr Jenkins says she agrees:
 14 "Based on the considerations above, the fact that BT
 15 has raised prices by a SSNIP and/or maintained a price
 16 gap in excess of a SSNIP between two different sets of
 17 services is not informative as to whether such a price
 18 increase would have been profitable for the hypothetical
 19 monopolist. The absence of 'sufficient' switching away
 20 from BT's SFV services to force BT to reverse the SSNIP
 21 price increases or price differences tells us very
 22 little about whether the price increases or price gaps
 23 would be profitable for a hypothetical monopolist
 24 because:
 25 "BT made gains through recapture that would not be

1 available to [the monopolist], as many of the customers
 2 switching away ... [would have] switched to BT's ...
 3 bundles."
 4 Then she says this:
 5 "BT's commercial intentions were to retain its fixed
 6 SFV customers and hence it was encouraging switching
 7 into voice sold in bundles, rather than looking to avoid
 8 it ..."
 9 {OE-E/49/63}
 10 "I agree it is standard practice to use the data
 11 from an incumbent with a large product share as a proxy
 12 for the data that would be available from a hypothetical
 13 monopolist if it existed ..."
 14 So usually Mr Parker is following the standard
 15 approach. But she says he has gone further, because he
 16 is using the behaviour of the incumbent in his argument.
 17 He relies on the decision of BT to implement and not
 18 reverse the pricing policy that they did, and it stands
 19 or falls on whether the HM would have found it
 20 profitable to make the same decisions. So she is saying
 21 normally you would use the incumbent's data but not
 22 here.
 23 She is going a bit further here. She is saying it
 24 is not just about incentives. That is what she says in
 25 her report. She is saying BT actually intentionally set

1 high SFV prices to drive customers to bundles. So that
 2 is her explicit argument. In other words, BT's actual
 3 motives for charging such high prices to SFV customers
 4 were to prod these standalone customers over to bundles,
 5 essentially pricing them out of the SFV market over into
 6 bundles.
 7 I just want to highlight, I do not need to pull it
 8 out, but Otera ran precisely the same argument before
 9 Ofcom on behalf of BT in 2017. You saw that they
 10 acknowledged that BT was price discriminating, but they
 11 argued that it was the good kind of price discrimination
 12 because it was a migration strategy, not a segmentation
 13 strategy. So it is the same point, Otera in 2017.
 14 Dr Jenkins now is saying, well, this is all showing
 15 a wide bundles market, because the reason for the high
 16 prices is for SFV customers to be tumbled into bundles
 17 in reaction to these very high prices. That obviously
 18 got no traction with Ofcom.
 19 Now, Dr Jenkins' migration intent, the intention to
 20 migrate the bundles theory, is implausible, and it is
 21 disconnected from the economic facts.
 22 There are two problems. I want to deal with its
 23 obvious implausibility first. Let us step back and let
 24 us breakdown her reasoning, and you will see, I will
 25 take it in stages, you will see where the flaws are.

1 First of all, Dr Jenkins is arguing that bundles and
 2 SFV services form a single broad product market, and she
 3 says they compete with each other. That is her
 4 conclusion on market definition. She says that broad
 5 market is a market in which BT does not have market
 6 power. It is a broad market.
 7 Despite not having market power in this broad
 8 market, competitive marketplace, BT is nonetheless able
 9 to sell SFV services at very high prices. In fact,
 10 the prices are so high that they are higher than the
 11 hypothetical monopolist's prices applying a SSNIP. That
 12 is because she says BT has a recapture incentive. So
 13 this broad market is driving SFV up.
 14 She then says BT loses SFV customers who switch away
 15 in the face of these very, very high prices, and it then
 16 recaptures some of them who go on to buy the low priced
 17 bundles, the competitively priced product. She says
 18 this recapture of these ex-high price customers into
 19 these new low price customers, in this very broad
 20 market, that serves to explain why BT set these high
 21 prices in the first place. Using her language, she says
 22 that was BT's "commercial intention".
 23 Now, when you break the logic down, the chain of
 24 logic like that, you can see the false steps. There are
 25 five key flaws.

1 It is frankly a conundrum how it is, on her logic,
 2 that BT can charge these very high SFV prices, above the
 3 HM, when it is operating in a broad and competitive
 4 market, on her view of the world, where bundles compete
 5 with SFV services.
 6 MR RIDYARD: Is that such a conundrum? If she is right that
 7 the market is broad, then the HM's price is not
 8 excessive, is it? Because if it is a broad market, then
 9 the HM within some part of that broad market does not
 10 have market power, so it is not really a meaningful
 11 monopolist at all.
 12 MS KREISBERGER: But what she is saying is that, on her
 13 approach, how can the SSNIP hold? Because she says that
 14 you drive up the price to these very high levels, given
 15 the recapture incentive --
 16 MR RIDYARD: She is saying that the price of someone who has
 17 a stake in the alternative is going to be higher than
 18 the price of someone who does not have a stake in the
 19 alternative.
 20 MS KREISBERGER: Yes, but it depends on ... She is positing
 21 this as an explanation for the real world SSNIPs that we
 22 have seen.
 23 MR RIDYARD: Yes.
 24 MS KREISBERGER: So how is it that BT is able to force
 25 through those repeated SSNIPs over 14 years in this

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1 broad marketplace where it has no market power?
 2 MR RIDYARD: Because it is profitable to do so, because it
 3 takes into account not just the impact on voice only
 4 customers but also the bundle customers.
 5 MS KREISBERGER: But the SSNIPs would not hold and
 6 accumulate if bundles are competing. You have seen the
 7 switch away. You would not have a firm of the ability
 8 to impose a SSNIP year on year, maintain the SSNIP --
 9 this is not a transient issue.
 10 MR RIDYARD: No.
 11 MS KREISBERGER: Maintain the SSNIP over 14 years whilst it
 12 is competing with bundles.
 13 MR RIDYARD: You would be comfortable about that, would you
 14 not, if it was customers who were migrating from
 15 something that was generating £20 profit per customer to
 16 something that was generating £25 profit per customer?
 17 MS KREISBERGER: But you would not be able to maintain the
 18 high prices for 14 years if you are competing with
 19 bundles. You would not have market power in order to
 20 keep these prices so far above competitive levels
 21 because --
 22 MR RIDYARD: I am not subscribing fully to the whole story,
 23 but, as I understand it, the story is they are not -- in
 24 Dr Jenkins' sort of view of the world, they are not
 25 particularly high prices. I mean, this is just

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1 a naturally occurring competitive phenomenon because of
 2 the interlinkages between the voice only and the
 3 bundle --
 4 MS KREISBERGER: She is explaining the SSNIPs that you
 5 observed in the real world, so they are high prices.
 6 MR RIDYARD: What do you mean by "high prices"?
 7 MS KREISBERGER: So the increases -- let us assume that 2009
 8 is the competitive level. I have shown you the repeated
 9 SSNIP because that is when the regulations fell away.
 10 Let us take that working assumption, and maybe the
 11 argument is even then it was not. But let us assume
 12 2009 is the competitive level, and you have seen how the
 13 SSNIPs go up 5%, and so on.
 14 MR RIDYARD: Yes.
 15 MS KREISBERGER: So she has to explain. It is not notional;
 16 these are real world SSNIPs and they have held over the
 17 period. A firm with market power could not have raised
 18 the price above the competitive level year on year by a
 19 SSNIP whilst not having market power in ... The
 20 definition of market power is the ability to keep prices
 21 above the competitive level.
 22 MR RIDYARD: If all of this discussion is premised on the
 23 assumption that the 2009 price was competitive, then
 24 clearly what you are saying has to be true, but I do not
 25 think that premise would necessarily be accepted by

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1 Dr Jenkins.
 2 MS KREISBERGER: Well, she has not argued that they are in
 3 some way below cost that falling away -- when the
 4 regulation fell away.
 5 MR RIDYARD: I do not think -- yes, okay. Maybe it is
 6 something you will put to her.
 7 MS KREISBERGER: I will deal with the numbers as well, which
 8 may help, on the recapture incentive, because we do not
 9 accept she has that right either.
 10 THE CHAIRMAN: Okay, that would be useful.
 11 MS KREISBERGER: But I just want to stay with the concept,
 12 if I may.
 13 THE CHAIRMAN: Anyway, that was your first flaw?
 14 MS KREISBERGER: I will carry on.
 15 THE CHAIRMAN: That was your first flaw?
 16 MS KREISBERGER: So the first flaw is her central case is BT
 17 has no significant market -- no significant market power
 18 in SFV services because bundles constrain the price and
 19 yet at the same time it can push up SFV prices without
 20 market power.
 21 Mr Ridyard, it might help if I complete the chain of
 22 logic.
 23 So let us turn a blind eye to what I would say is
 24 actually a paradox at that first stage. Another problem
 25 crops up because she says BT charges these

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1 supra-competitive prices because of the carrot of
 2 recapture. The competitive nature of the bundles market
 3 is common ground. It follows that BT cannot earn
 4 economic profits, so that is profits above a reasonable
 5 margin, by selling bundles. That is an economic
 6 impossibility in a competitive marketplace. At the same
 7 time --
 8 THE CHAIRMAN: Sorry, you said it cannot earn economic ...
 9 MS KREISBERGER: Economic profits. Economic profits are
 10 essentially profits above a reasonable margin.
 11 THE CHAIRMAN: Above. Right.
 12 MS KREISBERGER: So you need market power to earn economic
 13 profits. You cannot earn economic profits in
 14 a competitive marketplace.
 15 At the same time, on her logic, BT is generating
 16 economic profits in bundles in order to charge these
 17 very high SFV prices. In other words, we are being
 18 asked to believe that BT is putting up the price of SFV
 19 services, the product on which BT does earn economic
 20 profits, because it does have market power, in order to
 21 convert those customers to a product where it cannot
 22 earn economic profits: bundles. That is the paradox in
 23 her thinking; we have gone through the economic looking
 24 glass.
 25 THE CHAIRMAN: But hang on, and I know this is disputed both

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1 as to the fact and as to the analysis, but in fact BT's
 2 case is that it earns a greater gross margin on the
 3 bundles than on SFV, leave aside whether that is
 4 exceeding a reasonable margin or not for the moment. So
 5 how does that take it into account?
 6 MS KREISBERGER: I am moving on to that. But I just want to
 7 deal with the conceptual problem before one gets to
 8 numbers.
 9 THE CHAIRMAN: Right, okay.
 10 MS KREISBERGER: Which is BT cannot be earning economic
 11 profits on the bundles in a competitive marketplace. So
 12 there is a conundrum here. How is it that BT can
 13 justify putting up SFV prices, a product on which it
 14 does earn economic profits, on her own telling of it --
 15 she says they can drive up the profits -- to move these
 16 customers to a competitive marketplace where it cannot
 17 earn economic profits. The logic does not work.
 18 Of course, this is a very contorted theory,
 19 hypothesis, when the simplest explanation is the true
 20 one, and that is the one you saw on the documents: these
 21 SFV legacy customers could be exploited by BT to extract
 22 maximum value from them to grow BT's revenue.
 23 I showed you a selection of the documents. This
 24 migration intent theory finds no support whatsoever in
 25 BT's contemporaneous documents. It is right that there

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1 are documents referring to encouraging customers to get
 2 online, but you go through the extensive documentary
 3 record in vain for any evidence that BT's motivation,
 4 which is what Dr Jenkins says, for increasing SFV prices
 5 was to encourage switching to bundles. It is what
 6 I called the "made for litigation special", and it is
 7 precisely the type of theory that was deprecated by this
 8 tribunal in the *Napp* case back in 2002.
 9 I will just show you that briefly. I am going to
 10 take it from the Class Representative's skeleton and it
 11 is at footnote 222 on page 26 {A/12/26}. It should be
 12 page 26. That is not right, I think it is the next page
 13 {A/12/27}? No, {A/12/29}.
 14 THE CHAIRMAN: What is the paragraph number?
 15 MS KREISBERGER: It is footnote 222.
 16 THE CHAIRMAN: Yes, 222.
 17 MS KREISBERGER: Yes, I am sorry about that.
 18 THE CHAIRMAN: *Napp*, yes.
 19 MS KREISBERGER: Page {A/12/28}. There we go.
 20 The Tribunal impugned in *Napp*, one of the earlier
 21 cases:
 22 "... a pricing theory which 'flow[ed] not from any
 23 internal documents from *Napp* but from the work done by
 24 *Napp's* economic advisers for the purposes of the present
 25 case' which 'does not carry matters any further forward

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1 in the absence of any evidence that *Napp* in fact took
 2 the theory upon which it is based into account in
 3 setting its prices'."
 4 It perfectly encapsulates the situation here. The
 5 only time you see this theory emerge is when BT starts
 6 developing its arguments for Ofcom as its audience.
 7 Now, the reason why you do not see this evidence in
 8 BT's documents is that, frankly, putting up your SFV
 9 price to win bundle customers is not a very sensible
 10 strategy. If you price your high paying SFV customers
 11 out of the market, you risk losing that customer to
 12 another bundle provider, like Sky.
 13 Mr Parker explains this in his fourth report. For
 14 your note, it is paragraph 6.15 onwards, and I will
 15 paraphrase.
 16 If what you want to do is convert your SFV customers
 17 to bundles, the rational approach is to lower the price
 18 of your bundles, because then you avoid the risk of
 19 pricing your SFV customers out of your stable into the
 20 arms of a rival. If you lower your bundle price instead
 21 to attract more people to your bundles, you might
 22 attract some other SFV customers, like the Post Office's
 23 SFV customers, to your bundles.
 24 What all of this shows is that BT's decisions to
 25 raise its SFV prices had nothing to do with boosting

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1 bundle sales and everything to do with generating more
 2 and more revenue from them.
 3 Sir, I said I would come back to the numbers so
 4 I will do that now. So this is the second -- that was
 5 the conceptual problem. Here is the implementation
 6 problem.
 7 I am going to deal with this briefly, if I may. It
 8 may be one best dealt with in the hot tub. But
 9 Mr Parker shows that Dr Jenkins' somewhat surprising
 10 premise that bundles are more profitable than SFV
 11 services is based on the wrong measure of profitability.
 12 If we could go back to the joint expert statement,
 13 {OR-E/49/45}, at 5.1.4 the proposition is:
 14 "A supplier's incentives may differ from those of
 15 the hypothetical monopolist."
 16 If I could read out what Mr Parker says about this.
 17 He partly agrees. He says:
 18 "As a general proposition, I agree that an
 19 individual supplier's incentives may differ from those
 20 of the hypothetical monopolist for a variety of reasons.
 21 "In this case, BT - unlike the hypothetical
 22 monopolist - is a multi-product firm, and may face
 23 different incentives when setting prices for the focal
 24 product given the potential ... to recapture some
 25 proportion of the customers that switch away ... through

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1 other BT products. However, there is no evidence to
 2 suggest that BT would be incentivised to set prices for
 3 the focal product (ie SFV Services) so as to encourage
 4 the take-up of bundled services by switching customers
 5 recaptured by BT. This is because the unit
 6 profitability of bundled services is lower than SFV
 7 Services, as shown in Annex A3a [and some other
 8 references]. (... where I explain that a comparison of
 9 gross margins is not the relevant comparison, as a gross
 10 margin which only considers direct incremental costs
 11 will exclude some costs that operators need to recover
 12 in the long-run, and is therefore not the correct
 13 measure of long-run profitability). As a result, the
 14 recapture incentive is not relevant when considering the
 15 differences in incentives between BT and the [HM], as
 16 there is no evidence to suggest BT faced such an
 17 incentive."
 18 So it is just not right on the numbers.
 19 "I also note that in the case at hand BT itself was
 20 close to being an actual monopolist of SFV Services ..."
 21 Then it is a different point:
 22 "... to the extent ... the cellophane Fallacy might
 23 apply, [that tends] to lead to markets defined too
 24 widely."
 25 That is not a problem for Mr Parker because he has

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1 a narrow market.
 2 "The fact BT did not have an incentive to raise
 3 prices for SFV Services so as to encourage switching by
 4 customers to bundle services suggests instead that BT's
 5 increased pricing of SFV Services simply represented the
 6 fact that BT had market power over these customers."
 7 Occam's razor.
 8 So Dr Jenkins' recapture incentive calculation
 9 relies on gross margins. Mr Parker explains that is the
 10 wrong measure because it leaves out costs such as
 11 indirect incremental costs which the hypothetical
 12 monopolist has to cover in the long run.
 13 Now, he refers to his analysis of this. It begins
 14 at the joint statement, page 229, {OR-E/49/229} and the
 15 tables which follow.
 16 THE CHAIRMAN: Sorry, just one second, please.
 17 MS KREISBERGER: Sorry, sir.
 18 THE CHAIRMAN: Just give me one second. (Pause). Sorry,
 19 right, now, page 229.
 20 MS KREISBERGER: I am giving you that, sir, for your note,
 21 and I will give you one other reference to our skeleton
 22 which deals with this at {IR-A/12/28}, paragraph 78-83.
 23 Now, given the time, I am not going to take you through
 24 Mr Parker's tables. I do not have time but I highly
 25 recommend them and I know Mr Parker will be very happy

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1 to address them in the hot tub and it may be more
 2 fruitful in any event to hear it from the horse's mouth.
 3 But the short point is Dr Jenkins' so-called
 4 recapture incentive calculation ignores costs that the
 5 hypothetical monopolist would have to recover and
 6 Mr Parker shows that using the correct measure of
 7 profitability, taking account of those costs, then the
 8 profitability of a bundle customer is lower than that of
 9 an SFV customer.
 10 Now, that is not a surprising conclusion. Bundles
 11 are more expensive to supply. But Mr Parker will show
 12 you that that is true on the figures, but given the
 13 aggressive nature of competition in bundles that is what
 14 one would expect to see.
 15 Dr Jenkins' opposite contention is divorced from
 16 that economic reality.
 17 MR RIDYARD: I do not want to go into detail on this because
 18 I agree it might be better to do that later, but just,
 19 in this discussion it seems there is a sort of a weak
 20 form and a strong form of what Dr Jenkins is saying
 21 about this. The sort of strong form is saying it is
 22 actually advantageous for BT to get people to trade up
 23 from a voice contract to a because bundle because profit
 24 is higher on the bundle than the voice and I understand
 25 from these tables, and I do understand what is being

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1 said here and Mr Parker disagrees with that.
 2 But there is a weak form of Dr Jenkins' argument
 3 which is just saying compared to the hypothetical
 4 monopolist, for the hypothetical monopolist any
 5 switching from voice only to the bundle is just a loss
 6 of business and it is all just bad news. But for BT it
 7 is not all bad news. Even if it is less profitable to
 8 supply bundles than voice, at least there is some profit
 9 there, so that does dull the pain of losing sales.
 10 So on this sort of weak version of Dr Jenkins'
 11 argument you would still say that BT is not the
 12 hypothetical monopolist and BT would be less worried
 13 about losing sales than the hypothetical monopolist
 14 would and therefore at least there should be some
 15 adjustment to the hypothetical monopolist test and you
 16 should not use -- and therefore I think the conclusion
 17 that Dr Jenkins makes from that is that you cannot infer
 18 in the way that you have done today and this morning,
 19 you cannot infer that just because BT chose to impose
 20 a SSNIP that a hypothetical monopolist would impose
 21 a SSNIP.
 22 Can you just briefly respond to that: the weak form
 23 of the argument rather than the strong form.
 24 MS KREISBERGER: The weak form of the argument falls down on
 25 the numbers. So again, one has to step back. What is

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1 the question we are looking to address? The question is
 2 whether bundles pose an effective constraint on SFV
 3 prices.
 4 MR RIDYARD: On a hypothetical monopolist supplier --
 5 MS KREISBERGER: Yes, quite.
 6 MR RIDYARD: So it must be possible that the switching
 7 would -- there must be a set of facts in which the
 8 switching that does happen, if switching does happen in
 9 response to a price rise, I know that in itself is
 10 contentious, contended but there must be a set of facts
 11 in which for a hypothetical monopolist it would not make
 12 sense to switch but for BT it would make sense to
 13 allow -- sorry, that was not well expressed. There must
 14 be a set of facts in which for a hypothetical
 15 monopolist it would regret raising a price but for BT it
 16 would not regret raising the price because it picks up
 17 a bit on the rebound from the profits it makes on
 18 bundles.
 19 MS KREISBERGER: You come back to the economic profits
 20 point. It does not make sense. When you say does it
 21 soften the blow, that is not actually what is being
 22 contended here. Dr Jenkins is saying that weak or
 23 strong that the explanation for the high SFV price is
 24 the recapture.
 25 MR RIDYARD: She is just saying that you cannot put BT in

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1 the shoes of the hypothetical monopolist because it is
 2 different and BT does get something from the rebound
 3 even if it is only a small return.
 4 MS KREISBERGER: It gets something back, yes.
 5 MR RIDYARD: Yes, and that affects -- that means BT's
 6 position is different from that of this hypothetical
 7 monopolist which gets nothing back.
 8 MS KREISBERGER: But it is not an effect which offsets the
 9 SSNIPs that you observed in the market.
 10 MR RIDYARD: That depends on the numbers, does it not? Yes.
 11 MS KREISBERGER: Yes, I will come back to the point that,
 12 again, stepping back, the purpose of the exercise is to
 13 work out if BT -- sorry, to work out if BT has market
 14 power in SFV services. Dr Jenkins' line of argument is
 15 to say BT does not have market power, and it does not
 16 have market power because it has the ability to drive
 17 SFV prices up to a very high level. That is her proof
 18 of the absence of market power. It is utterly
 19 paradoxical.
 20 THE CHAIRMAN: But hang on a second. At least, in this
 21 context, what we are talking about here first of all is
 22 market definition. That is what all this is about,
 23 supposedly, the SSNIP test and whether bundles operate
 24 as a constraint, so you look at the question of
 25 substitutability.

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1 Why is there not a valid point to be made -- and you
 2 use the SSNIP test to try and work out the market
 3 definition. But if the SSNIP test is saying that you
 4 have to see effectively the point at which the
 5 hypothetical monopolist would say, okay, that is it,
 6 I am not staying in this market because I am losing too
 7 many customers, it is no longer profitable, why is it
 8 not fair comment to say at that point you cannot,
 9 without more, simply use what BT did as a surrogate for
 10 the hypothetical monopolist, because there may be an
 11 explanation why it has gone to a sort of SSNIP plus
 12 increase?
 13 MS KREISBERGER: The answer --
 14 THE CHAIRMAN: I think that perhaps is the weaker form of
 15 the argument that is being made, and I am not quite sure
 16 what the answer to that is at the moment.
 17 MS KREISBERGER: Yes. So the answer to that is that version
 18 of the argument depends on BT having what Dr Jenkins
 19 calls a recapture incentive, and Mr Parker shows BT has
 20 no recapture incentive. BT's interest --
 21 THE CHAIRMAN: Hang on. That I understand. That is a sort
 22 of factual point. That is you saying, well, it does not
 23 really matter because actually they did not have
 24 recapture incentive.
 25 MS KREISBERGER: Yes.

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1 THE CHAIRMAN: But I thought here you were dealing with the
 2 sort of conceptual soundness of Dr Jenkins'
 3 qualification .
 4 MS KREISBERGER: Yes. So the conceptual soundness explains,
 5 stepping back, why her argument breaks down. It is
 6 thoroughly implausible.
 7 But if you are saying to me: is there not a weaker
 8 version of the argument? That is what I am answering
 9 here, which sort of gets away from the implausibility,
 10 because it is not actually what Dr Jenkins says.
 11 But if what she is saying is, well, the numbers are
 12 not quite right because there is some benefit flowing
 13 back, that is incorrect on the facts, because Mr Parker
 14 shows BT does not have a recapture incentive.
 15 Where do BT's incentives lie? BT's incentives lie
 16 in charging very high prices to SFV customers who pay
 17 them and having as many bundle customers as they can.
 18 BT does not have an incentive to convert an SFV
 19 customer, on which BT makes economic profits, to this
 20 competitive product where BT does not make economic
 21 profits. So BT does not have a recapture incentive, so
 22 it fails. Plus there is the point that we have not seen
 23 any evidence of this. It is ex post facto.
 24 So that is migration intent hypothesis. Shall
 25 I press on?

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1 THE CHAIRMAN: Is your next point a short point or a long
 2 point? I do not want to stop you in the middle of it.
 3 MS KREISBERGER: It is bundle pricing fallacy. It is not
 4 the shortest point, so I think it might be a good ...
 5 THE CHAIRMAN: We will deal with bundle pricing fallacy
 6 after the break, in that case.
 7 (3.18 pm)
 8 (A short break)
 9 (3.31 pm)
 10 THE CHAIRMAN: Yes. Just before we continue, we have asked
 11 a few questions this afternoon, so we would like to run
 12 on a little bit longer. If the transcriber is content,
 13 we can go to 20 to 5 rather than half past 4.
 14 I am not sure contentment is the right word,
 15 acceptance maybe, but thank you very much.
 16 MS KREISBERGER: Thank you. Contentment over here
 17 certainly. I am grateful.
 18 So now for something completely different; in fact,
 19 opposite. This is the third and final of Dr Jenkins'
 20 criticisms of Mr Parker's assessment. She says
 21 Mr Parker has overlooked the key fact that, regardless
 22 of whether BT was supplying a fixed voice service to
 23 a customer as part of a bundle, or on its own, SFV, it
 24 charged the same price. She says the price does not
 25 vary across the two products, and we have already had an

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1 exchange about that today, so I am coming back to that
 2 point. I gave you some illustrative numbers. I will
 3 take the point at a little bit more granular level now.
 4 So this is what we say is a bundle pricing fallacy .
 5 Now, I have shown you that Dr Jenkins' migration intent
 6 hypothesis, which we have been debating, is that BT's
 7 supply of bundles acted as an upwards force on its SFV
 8 price. That is her argument. So it is a little curious
 9 to find that she advances a different hypothesis which
 10 posits precisely the opposite force. According to this
 11 theory, bundles exert a downward constraint on the price
 12 of SFV services.
 13 I want to draw out what it is she is actually
 14 postulating. So let us look at the genesis of this
 15 theory in her report and then see how it has evolved in
 16 the joint statement.
 17 So if we go to Dr Jenkins' first report.
 18 {IR-E/17/22}. If we go to paragraph 2.7. That is
 19 actually on the previous page, 21, thank you.
 20 {IR-E/17/21}
 21 She says:
 22 "In assessing BT's pricing of SFV Services the
 23 relevant market context throughout the ... period must
 24 be adequately taken into account. This includes
 25 a broader assessment of the market dynamics relating to

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1 the nature of competition for fixed voice services and
 2 the context in which [it] was setting ... prices and
 3 [its] commercial strategies.
 4 "Specifically, I consider it necessary to take into
 5 account in any economic assessment, the fact that BT was
 6 setting its price for all fixed voice services at the
 7 same level, regardless of whether they were sold on
 8 a standalone basis or in a bundle ... Further, rivals
 9 competing for the business of the Class Members, sought
 10 to attract them ... to SFV ... or bundles with other
 11 products. Any assessment of BT's pricing behaviour for
 12 SFV products must take into account of these features,
 13 as well as the regulatory decisions ... by Ofcom, and
 14 the evidence on pricing and competitive dynamics ..."
 15 Then if we go forward to 2.11 {IR-E/17/22}, there
 16 she posits this theory:
 17 "I take this broader context into account in
 18 undertaking my market assessment. As I explain in this
 19 report, supply-side and demand-side factors mean that
 20 the competitive dynamics in the supply of SFV services
 21 cannot and should not be considered in isolation from
 22 those in the supply of fixed voice services sold in
 23 bundles.
 24 She says:
 25 "There is a clear link. This interlinkage permeates

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1 all aspects of my analysis. It is relevant for the
 2 assessment of: the relevant market ...”
 3 Then she goes on to say "dominance", "Limb 1" and
 4 "Limb 2". So it is very important.
 5 If we now go forward to her evidence on the relevant
 6 market, you can see how she relies on what she calls
 7 this interlinkage, how it feeds through to her market
 8 definition. That is at page {IR-E/17/74} of this
 9 document.
 10 At paragraphs 4.44:
 11 "BT set its pricings for fixed voice services at the
 12 same level, whether it was supplied as an SFV service or
 13 as part of a bundle. Indeed, prior to the BT
 14 Commitments in April 2018, the Voice Proposition team
 15 within BT set prices for Voice as a whole, as explained
 16 by Mr Bunt in his Second Witness Statement: "Prior to
 17 the 2017 Review our pricing strategy for Voice products
 18 (including line rental) did not distinguish between what
 19 are now called VO and SP customers (nor did it
 20 distinguish between SFV customers and customers who
 21 purchased landline ... [in] a bundle). This meant that
 22 we in the Voice Propositions Team were never pricing
 23 line rental specifically for SFV customers; we were
 24 doing so for the ... entire Voice customer base of
 25 approximately 8–9 million people ...

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1 "On this basis, the competitive dynamics relating to
 2 the sale of fixed voice services as part of a bundle
 3 would therefore have been [what she says is] an
 4 important consideration with respect to the price that
 5 BT, or any provider, set for fixed voice services. Too
 6 high a price for fixed voice services could have led to
 7 an increase in the overall price BT charged for bundles
 8 including fixed voice ... and lead to a reduction in the
 9 number of customers choosing BT [to buy their bundle
 10 from]."
 11 The conclusion here is somewhat diffidently
 12 expressed. She says "too high a price" for SFV services
 13 "could", not "would", pass through to bundles. So the
 14 clear implication, despite the diffidence, is that
 15 bundles exert a downward force in the SFV price because
 16 they are very competitive.
 17 So she says, despite what you see in the BT SSNIP
 18 data, her thesis is that BT's provision of bundles
 19 was -- BT was constrained when it was providing -- it
 20 was constrained from raising SFV prices because it also
 21 provided bundles, and the same price applied to both.
 22 Just pausing there. She never explains how this
 23 interlinkage theory can be reconciled with her migration
 24 intent theory of an upwards force on SFV prices from
 25 bundles, but putting that aside.

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1 Mr Parker explained in his reply report that her
 2 interlinkage theory is based on a fallacy. This is the
 3 hypothetical example I posited for you. For your note,
 4 again, with an eye on the time, that is at Mr Parker's
 5 fourth report, paragraphs 3.13–3.23, {IR-E/5/22}.
 6 In short, Mr Parker explains that BT was free to set
 7 the price of bundles independently of the price it
 8 charges for SFV access and calls and could be expected
 9 to set the bundle price by reference to competitive
 10 condition in that market, in the supply of bundles.
 11 I showed you this morning Mr Parker's graph that
 12 shows bundle prices flatlining or going down against SFV
 13 prices that were going up. So that is the disconnect.
 14 Higher line rental, flat ... So you can see immediately
 15 the line rental prices are not being mirrored in the
 16 bundle prices, the increases. The £1 increases do not
 17 feed through to the bundle price there.
 18 So that really answers the contention. It is just
 19 not the case. Price increases are not reflected in
 20 bundle prices; line rental price increases.
 21 Now, again, just coming back to my hypothetical
 22 example. BT can label a part of the overall bundle
 23 price as the line rental fee and say: this is line
 24 rental fee and the remainder of the bundle price is
 25 broadband. That is what they call the incremental

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1 broadband price within the bundle.
 2 How you slice and dice the overall bundle price
 3 across its two components is essentially a fiction. It
 4 is relevant to marketing, it is a way to attract
 5 customers, but it is not relevant to price setting,
 6 because the price set is the price that the bundle
 7 customer pays.
 8 So again, as I said, if BT sells line rental at
 9 £17.99 a month and standalone broadband at £10 a month,
 10 that would be £27.99. If it sets a bundle price at
 11 £19.99 a month, in the old days, and I will come back to
 12 that, it could advertise the bundle as offering
 13 broadband for only £2 a month. So that is the
 14 difference between the standalone line rental price and
 15 the overall ...
 16 I can see you have a point, sir.
 17 THE CHAIRMAN: That is the ASA ruling you are talking about
 18 from 2016.
 19 MS KREISBERGER: It is. I will go to that in a moment.
 20 Yes, I am grateful.
 21 But putting it in that way, it is no more true than
 22 BT saying: buy our bundle and you get line rental for
 23 only £10 a month. They can cut it any way they like.
 24 That would be the difference between the standalone
 25 broadband price and the bundle price, you just flip it

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1 round the other way. It does not matter how you present
 2 it; the truth of the matter is the customer is paying
 3 one bundle price for both components in the bundle, and
 4 that is why her hypothesis is actually a labelling
 5 fallacy.

6 So Mr Parker explains that in his reply report, and
 7 in the face of that criticism her theory, the
 8 interlinkage theory, morphs in the joint statement. So
 9 let us have a look at that. That is {OR-E/49/16}.

10 3.1.3:

11 "For the competitive conditions facing bundles to
 12 have had an impact on the pricing of fixed voice
 13 services to standalone customers, it must be the case
 14 that a change in the price of fixed voice services
 15 automatically fed through to the price of the bundle."

16 So this is what we understood Dr Jenkins to be
 17 saying.

18 If we go down -- well, let us read it. Dr Jenkins
 19 says:

20 "There is a link between the prices of SFV Services
 21 and fixed voice ... sold in bundles, and this is
 22 relevant to the assessment of how competitive conditions
 23 facing fixed voice services sold in bundles had an
 24 impact on SFV pricing. For this competitive
 25 interlinkage to be relevant, I do not agree that it is

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1 a requirement for the total price of a bundle including
 2 fixed voice services to increase one for one with
 3 a change in the price of SFV services, nor did I ever
 4 state this as my view. Mr Parker's ... is [the one who
 5 is being] fallacious.

6 "In terms of the pricing mechanics ..."

7 This is the point I want to draw out for you. She
 8 says this, this is her interlinkage theory now:

9 "... the following linkages are necessarily present:

10 "(a) The price of a bundle is necessarily bounded
 11 below the price of SFV services."

12 So you do not sell the bundle for less than the line
 13 rental price.

14 "(b) If the price of SFV services increases, then
 15 (taking the example of a dual play bundle) BT Consumer
 16 must either raise the price of the dual play bundle;
 17 lower the incremental price of broadband within
 18 a bundle; or some mix of the two. Hence the two are
 19 inter-related."

20 So it is just sophistry. It is language. She is
 21 saying they are related, but what she is actually saying
 22 is BT can do what it likes with the bundle price. She
 23 says BT has a choice. Let us say that BT, as it has
 24 done many times, raises the price of line rental by £1,
 25 £1 a month. It can either, on what she is saying here,

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1 put up the price of the bundle by £1 a month, it cannot
 2 put up the price of the bundle at all, or it could put
 3 up the price of the bundle by some other amount, like
 4 50p. She calls that a linkage, but that is conceding no
 5 linkage at all. It is pricing freedom for bundles. It
 6 is independent pricing.

7 Now, where I started is that is the only possible
 8 explanation for what you see, when line rental goes up
 9 and bundle prices stay flat or come down. Perhaps just
 10 for your note, this is aptly illustrated by one of
 11 Dr Jenkins' own graphs. If we could just bring it up on
 12 the screen. It is {IR-E/17/136}. It is essentially the
 13 same as Mr Parker's graph.

14 You see there standard line rental going up, up, up
 15 at the top, and bundle -- sorry, and incremental -- so
 16 here she has taken the difference in price in the
 17 bundle, it is what they call the incremental broadband
 18 price.

19 So what she is showing you here is what BT did to
 20 what it called the bit of the bundle that represents the
 21 broadband price. So it is not the whole bundle price,
 22 she subtracted line rental. So in other words, to avoid
 23 the increase -- the increasing line that you see, the
 24 yellow line at the top, standard line rental, to avoid
 25 those increases being reflected in the bundle price,

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1 this is what they did to what they called the
 2 incremental broadband price, downwards. That is what --
 3 this is Dr Jenkins' graph. That is what shows there is
 4 no competitive interlinkage whatsoever.

5 THE CHAIRMAN: But the actual pricing would be somewhat
 6 above.

7 MS KREISBERGER: You would add in the line rental price. It
 8 would be above --

9 THE CHAIRMAN: It is going to be at the top, is it not?

10 MS KREISBERGER: Yes.

11 THE CHAIRMAN: It cannot be below the line rental price.

12 MS KREISBERGER: Yes.

13 THE CHAIRMAN: Yes.

14 MS KREISBERGER: So I just wanted to come back to a point
 15 I made earlier. When you see reference in BT's internal
 16 documents to voice being "our most margin-rich product",
 17 that is the top line, because the bundle customers are
 18 not paying it. So the rest of the voice customer base
 19 is not generating the revenue, it is the line rental,
 20 standalone.

21 I want to address the ASA ruling and I am grateful
 22 to you, sir, for raising that. Now, that is at -- the
 23 ASA is at {E/45/169}?

24 THE CHAIRMAN: I am not sure we need to go there.

25 MS KREISBERGER: We do not need to go there.

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1 As you say, the advertising example I gave is one
 2 from real life before the ASA ruling in 2016. So these
 3 prices that you see on the graph {IR-E/17/136}, that was
 4 the price that BT and the other providers would
 5 advertise: buy our bundle and get broadband for only £2
 6 a month. But of course it was £17.99 a month because
 7 they were adding in the price of line rental. In fact,
 8 sometimes they said broadband is free, so you are just
 9 paying the line rental price.

10 The ASA ruled, unsurprisingly, that that was
 11 a misleading practice, because people were not paying £2
 12 a month for their bundle, they were paying £17.99
 13 a month.

14 Now, the point I want to put before you is that
 15 Oxera, Dr Jenkins' consultancy, heavily relied on the
 16 ASA ruling when they were trying to persuade Ofcom that
 17 it did not need to cap the prices of SFV services. That
 18 is at {OR-C/6/11}. This is the Oxera 2017 submission
 19 which I have already shown you today.

20 If we go to Opus page {OR-C/6/11}. At 1.2,
 21 "Obligations recently imposed by the [ASA] may alone
 22 address the concern Ofcom raises":

23 "Given the above context, a key market change has
 24 occurred which creates further opportunities for
 25 competition to deliver benefits to voice-only

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1 customers: the intervention by the ... (ASA) to ensure
 2 that broadband prices cannot be advertised separately
 3 from line rental charges. Ofcom has failed to take such
 4 market dynamic effects into account in its assessment.

5 "The obligations ... stipulate that the
 6 all-inclusive dual play price (... including line
 7 rental) must be presented in marketing materials without
 8 line rental being presented separately."

9 Then it gives some examples.

10 "As a result of these changes, and the new form that
 11 price competition will (and must) now take going forward
 12 (on the basis of the full dual play bundle price), the
 13 incentives to compete in the voice-only segment are
 14 materially increased, in that they are less affected by
 15 the impact on what were formally headline incremental
 16 broadband prices.

17 "In fact, going forward, lowering line rental prices
 18 provides a further means to compete for voice-only
 19 customers alongside product innovation and discounts
 20 (although dual play providers may still balance this
 21 with promoting further uptake of bundles by keeping
 22 implicit broadband prices low). The logic ... can be
 23 set out [for this] in four steps."

24 Could I ask you just to read those four steps to
 25 yourself. (Pause)

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1 Can I draw your attention to just two points before
 2 we put that away.

3 At paragraph 2, it is clear that here, where they
 4 are talking about voice only, they say that is:

5 "... (... 2.9 [million] customers, if we include
 6 split purchase customers)...."

7 So they are talking about both Sub-Classes.

8 Then at the end, the statement:

9 "[The] CPs [that is communication providers] may now
 10 be more relaxed about an implicit increase in the
 11 incremental broadband price, to offset a decrease in the
 12 line rental price ... because it is no longer the focus
 13 of price competition...."

14 So they are saying you can expect line rental price
 15 decreases because of the ASA ruling.

16 So that is what Oxera said in 2017. We know that
 17 did not happen. I showed you the table; the price
 18 increases carry on to the SPCs post-commitments, and
 19 this includes SPCs.

20 So Oxera told Ofcom: do not worry, price decreases
 21 in line rental, they are coming. Ofcom was right to
 22 reject that argument.

23 If we go to Ofcom's statement at {IR-C/3/18}, 3.29:

24 "We have considered BT's argument that the ASA
 25 ruling will reduce incentives to raise line rental

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1 prices, and may lead to lower prices. The ASA announced
 2 its intention in May 2016 and implementedin October

3 After the ASA's announcement BT, Plusnet, TalkTalk,
 4 Post Office and Virgin Media each raised the price of
 5 line rental by approximately £1. Since implementation,
 6 none of the main providers has decreased its price, and
 7 Plusnet has increased its price. We consider that the
 8 evidence to date does not demonstrate that that, as BT
 9 has suggested, the price of standalone fixed voice
 10 services would fall materially as a competitive response
 11 to the ASA ruling."

12 Now, I am not just showing you this to make BT look
 13 bad, although it does, but the reason I am showing you
 14 this is that Dr Jenkins does not address this in her
 15 evidence. What her consultancy was saying in 2017 is,
 16 well, because of this same price for fixed voice
 17 services for standalone and bundle customers, because we
 18 set the same price, this ASA ruling, which impacts
 19 bundles not standalone customers, bundles, is going to
 20 cause the prices to come down to our standalone
 21 customers, so you, Ofcom, need not worry about price
 22 caps.

23 That did not happen. Dr Jenkins not only does not
 24 address it, but she does not explain why her
 25 interlinkage theory can be maintained, given what Oxera

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1 said in 2017. That proves it comes to nothing, and yet
 2 what I showed you in Dr Jenkins' first report is she
 3 says this is the theory that permeates all parts of her
 4 evidence.
 5 So that completes my section on her criticisms of
 6 Mr Parker, her theories.
 7 This is my final topic, happily, on market
 8 definition, and that is Dr Jenkins' critical loss
 9 analysis. I will deal with it to set out the
 10 architecture of the argument, it is obviously one for
 11 the hot tub, particularly given the time.
 12 So she supports her broad market definition with
 13 a critical loss analysis. A critical loss analysis
 14 compares the hypothetical monopolist's actual loss
 15 flowing from a price rise with its critical loss or
 16 breakeven point. I showed you the CMA Guidelines on
 17 this: the critical loss is the minimum percentage loss
 18 in volume of sales required to make a 5-10% increase on
 19 a product unprofitable. So if the hypothetical
 20 monopolist's actual loss is greater than its critical
 21 loss, then the price rise would be unprofitable,
 22 indicating a broader market.
 23 Now, my overriding submission is that her CLA is
 24 not, I am afraid, fit for purpose. Mr Parker sets out
 25 the myriad defects in it in his fourth report. We rely

1 on all of them. I will not delve into all the granular
 2 detail in advance of the hot tub, and Mr Beard has made
 3 the running on the CLA. But with your permission,
 4 I would like to set out the Class Representative's and
 5 Mr Parker's principal criticism, which is that her CLA
 6 is tainted by the cellophane fallacy and it cannot be
 7 rescued, it cannot be adjusted.
 8 Now, the cellophane fallacy arises where prices
 9 charged in the market are already above the competitive
 10 level. In that case, SSNIPs applied -- so small but
 11 significant price increases -- and SSNIPs applied to
 12 already inflated prices will show switching that will
 13 not be observed at competitive levels.
 14 So what that means, the upshot is that findings of
 15 broad markets are not reliable when the cellophane
 16 fallacy infects the data, because observed switching to
 17 other products would not happen at competitive levels.
 18 That is the point. I showed you, no need to turn it up
 19 again, paragraphs 5.4-5.6 on this in the CMA Guidelines.
 20 Now, there are three obvious reasons to think that
 21 BT's prices are already well above the competitive
 22 level. The first is BT's very high shares of supply to
 23 SPCs, split purchasers, and voice only customers; close
 24 to monopoly in the case of split purchasers. Second, is
 25 that Ofcom found in 2017 that BT's SFV prices were far

1 above the competitive level, so you have the specialist
 2 regulator's finding. The reason we are all here is that
 3 because that is the Class Representative's allegation,
 4 that BT is charging prices above the competitive level.
 5 That is the abuse here.
 6 So three good reasons to think that there is at
 7 least a risk that BT's prices are already above the
 8 competitive level, and that is an existential problem
 9 for Dr Jenkins and her CLA, because she is positing
 10 broad markets based on her CLA version of the SSNIP
 11 test. If the data is infected by the cellophane fallacy
 12 those findings of broad markets are unreliable.
 13 Dr Jenkins in her CLA relies on observed levels of
 14 actual switching away from BT SFV services which occur
 15 at what we say are the supra-competitive prices. So she
 16 relies on the actual levels of switching. So the
 17 switching rates she relies on are infected by the
 18 cellophane fallacy, so switching at supra-competitive
 19 levels.
 20 She does not know how many people would switch away
 21 in a counterfactual world where BT charges competitive
 22 SFV prices. That data does not exist. We do not know
 23 what the level of switching would be in the competitive
 24 counterfactual world where SFV prices are charged at the
 25 competitive level. That cannot be reverse engineered.

1 You cannot say, oh well, we see switching at this level
 2 will -- we will adjust it. It does not work. It cannot
 3 be reverse engineered from observed switching levels,
 4 and I showed you the CMA Guide on that.
 5 Could we go to Mr Parker's fourth report,
 6 {IR-E/5/35}.
 7 Paragraph 3.56:
 8 "I note that the impact of Dr Jenkins' failure to
 9 adequately control for the cellophane fallacy is
 10 compounded by the fact that the likelihood of customers
 11 switching away from the hypothetical monopolist may also
 12 be reduced if prices for SFV services were lower ...
 13 This leads to the further possibility that the results
 14 of Dr Jenkins' CLA (and her subsequent conclusions on
 15 market definition) are driven by two factors: prices
 16 that are above the competitive level and switching that
 17 is above the level that would occur if prices were set
 18 at the competitive level. Dr Jenkins' approach does not
 19 adequately address this latter concern, a fact she
 20 appears to be aware of when noting that 'I am only able
 21 to partially adjust my analysis to account for the
 22 cellophane fallacy', and that it is 'generally difficult
 23 to generate a proxy for how observed switching would
 24 have differed if prices had changed from the
 25 hypothetical lower level'."

1 So she acknowledges it, but then she goes on to rely
 2 on it, and we say: you cannot address the problem, the
 3 CLA is unreliable.
 4 That, happily, concludes my submissions on market
 5 definition, and with that I will move to market power.
 6 I should say, in terms of timing, market definition
 7 was always going to be the lion's share, so the other
 8 topics can be taken at a crisper pace.
 9 THE CHAIRMAN: Yes.
 10 MS KREISBERGER: So I will take the next topic of dominance
 11 briskly, because if you are with me that bundles are not
 12 in the same market as SFV services, the corollary of
 13 that finding is that BT is dominant in these SFV only
 14 markets.
 15 Now, I propose to structure my submissions as
 16 follows: a brief word on the economic litmus test, and
 17 then if we turn to the list of issues in a moment, there
 18 are seven sub-issues in our list of issues and I will
 19 take each of them, as I say, at a brisk trot.
 20 THE CHAIRMAN: Yes.
 21 MS KREISBERGER: The litmus test for assessing market power,
 22 happily, it is a matter of common ground. The classic
 23 statement of dominance is a position of economic
 24 strength. Sorry, let me just get that up on the screen,
 25 perhaps from my skeleton. {IR-A/12/20}, skeleton

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1 paragraph 49. But I can give you the authority
 2 reference as well for your notes, *United Brands*,
 3 paragraph 65, {G/107/58}. Either version will do.
 4 If we could zoom in on paragraph 49:
 5 "The classic legal definition of dominance is
 6 'a position of economic strength enjoyed by an
 7 undertaking which enables it to hinder the maintenance
 8 of effective competition on the relevant market by
 9 allowing it to behave to an appreciable extent
 10 independently of its competitors and customers and
 11 ultimately of consumers.'
 12 The experts are also agreed that the legal concept
 13 of dominance is equivalent to the economic concept of
 14 significant market power. For your note, that is
 15 {OR-E/49/81} in the joint statement.
 16 They are also agreed that market power refers to the
 17 ability to raise prices above the competitive level, and
 18 of course, all of the debate we have had on market
 19 definition, that is a means to an end to get to the
 20 assessment of market power, which is an important point
 21 for some of the submissions I was making earlier.
 22 Market shares play a central role in the assessment
 23 of dominance. We have set out a number of relevant
 24 authorities on this in the skeleton argument at
 25 paragraph 50 {IR-A/12/20}, but could we turn up

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1 {G/42/43}.
 2 Starting at "Analysis of Dominance", paragraph 118:
 3 "Since market share is ..."
 4 This just is a convenient authority which sets out
 5 the principles.
 6 "Since market share is, generally speaking, an
 7 important indicator of market power, market share plays
 8 a central role in the assessment of dominance. In
 9 *Hoffman-La Roche* ... the Court of Justice said ...
 10 "Furthermore although the importance of the market
 11 shares may vary from one market to another, the view may
 12 legitimately be taken that very large shares are in
 13 themselves, and save in exceptional circumstances,
 14 evidence of the existence of a dominant position. An
 15 undertaking which has a very large market share and
 16 holds it for some time ... is by virtue of that share in
 17 a position of strength ..."
 18 In *AKZO*, the court said:
 19 "With regard to market shares the Court has held
 20 that very large shares are in themselves, and save in
 21 exceptional circumstances, evidence of the existence of
 22 a dominant position ... That is the situation where
 23 there is a market share of 50% such as that found to
 24 exist in this case.'
 25 "In *Napp* ... and *Genzyme* ... cited above, the

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1 Tribunal followed the above jurisprudence in holding:
 2 "In most circumstances, in the Tribunal's view,
 3 a market share of 90% or above, which has continued
 4 throughout the period of the infringement and is likely
 5 to continue for several years, will be sufficient,
 6 depending on the circumstances, to infer the existence
 7 of dominance."
 8 So that is the importance of market share. The
 9 legal presumption of dominance of course kicks in at the
 10 50% threshold, as you see there.
 11 Now, with that, I will turn to each of the
 12 sub-issues on dominance. The list of issues is at
 13 {A/10/2}.
 14 4(a):
 15 "What were BT's [market] shares ... and do [they]
 16 give rise to a presumption of dominance?"
 17 If I could take you to the joint statement,
 18 {OR-E/49/83}. That is page 83.
 19 6.1.3, Mr Parker says at the bottom of the box:
 20 "... BT's market shares were extremely high – likely
 21 above 80% throughout the pre-Commitments period and
 22 above 95% throughout the post-Commitments period."
 23 Just to see the breakdown by customer group,
 24 Mr Parker's third report, {IR-E/3/113},
 25 paragraph 5.22(a). These figures have been released as

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1 well:
 2 "In the period prior to the introduction of the
 3 Commitments ...
 4 "(i) when measured in ... number of lines,
 5 I estimate that BT's share was between 64% and 76%; and
 6 "(ii) ... in ... revenue ... between 70% and 78%."
 7 This is for voice only.
 8 Then in the period after the commitments:
 9 "... BT's share is likely to have been between 54%
 10 and 64% ..."
 11 That is voice only, and that is post-commitment, so
 12 that need not trouble us.
 13 If you go back to page {IR-E/3/112}, you see the
 14 graphical representation of market shares to voice only
 15 customers. Perhaps we could zoom in on the chart.
 16 Thank you.
 17 You see there those are the voice only figures .
 18 They were for the pre-commitments period.
 19 Then for SPCs, could we move to page {IR-E/3/115}.
 20 We see figure 15. It is a pretty conclusive set of
 21 numbers there, [redacted] onwards, drops all the way down
 22 to [redacted]. BT confirms in its skeleton, helpfully, that
 23 it does not challenge these market shares if the market is
 24 SFV services only.
 25 So these are obviously very high market shares which

1 BT has held for well over a decade and they reflect BT's
 2 past as the telecoms monopolist. That is what bestowed
 3 this unrivaled and enduring market strength on BT in
 4 standalone landlines and calls .
 5 Perhaps for your note, Ofcom also looked at market
 6 shares. Provisional conclusions, paragraph 4.27. Ofcom
 7 assessed a market share of 79% for access.
 8 My submission is there would have to be really
 9 exceptional circumstances in play to dislodge the
 10 natural conclusion that BT is dominant, perhaps
 11 superdominant, but I am now going to go through the
 12 other economic circumstances that are relevant to market
 13 power, to dominance, which actually only reinforce the
 14 obvious strength of BT's position in this market.
 15 So those are market shares.
 16 If we go back to the list of issues, {A/10/2}, 4(b):
 17 "To what extent do BT's prices for SFV Services
 18 during the Claim Period support a finding of dominance?"
 19 Now, SFV, as I foreshadowed earlier, equates,
 20 corresponds, to the ability to raise prices
 21 significantly above the competitive level. So evidence
 22 that the allegedly dominant firm has pushed prices
 23 beyond the competitive level is obviously direct
 24 evidence of market power. It is direct evidence of
 25 market power.

1 The SSNIP data triptych, which reflects the
 2 programme of repeated annual SSNIPs from 2009, provides
 3 powerful evidence of BT's market power. That is where
 4 I opened.
 5 Just to show you Mr Parker's evidence on this in the
 6 joint statement, {OR-E/49/84}. That is 6.1.5:
 7 "It is appropriate to consider evidence on BT's
 8 actual pricing in assessing whether it was dominant."
 9 Mr Parker agrees this is relevant.
 10 "Dominance is the ability of a firm to exercise
 11 significant market power. Whether BT in fact was able
 12 to put prices up above the competitive level is
 13 relevant ... (although ... I consider [it] after ...
 14 market shares and ... countervailing factors) ...
 15 "I have found that BT increased its line rental
 16 prices when the cost of the principal input ... was
 17 falling . BT appeared to benefit from leader-follower
 18 behaviour. BT's calls ARPMS were higher than rivals and
 19 increasing over time while rivals' calls ARPMS were
 20 falling . These findings are confirmed by the more
 21 detailed analysis I have carried out of BT's overall
 22 pricing relative to the cost-plus competitive benchmarks
 23 calculated by Mr Duckworth."
 24 They are consistent with Ofcom's 2017 review.
 25 Ofcom addressed BT's prices at paragraph 4.47 of the

1 provisional conclusion {IR-C/1/53}. I will just show
 2 you that briefly . At 4.67. Sorry, 58, {IR-C/1/58}.
 3 No, I have got a wrong -- it is correct, yes, 53:
 4 "The ability to price persistently and significantly
 5 above the competitive level is an indicator of market
 6 power. In a competitive market, individual firms should
 7 not be able to persistently maintain prices above costs
 8 ... and thus sustain excessive profits ."
 9 Then you see figure 4.2, which should be, by now,
 10 a familiar graph.
 11 Then if we move forward to 4.67 on page {IR-C/1/58}:
 12 "Our analysis of the evidence on prices suggests
 13 that prices are significantly above costs ... and have
 14 been diverging further over recent years. BT's prices
 15 also appear to be above those of other operators without
 16 this materially affecting its position in the market in
 17 terms of market share ... There is evidence that BT acts
 18 as a price leader, with other CPs following its
 19 increases in line rental in terms of both timing and
 20 magnitude. Price discrimination to offer greater
 21 discounts to more engaged customers (for example,
 22 through its Home Phone Saver ...) allows BT to increase
 23 prices for (largely unengaged) SFV customers whilst
 24 limiting the risk to the revenues it earns from more
 25 active customer groups."

1 MR RIDYARD: Can I just briefly ask, what is your position
 2 on the rivals' prices? Because at one point you are
 3 saying that the rivals are price followers, and
 4 I understand the umbrella point. But then you also seem
 5 to be saying that the rivals' prices are falling whilst
 6 BT's are rising.
 7 MS KREISBERGER: That is on calls. So is it helpful to go
 8 back to that chart?
 9 The line rental prices, they were sheltering under
 10 the umbrella, and calls prices -- you see rivals' calls
 11 in that ARPMs chart I showed you -- rivals' calls prices
 12 go down on the ARPMs.
 13 MR RIDYARD: So they were not following on the calls.
 14 MS KREISBERGER: That is right. I am grateful for that,
 15 sir. That is quite right.
 16 That deals with prices.
 17 Going back to the list of issues, {A/10/2}:
 18 "To what extent does BT's profitability ... support
 19 a finding of dominance?"
 20 We stay in the provisional conclusions. Again, with
 21 an eye on the time, if I could ask you to read
 22 {IR-C/1/58}. This is Ofcom's assessment of BT's
 23 profitability. We will get to Mr Duckworth under limb 1
 24 at paragraphs 4.68 to 4.70. Can I ask you to read those
 25 paragraphs. (Pause)

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1 So Ofcom relied on BT's high and increasing
 2 profitability, as does Mr Parker, relying on
 3 Mr Duckworth's comprehensive assessment which we will go
 4 to under limb 1.
 5 Coming back to the list of issues {A/10/2}. I am
 6 now going to amend the order at this point and address
 7 barriers to entry next, so that is 4(g):
 8 To what extent, if any, were the prices of BT SFV
 9 Services constrained by ... barriers to entry and/or
 10 expansion ..."
 11 If we could turn up Mr Parker's third report, and
 12 I will ask you to cast your eye over {IR-E/3/126}. That
 13 is paragraphs 5.52 to 5.56 on barriers to entry. This
 14 is Mr Parker's evidence. (Pause)
 15 Picking up on Mr Parker's point at paragraph 5.54,
 16 that it is only in "an extreme situation" one could
 17 conceive of a firm with extremely high shares like BT,
 18 but no market power, because barriers are so low that
 19 the market is super contestable, as it were.
 20 THE CHAIRMAN: Yes.
 21 MS KREISBERGER: That is an interesting academic debate.
 22 The economic circumstances here are at the other end of
 23 the scale: high market shares, high barriers to entry.
 24 Now, you will have seen that BT argues that barriers
 25 to entry and expansion of these services are low, but it

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1 does not anywhere advance evidence or in fact plead
 2 a case that the purported barriers are so very low that
 3 BT does not have a strong market position if it is SFV
 4 only markets with very high shares, and frankly that
 5 would stretch credulity.
 6 Now, I want to carry on with Mr Parker's evidence
 7 here. Under the heading "Evidence from third party
 8 operators", paragraph 5.57, so if we could just go down
 9 to the next page, {IR-E/3/127}, Mr Parker says:
 10 "My review of the evidence provided to Ofcom by
 11 third party operators indicates that barriers to
 12 customer acquisition (resulting from customer inertia
 13 and high customer acquisition costs) were a significant
 14 barrier to entry and expansion in the market for SFV
 15 Services. This is often the case in markets which are
 16 decreasing in size and, in the case at hand, is
 17 illustrated by the following examples of operators
 18 exiting the market, and/or commenting on the existence
 19 of barriers to expansion."
 20 So then he gives the examples. This is what the
 21 other operators say:
 22 "TalkTalk stopped offering SFV Services to new
 23 customers in 2014. In 2016, TalkTalk confirmed 'that
 24 there was no internal appetite for re-entering the
 25 market as while margins now look quite high, customer

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1 inertia is such that the low likely numbers of switchers
 2 does not justify the costs/complexity of pursuing the
 3 business'. It also stated that 'high customer
 4 acquisition costs driven by customer inertia, understand
 5 desirable additional business complexity, and the
 6 declining market size mean there is no incentive for us
 7 to re-enter the market. It would not be profitable to
 8 do so each facing BT's current inflated price levels.
 9 We consider that this position is likely to be similar
 10 for other potential entrants'.
 11 Could I ask you to read Sky's comments, which is
 12 marked "Confidential". (Pause)
 13 THE CHAIRMAN: Yes.
 14 MS KREISBERGER: Then the next one, SSE. If you go over the
 15 page, if you could read their comment. (Pause) Then:
 16 The Post Office ... 'conducted very little research
 17 into the Retail Voice only market. We have generally
 18 worked on the following assumptions; the market is
 19 inert; the demographic is elderly; the market is in
 20 decline at approx 10% per annum' and 'we have attempted
 21 to market to current BT customers with two campaigns in
 22 the last 20 months ... unfortunately neither campaign
 23 was successful'.
 24 Mr Parker then concludes:
 25 "This evidence shows that challenges in identifying

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1 and advertising to SFV Customers, as well as inertia in
 2 this customer group, made customer acquisition
 3 sufficiently difficult that rivals such as TalkTalk and
 4 Sky were ceasing to provide the relevant services at
 5 least to new customers, irrespective of BT's pricing
 6 behaviour. It therefore seems highly likely that any
 7 other rivals or entrants facing the same high customer
 8 acquisition costs would find it difficult to compete
 9 effectively in this market. This conclusion holds
 10 whether one considers Voice Only customers and Split
 11 Purchase customers separately or collectively ... Ofcom
 12 reached the same conclusion."
 13 THE CHAIRMAN: Yes.
 14 MS KREISBERGER: Pausing there, I would like to show you
 15 what Dr Jenkins says about this. That is in the joint
 16 statement, {OR-E/49/98}. 6.4.2:
 17 "Rivals to BT considered there were barriers to
 18 entry and expansion resulting from inertia leading to
 19 high customer acquisition costs."
 20 So that is the proposition based on the evidence
 21 I just showed you. Dr Jenkins says:
 22 "Disagree
 23 "The market for fixed voice services was not
 24 characterised by high barriers to entry driven by
 25 customer inertia and high acquisition costs. BT's

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1 competitors were able to expand in the market by
 2 attracting fixed voice customers through the offering of
 3 fixed voice services (however sold).
 4 "In fact, as the majority of customers leaving the
 5 SFV base were moving to bundles, the most efficient
 6 strategy for BT and its competitors was therefore to
 7 focus on encouraging the take-up and purchase of fixed
 8 voice services in a bundle. The fact that BT's rivals
 9 were able to increase their shares of supply at the
 10 expense of BT's SFV customer base proves that the
 11 majority of these customers were not inert."
 12 But she is asked to comment on the proposition that
 13 rivals thought there were barriers to entry resulting
 14 from inertia and her answer is no, there were not
 15 because they could sell bundles. The evidence that
 16 I took you to from those providers was that they did
 17 face high barriers because of the customer inertia.
 18 They could not get the SFV customers to switch. So her
 19 statement is --
 20 THE CHAIRMAN: Sorry, SFV customers to switch to?
 21 MS KREISBERGER: To their SFV service.
 22 THE CHAIRMAN: Exactly, not the bundles.
 23 MS KREISBERGER: Quite, quite. Again, we are in --
 24 MR BEARD: I am just going to pause. I resisted on numerous
 25 selective evidential references today but we have got to

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1 be extremely careful. We have no evidence from these
 2 third parties. The Class Representative has not put
 3 forward any factual evidence at all and the criticism
 4 that is now being levelled at Dr Jenkins that she is not
 5 commenting on Mr Parker's appraisal of submissions that
 6 were made to Ofcom that we cannot test. She set out her
 7 position here and we do not have evidence from those
 8 people. It will be a point I will be picking up.
 9 THE CHAIRMAN: Yes, all right, thank you very much.
 10 MS KREISBERGER: So of course there are penalties for
 11 companies that lie to Ofcom in their submissions.
 12 THE CHAIRMAN: Let us just concentrate on the point at hand,
 13 and we have only have a couple of minutes left now.
 14 MS KREISBERGER: Yes, understood.
 15 Dr Jenkins does not mention that evidence or try to
 16 explain how it is that she as BT's expert has reached
 17 a different conclusion from those providers and what
 18 they told Ofcom.
 19 THE CHAIRMAN: I think we have got the point.
 20 MS KREISBERGER: Yes.
 21 THE CHAIRMAN: No doubt it is something you can explore in
 22 cross-examination when you get to it with Dr Jenkins.
 23 MS KREISBERGER: I am grateful.
 24 THE CHAIRMAN: I am quite keen -- if you can deal with the
 25 remaining list of issue points on dominance before we

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1 have to stop in a few minutes that would be great.
 2 MS KREISBERGER: That is my goal. I think it might take.
 3 THE CHAIRMAN: What you can do because I am quite keen to
 4 have a clean start on limb 1 tomorrow morning is let us
 5 use the remaining time, get as far as you can on those
 6 points and then if there is something you would like us
 7 to read up on the remaining list of issue points on
 8 dominance we can do that overnight.
 9 MS KREISBERGER: I am grateful.
 10 THE CHAIRMAN: Right.
 11 MS KREISBERGER: So I will just highlight the next point.
 12 That is the low and slow growth in rival shares. Ofcom
 13 took the view that that was the case at 5.6.2 of the
 14 provisional conclusions. Dr Jenkins rejects this at JES
 15 6.41, page 97. That is at {IR-E/49/97}, for your note.
 16 It is the same problem. Without going there, she
 17 rejects the proposition, the proposition is that there
 18 was low and slow growth in SFV rivals' market shares.
 19 Can I just remind the Tribunal that at this point
 20 I am making submissions on dominance on the basis of an
 21 SFV only market. She again makes the point, oh well,
 22 you have got to look at bundles and their market shares.
 23 There was not low and slow growth in bundles: the same
 24 point.
 25 THE CHAIRMAN: Yes.

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1 MS KREISBERGER: The next one is:
 2 "Did SFV services of other providers act as
 3 a material constraint on SFV prices?"
 4 No, they did not because we have the SSNIP data.
 5 I need not say anything more about that. That is
 6 4(d) in the list of issues .
 7 SSNIP data shows no effective constraint.
 8 4(e):
 9 "Did bundles with fixed voice services materially
 10 constrain BT's SFV prices?"
 11 Once again bundles on this view are outside the
 12 market, and you will see that this is the point on which
 13 Mr Beard majors in his skeleton on dominance. If
 14 I could just spend -- this is really my last point.
 15 THE CHAIRMAN: Right.
 16 MS KREISBERGER: So I am going to spend the last few minutes
 17 on this .
 18 If you could bring up Mr Beard's skeleton,
 19 {OR-A/13/35}: The heading is "Constraints from the
 20 supply of fixed voice services in bundles". So it looks
 21 like Mr Beard is going to make the submission which
 22 permeates the whole of Dr Jenkins' analysis that BT
 23 charges the same price for standalone and bundle fixed
 24 voice.
 25 Now, what we see is that this looks like the bundle

1 pricing fallacy which Mr Parker has debunked.
 2 At paragraph 106 he says:
 3 "BT's rivals were incentivised by the structure of
 4 the regulated wholesale access to encourage customers to
 5 take-up fixed voice services in bundles with other
 6 products. They achieved this by offering bundles at
 7 a discount to standalone prices , through low incremental
 8 broadband prices for bundle customers. This strategy
 9 resulted in BT losing huge numbers of SFV customers to
 10 its rivals , the vast majority of whom were switching to
 11 purchasing their fixed voice services in a bundle ...
 12 BT's rivals were incentivised to take up of bundles ..."
 13 They achieved it by "offering bundles at a discount
 14 to standalone prices , through low incremental broadband
 15 prices" and BT lost a lot of bundle customers.
 16 So far so good. That is common ground.
 17 At 107 he then goes on to set out a long list of
 18 factors which he says influenced BT's SFV prices. Those
 19 are encouraging customers, SFV customers to switch to
 20 bundles. That is migration intent. Obtaining
 21 additional revenue to invest in ensuring that BT had an
 22 attractive offering for its content and service
 23 improvements (including gives), to offset the impact of
 24 acquisition pricing , declining incremental broadband
 25 prices . BT had to compete aggressively. Offset the

1 decline in fixed call volumes. Mitigating the loss of
 2 fixed voice services to competitors, whether to
 3 competing SFV services or bundles.
 4 So he has this long list of factors . He is praying
 5 in aid here a menu of supposed commercial aims of BT.
 6 Now, as I say, the first one brings us back to
 7 migration intent theory: encouraging switching to
 8 bundles. That is the theory that posits an upward force
 9 on SFV prices from bundles.
 10 You have my point that it is the opposite of
 11 a constraint on BT's ability to sustain prices above the
 12 competitive level which is what BT is looking to
 13 establish if it wants to defend itself against the
 14 allegation of dominance. If the dominance BT is arguing
 15 that it was constrained, it did not have market power to
 16 raise price above the competitive level. But his first
 17 point is an argument that BT was encouraged to raise
 18 prices above the competitive level.
 19 Then he lists these other factors which include
 20 commercial aims like boosting revenue to make up for low
 21 broadband prices. Again, it is not clear how BT's goal
 22 of making more money in uncompetitive markets in order
 23 to offset low prices in competitive ones, remember we
 24 are in dominance, it is an SFV only market, it is not
 25 clear how that helps him establish that bundles exert

1 a downward pressure on SFV prices.
 2 Nor is his point (c) any more pellucid. He says one
 3 of BT's aims is to mitigate the loss of SFV customers to
 4 competing providers of bundles. That would explain low
 5 bundle prices; it does not explain how SFV prices.
 6 Then we get to the punchline of all of this . He
 7 says:
 8 "It follows that BT could not and did not price
 9 fixed voice services independently from its customers
 10 and competitors."
 11 Now, my submission is that is something of a damp
 12 squib after all that because if we go back to the
 13 heading it looked like he was going to tell us why
 14 bundles exerted downward force on SFV prices but this is
 15 a much more bland proposition that does not identify any
 16 constraint on prices at all .
 17 THE CHAIRMAN: I think we will call it a day there. If
 18 there are a few bits that you want to sort out tomorrow
 19 before going on to limb 1, we will do that, but I am
 20 very grateful to the transcriber .
 21 Just one moment please. (Pause)
 22 Right. Thank you very much. 10.30 tomorrow.
 23 MS KREISBERGER: Thank you, sir.
 24 (4.45 pm)
 25 (The hearing adjourned until Tuesday, 30 January at

1 10.30 am)
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