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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 29<sup>th</sup> January – Friday 22<sup>nd</sup> 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

(1) BT Group PLC  
(2) British Telecommunications plc  
(Together, "BT")

**Respondent**

**A P P E A R A N C E S**

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

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

Jennifer MacLeod (On behalf of the Competition & Markets Authority)

Monday, 18 March 2024

(10.00 am)

THE CHAIRMAN: Good morning. Some of you are joining us live stream on our website, so I must start with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as a contempt of court.

We are most grateful to both sides for their very helpful written submissions and ancillary documents.

Yes, Ms Kreisberger.

Closing submissions by MS KREISBERGER

MS KREISBERGER: Thank you, sir. I do not think there is any housekeeping as you have received the documents, so I will go straight into my closing submissions.

Before I turn to my detailed submissions, if I may, I would like to begin by making some short prefatory remarks first on three key themes in the case.

My first observation is that this case involves an unusual set of circumstances which were the context for BT's exploitation of the SFV customer base. Now, those exceptional features involve an ex-statutory monopolist who started out with the whole country as its fixed

1 voice customer base. BT never had to compete to acquire  
2 those customers. But following deregulation, BT's focus  
3 rapidly shifted to the bundles market where competition  
4 was aggressive and discounts were deep. That meant that  
5 the SFV markets began to dwindle as customers were  
6 migrating across to bundles. As you know, that shift  
7 took the form of a steady secular decline as Standalone  
8 Fixed Voice fell out of favour as customers were  
9 attracted to broadband.

10 Now, most standalone customers were legacy customers  
11 from BT's monopolist days who, for whatever reasons,  
12 inertia or otherwise, had not yet made the leap to  
13 bundles. So BT competed -- did not compete for those  
14 customers, it inherited them, and BT enjoyed extremely  
15 high shares of these declining SFV markets with limited  
16 interest from other operators as the sun sets on the SFV  
17 markets.

18 Now, it is possible that one day fixed voice sold as  
19 a standalone product might well join the ranks of other  
20 defunct products, like cassette tapes and the Walkman  
21 and Betamax, but that day has not come. The precise  
22 figure is confidential but, as I stand here today, there  
23 are still over 300,000 SFV customers and at the start of  
24 the claim period there were around 2 and a half million  
25 of them. For your note, that is Table 6 of Annex 1 to

1 our written closings, {A/15.1/5}.

2 Now, those customers who continued to buy standalone  
3 services revealed themselves as willing to swallow BT's  
4 high and ever-increasing prices. BT, as you know,  
5 turned up the heat on them year-on-year, with Line  
6 Rental prices steadily increasing against a background  
7 of falling wholesale costs. That graph will now be very  
8 familiar to you.

9 So by the start of the claim period in 2015, BT's  
10 prices for Standalone Fixed Voice services had long  
11 departed from competitive levels by that time, and that  
12 enabled BT to extract large amounts of revenue from SFV  
13 customers to fund investments in products like BT Sport  
14 which improved its bundles offering, because that was  
15 the arena of competition, not its SFV products. It did  
16 not improve those products.

17 Now, to end on this first observation, BT's  
18 contention of wide-ranging ramifications is untrue.  
19 These are a highly particular set of circumstances.  
20 They are a product of history, incumbency and  
21 deregulation which BT has exploited by imposing prices  
22 which are unfairly inflated above its costs.

23 Now, far from having a chilling effect, a finding of  
24 abusive pricing in these circumstances would have the  
25 appropriate deterrent effect on unlawful exploitative

1 behaviour by dominant firms.

2 So that is my first observation.

3 My second set of observations is this: it is  
4 a central plank of BT's defence, which in fact emerges  
5 from the first few paragraphs of its written closings,  
6 that Class Members could just have switched to bundles  
7 to access competitive prices. Now, for those who wanted  
8 to take broadband, that is true, and it is a central  
9 element of the Class Representative's case that BT was  
10 offering those customers competitive prices while  
11 targeting unfair prices at the SFV customer base.

12 Now, that is not a point in BT's favour. Dominant  
13 firms bear a special responsibility in view of their  
14 strong market power over customers under the Act. They  
15 violate their statutory duty under competition law,  
16 Section 18(2) (a), when they charge their customers  
17 prices at an excessive mark-up over their costs.

18 The whole purpose of the prohibition on unfair  
19 prices is to prevent what the Tribunal referred to in  
20 the *Hydrocortisone* case as the "illegitimate  
21 exploitation" of market power by leveraging price well  
22 in excess of what is fair.

23 It would subvert the consumer protection role of the  
24 law of unfair pricing if dominant firms were permitted  
25 to evade responsibility by pointing to a different

1 product where they have no market power to extract  
2 unfair prices. A lawful price does not cancel out  
3 liability for an unlawful one.

4 Now, I can here return to my metaphor of boiling the  
5 frog, notwithstanding Dr Hunt's doubts over its  
6 biological efficacy. SFV customers are the frogs. They  
7 have the heat turned up on them each year. Over time  
8 some frogs leapt to bundles, but their departure did not  
9 help those frogs still sitting in the boiling SFV vat at  
10 any point in time.

11 If BT's unfairly high SFV prices violate competition  
12 law, then BT bears liability for that violation and  
13 those customers are entitled to compensation. The fact  
14 that at the same time BT offered low prices to bundle  
15 customers does not absolve it of liability for unfairly  
16 overcharging the SFV base.

17 So that is my second observation.

18 My third observation is a different point. These  
19 are collective proceedings, of course, claiming  
20 aggregate damages. That is an important feature of this  
21 litigation and it informs, it properly informs the  
22 Tribunal's approach to the evidence. In particular, it  
23 means there is no requirement to establish loss on an  
24 individual basis.

25 I am so sorry, I am just rearranging the screen.

1 (Pause)

2 In the *Gutmann* case, the Court of Appeal held that  
3 the statutory basis for section 47C(2), the aggregate  
4 damages provision, applies equally to liability as it  
5 does to quantum. Let us just turn that up. {G/89/1},  
6 and if we could turn up {G/89/13}, paragraph 35. You  
7 see there it refers to:

8 "... a substantial body of case law treating  
9 section 47C(2) as applying to liability as well as to  
10 quantum", and it refers to *Le Patourel* in that passage.

11 If we could then go down to page {G/89/21},  
12 paragraph 59. Could we focus in, thank you.

13 So this is what the Court of Appeal said, this is  
14 where they introduce the broad axe:

15 "The axe and liability: The appellants argued that  
16 the broad axe did not apply to liability issues and that  
17 there was no authority establishing that it did. This  
18 misunderstands the purpose of the axe. It is not so  
19 much a substantive principle of law as a description of  
20 a well-established judicial practice whereby judges  
21 eschew artificial demands for precision and the  
22 production of comprehensive evidence on all issues and  
23 instead use their forensic skills to do the best they  
24 can with limited material to achieve practical justice.  
25 It was a term coined long before the introduction of the

1 overriding objective into the [CPR] Rules ..."

2 Then if I could just ask you to cast your eye over  
3 to the rest of the paragraph there. (Pause)

4 So that is the broad axe.

5 If we could go up a page to the previous paragraph,  
6 paragraph 58, {G/89/20}, you see there the first two  
7 sentences:

8 "The breadth of the axe and the nature of the  
9 claim: In forming its judgment at the certification  
10 stage, the CAT will bear in mind that at trial it is  
11 armed with a broad axe by which it can fill gaps and  
12 plug lacunae in the methodology. The axe head is  
13 adjustable and can expand and retract to meet the nature  
14 of the case."

15 Then if we could just go down to paragraph 60 on  
16 page {G/89/21}, "The height of the bar". Paragraph 60.  
17 Sorry, could we just focus in on paragraph 60.

18 "The test is about practical justiciability ..."

19 You see there at the end:

20 "... the CAT has the power to wield its broad axe  
21 and work, in a relatively rough and ready way, with  
22 assumptions and common sense intuitions, and that it can  
23 permit or even require adjustments to the methodology  
24 prior to and at trial."

25 So that is the approach to the evidence which, in my



1 submission, the Tribunal should adopt here, and  
2 particularly in relation to the evidence in relation to  
3 liability which includes cost data.

4 Now, much of BT's case particularly on limb 1, which  
5 I will come on to, depends on its claim that projecting  
6 forward 2009 cost data lacks precision. We do not  
7 accept that and I will address you on those points. But  
8 the correct approach in collective proceedings is not to  
9 demand unfeasible standards of precision. As you see  
10 there, the correct approach is to wield the broad axe in  
11 the interests of pragmatism, that involves the use of  
12 reasonable assumptions and estimations, in order to  
13 arrive at a realistic and meaningful assessment of  
14 costs.

15 So those are my opening observations and, with that,  
16 I turn to the detailed submissions on the case.

17 THE CHAIRMAN: Yes, thank you.

18 MS KREISBERGER: Now, as you have seen, we have put in  
19 detailed written submissions on all aspects. With the  
20 Tribunal's permission, I am not going to attempt to go  
21 through every point which arises. I am proposing to  
22 focus on a smaller number of points which I hope will be  
23 of most assistance to the Tribunal.

24 THE CHAIRMAN: Yes.

25 MS KREISBERGER: I will take each of the main topics in

1 turn, starting with market definition.

2 I will structure my submissions on market definition  
3 in five parts.

4 I will begin with a conceptual point on the evidence  
5 relevant to competition -- relevant to market  
6 definition, and that picks up one of the Tribunal's  
7 written questions.

8 THE CHAIRMAN: Yes.

9 MS KREISBERGER: Question 13.

10 Then my second part is an overview of why  
11 Mr Parker's assessment of market definition is the right  
12 approach and the inherent unreliability in Dr Jenkins'  
13 approach.

14 In my third part, I will address more detailed  
15 points on Mr Parker's SSNIP tests.

16 Fourthly, I have some observations on key defects in  
17 Dr Jenkins' evidence on market definition.

18 Then I will end this section of my submissions by  
19 addressing the Tribunal's question 10.

20 So beginning with the first point, the conceptual  
21 point. At question 13, the Tribunal posed the question:

22 "Can the existence or otherwise of excessive pricing  
23 (limb 1) assist on deciding the correct market?"

24 My short response to that is yes, it does assist,  
25 and limb 1 should be taken into account. The reason for

1 that is all three stages of the infringement  
2 assessment -- the market definition, the market power  
3 and the pricing abuse -- are all asking versions of the  
4 same question, which is: can SFV prices be raised and  
5 have they been raised significantly above the  
6 competitive level during the claim period? Because it  
7 is an excessive pricing case, what we have in the limb 1  
8 analysis, as you know, is a comprehensive comparison of  
9 BT's revenues for both calls and access with the  
10 competitive benchmark. That is a comparison which shows  
11 a very large gulf between the two.

12 So in my submission, limb 1 is the whole nine yards.  
13 It provides a complete answer to the prior questions of  
14 market definition and dominance because it identifies  
15 the extent to which BT's SFV prices are above the  
16 competitive level.

17 Now, given that, Mr Ridyard asked Mr Parker the  
18 heretical question in the hot tub, whether the prior  
19 assessments of market definition and market power, which  
20 address other metrics, metrics other than the SFV  
21 profitability metric, whether they remain useful. That  
22 brought to mind a quote from Professor Carl Shapiro,  
23 which features in Dr Jenkins' textbook, which we have  
24 been to a number of times, and it is on page 94.

25 Professor Shapiro said:

1           "I shudder to think how much brain damage among  
2 antitrust lawyers and economists has been caused by  
3 arguing over market definition."

4           It is a salutary warning that comes a little late  
5 for those of us who have spent seven weeks in this  
6 courtroom.

7           That is why both Mr Ridyard and Mr Parker agreed  
8 that market definition is a staging post and, in my  
9 submission, that is a particularly apt description. It  
10 is a stop along the way.

11           Putting the point in economic terms, the Tribunal  
12 has to be satisfied that the firm, that BT, wields SMP  
13 in the relevant products before proceeding to an  
14 assessment of the pricing abuse. But once you have gone  
15 on to do that profitability assessment and you have  
16 identified the large gulf between actual and competitive  
17 prices, one might say that prior assessment has been  
18 somewhat superseded, because here, as I said, the full  
19 assessment tells you that BT has charged prices which  
20 exceed the competitive price level by more than 5-10%,  
21 by more than a SSNIP. That is the threshold which  
22 establishes a distinct market under the SSNIP test.

23           Now, that is, as I understand it, Mr Ridyard's  
24 point, and I adopt it, however transgressive. As  
25 I said, limb 1, the ARPU assessment, is a complete

1 answer, and Mr Parker made that point in his evidence,  
2 that is in Parker 5, and in the hot tub. But the market  
3 definition stage has nonetheless been a useful staging  
4 post in this case for three principal reasons.

5 The first reason is that all of the guidance  
6 indicates that evidence in relation to these economic  
7 assessments should be assessed in the round. It is an  
8 evidence-hungry exercise. It is always helpful to have  
9 more, not less, evidence. So the market definition of  
10 "evidence", which Mr Parker relies on, and I will come  
11 to, adds to the totality of evidence before the  
12 Tribunal.

13 That brings me to my second related point on the  
14 facts of this case. Mr Parker's evidence, and in  
15 particular his SSNIP tests, they are telling you  
16 something very useful about the effective prices charged  
17 by BT for SFV services. So whereas limb 1 is the full  
18 profitability assessment based on ARPU, which takes  
19 account of access and calls together and factors in  
20 usage of calls, at the market definition stage,  
21 Mr Parker looks at the effective prices charged by BT  
22 for the two components separately.

23 Now, the focus for his SSNIP test is on the Line  
24 Rental price and this is a point on which both  
25 Dr Jenkins and Mr Parker agree. Now, Dr Jenkins

1 explained why she uses the Line Rental price in her CLA.  
2 I think it is captured in our written closings. So that  
3 is {A/15/39} at paragraph 103. It just captures her  
4 evidence:

5 "Dr Jenkins explains that she uses changes in Line  
6 Rental prices as the input for her CLA because: '(i)  
7 Line Rental price does not depend on usage pattern and  
8 thus would affect all customers the same [and] (ii) this  
9 change would have been more salient to the customer  
10 (since it is what would be advertised by BT)'. In the  
11 hot-tub, Dr Jenkins described a Line Rental increase as  
12 the 'push price' that is 'relevant' to a decision by SFV  
13 customers about whether to switch to bundles (given that  
14 call prices will be the same ...)."

15 A neutral factor.

16 So the Class Representative agrees with Dr Jenkins'  
17 assessment on that point.

18 Now, BT's submission -- and just for your note, it  
19 is in their written closings at paragraph 263. BT's  
20 submission is that:

21 "It is difficult to understand why Mr Parker has  
22 considered Line Rental separately for market  
23 definition."

24 That submission is itself difficult to understand in  
25 the light of Dr Jenkins' evidence.

1           Now, this appears to be one of BT's main lines of  
2           attack on market definition, that the Line Rental price  
3           is the wrong place to look. But BT is then parting ways  
4           with both experts, and it is just as much an attack on  
5           Dr Jenkins' CLA as Mr Parker's SSNIP test.

6           Now, Mr Parker shows that Line Rental prices are  
7           above the competitive level in relative terms, looking  
8           at increases in the price when costs are falling, by  
9           comparison with competitive bundle prices. So that is  
10          the SPC differential price analysis, his first SSNIP  
11          test. He goes on to corroborate those findings in  
12          relation to calls where he identifies a reinforcing  
13          effect.

14          Now, each of Mr Parker's SSNIP tests take account of  
15          informative pricing metrics which are necessary and for  
16          market definition purposes sufficient, because they show  
17          that the hypothetical monopolist can charge prices 5-10%  
18          above competitive levels. Those finds are then  
19          confirmed when you get to the full ARPU profitability  
20          assessment which shows exactly how far above competitive  
21          levels BT's charges collectively are.

22          So taken together, the totality of the pricing  
23          evidence demonstrates that, however you look at it, SFV  
24          prices are susceptible to the small increases you need  
25          to show to establish that SFV services make up distinct

1 markets, given the reality of the very large increases  
2 which BT in fact made.

3 Now, that takes me to my third point on this  
4 conceptual question, it is perhaps a prosaic one. The  
5 SSNIP test is frankly the way that regulators and  
6 competition practitioners, both economists and lawyers,  
7 traditionally approach these questions. You would not  
8 get very far as a claimant if you attempted to leap-frog  
9 that staging post, if you were to go straight to abuse  
10 without a more orthodox application of the SSNIP test.  
11 You have to pass through it. That is what Mr Parker has  
12 done. This certainly would not be the case to break  
13 with tradition.

14 I would say just imagine how BT would have responded  
15 to any leap-frogging, but, as it happens, you do not  
16 have to imagine it, because somewhat curiously they make  
17 the argument anyway even though Mr Parker has done all  
18 the work at the SSNIP test stage.

19 If I could ask you to turn up BT's written closings  
20 at paragraph 189 {IR-A/16/51}, they say this:

21 "In effect, therefore, Mr Parker is inviting the  
22 Tribunal to proceed without any proper assessment of  
23 market definition at all."

24 If we go forward to 196 on the following page,  
25 {IR-A/16/52} BT says this:



1            "It also underscores the backwards reasoning at the  
2            core of Mr Parker's position: that the Tribunal need not  
3            trouble itself with the hypothetical monopolist test  
4            because it can just rely on Mr Parker's limb 1  
5            benchmark. It is a serious error of approach."

6            BT says.

7            Well, that is a serious mischaracterisation of  
8            Mr Parker's evidence. Mr Parker conducted a holistic  
9            assessment of market definition based on three SSNIP  
10           datasets and a range of other evidence and data,  
11           including BT's internal documents, functional  
12           characteristics, data gathered by Ofcom in its analyses,  
13           as well as evidence advanced by Dr Jenkins, including  
14           her own events study of VOCs which I will come back to.

15           That submission also misses the point that to the  
16           extent that the three stages of the assessment raised  
17           the same question, then the same evidence can and should  
18           be taken into account. To suggest otherwise is to go  
19           through the looking glass.

20           Curiouser and curiouser, though, is that having  
21           attacked Mr Parker for relying on limb 1 in relation to  
22           market definition, BT then goes on to make the exact  
23           opposite argument that Mr Parker should have, but failed  
24           to rely on ARPU for market definition instead of dealing  
25           with Line Rental and calls separately.

1           So if we turn up BT's written closings at page  
2           {IR-A/16/66}, that is paragraph 263(b), BT says this:

3           "The best proxy for the price of SFV Services is the  
4           ARPU of SFV services, which combines the price paid by  
5           customers for Line Rental and calls. Indeed, it is  
6           accepted ... that ARPU is the relevant price for Line  
7           Rental and calls together."

8           Well, Mr Parker does not disagree, but he really  
9           cannot be criticised for looking at all his price  
10          metrics for market definition.

11          BT then goes on to argue that the SSNIP test is not  
12          met if you rely on ARPU. That is at paragraph (c) in  
13          the same passage. It says this:

14          "... the relevant question is therefore the rate and  
15          scale of the increase in the ARPU of SFV services. And  
16          data ... shows that, contrary to the CR's case,  
17          the price of SFV services did not increase significantly  
18          over time."

19          It is a point we heard them make several times  
20          during the trial.

21          That submission is wrong headed. The relevant  
22          question under the SSNIP test is not whether ARPU went  
23          up or down during the claim period. The relevant  
24          question under the SSNIP test is: could the hypothetical  
25          monopolist charge prices during the claim period which

1           were 5-10% above the competitive level, in other words,  
2           compared to the cost-plus benchmark. So when one is  
3           looking at ARPU, that means you are looking at the gulf  
4           between BT's SFV revenue and the cost-plus benchmark.  
5           The gulf, which exceeds 5-10%, is more than a SSNIP, and  
6           as you know, Mr Duckworth has identified far larger  
7           differentials than that.

8           It is trite to say that the price of a product can  
9           move up or down during the claim period. If that price  
10          exceeds the competitive level by a small increment, then  
11          that is probative of it being in a discrete market of  
12          its own.

13         MR RIDYARD: Ms Kreisberger, could you just help me a little  
14          on this. I understand your argument about the level of  
15          prices, and if prices are well above the competitive  
16          level then the fact that they have not increased more  
17          does not make them any less excessive.

18          But when we come -- when we were talking about the  
19          SSNIP test and what was happening during the claim  
20          period, if the ARPU -- ultimately ARPU is what counts.  
21          It counts for your limb 1 analysis and it counts when  
22          you get to your damage limitations. So if the ARPUs did  
23          not increase, let us say they were flat throughout the  
24          claim period, I know they are not entirely flat, but let  
25          us say they were flat throughout the claim period, does

1           that not cast some legitimate questions over inferences  
2           that you can make about increases in Line Rental prices,  
3           given that Line Rental price is just one element of what  
4           goes into ARPU?

5           MS KREISBERGER: I think there are two answers to that. The  
6           first is that ARPU reflects usage, so if usage is  
7           declining, ARPU is declining. So that is the first  
8           answer which, of course, one does not see in the other  
9           pricing metrics. But as Dr Jenkins said, it does not  
10          cast doubt on the Line Rental analysis because that is  
11          the price that customers are making their decisions on,  
12          essentially. So the Line Rental price metric is telling  
13          you that BT could keep charging more Line Rental and  
14          customers were looking at that price but paying it. It  
15          is the most relevant price in terms of what the customer  
16          pays.

17          MR RIDYARD: Is it? Yes. Ultimately customers care what  
18          their bill is, do they not?

19          MS KREISBERGER: I think it is both. It is the advertised  
20          price. Of course it is right, as you say, customers  
21          know what they are paying at the end of every month, so  
22          this is all information taken account of. But the Line  
23          Rental price is the price that providers are competing  
24          on that they are advertising. So it is simply one part  
25          of the puzzle.

1 MR RIDYARD: I guess that is my concern, it is just one part  
2 of the puzzle, and when we get to what counts, you know,  
3 on the excessiveness and the damage calculations, we are  
4 looking at the ARPU for reasons that I think are agreed  
5 and seem sensible.

6 MS KREISBERGER: Absolutely.

7 MR RIDYARD: So the challenge for you is why should we then,  
8 for the SSNIP test purposes, be looking at a price which  
9 just makes up one -- which is just one component of that  
10 ARPU?

11 MS KREISBERGER: Could I perhaps frame the point in  
12 a different way. We adopt that point, as I have said,  
13 on ARPU. The question is, you know, you get your  
14 complete answer when you look at limb 1 and you see it  
15 answers the differentials you are looking at for the  
16 purposes of the excessive pricing abuse and the much  
17 lower differential that you need to identify for the  
18 SSNIP test. So one could go straight to that. But my  
19 second point would be the Line Rental evidence is  
20 consistent with the ARPU assessment because it is  
21 showing you BT's ability to charge SSNIPs over time.

22 MR RIDYARD: I am not sure that follows, because you keep --  
23 the Line Rental went up and up and up as we saw, but the  
24 ARPU did not go up and up and up, so there is  
25 a difference between what happened to Line Rental and

1           what happened to ARPU.

2           MS KREISBERGER: But that reflects usage rather than -- the  
3           Line Rental price is increasing, but when you look at  
4           profitability, of course, if fewer customers are paying  
5           it your profits go down.

6           MR RIDYARD: But the profitability did not go up and up and  
7           up. The gross margins were about 65% year-on-year right  
8           through the claim period.

9           MS KREISBERGER: Which alters the SSNIP, of course.

10                  Could I just take a moment to check I have covered  
11           the point.

12           MR RIDYARD: Of course. (Pause)

13           MS KREISBERGER: Just to add: so when you look at the data  
14           in the round, what you are seeing is, and you look at  
15           Mr Parker's three SSNIP tests, you have the price  
16           differential, the SPC analysis, and Mr Parker's fifth  
17           report factoring in calls, and you see that even  
18           factoring in calls, you see the large differential.

19                  Then the ARPU assessment, as I said, reflects  
20           decreasing calls usage, which means that calls costs are  
21           going down which is captured in the ARPU  
22           profitability --

23           MR RIDYARD: You are supplying less for the same price and  
24           therefore ... But then why -- then my query about why  
25           profits did not go up and up and up?

1 MS KREISBERGER: The last point I hope addresses that, which  
2 is of course all these increases were happening before  
3 the claim period. You actually only have -- if you take  
4 VOCs, there is one increase during the claim period,  
5 5.6%. So the price increases happen before, and you see  
6 that is then reflected in the ARPU which is maintained  
7 over the claim period at these very high levels, 65%.

8 MR RIDYARD: Yes, okay. Thank you.

9 MS KREISBERGER: So with that, I will turn to Mr Parker's  
10 assessment of the evidence, so that is the evidence  
11 which is probative of market definition before you get  
12 to limb 1. It is covered in our written closings. But  
13 the centrepieces at the market definition stage are the  
14 three SSNIP datasets, that is the triptych I referred to  
15 in opening, and given time constraints, that analysis is  
16 going to be the focus of my closing submissions today.

17 But I want to begin by showing you why Mr Parker's  
18 approach is the right one for working out whether SFV  
19 services are in a market in their own right, a market  
20 worth monopolising. Then I will address along the way  
21 why his approach is not only to be preferred, but the  
22 problems with Dr Jenkins' market definition analysis.

23 So on the question of why Mr Parker's approach is  
24 the correct one, I will deal with that in three parts.  
25 First, why Mr Parker was right to use BT data in his

1 SSNIP tests, I will then give an overview of his  
2 methodology, and then address why my submission is that  
3 Dr Jenkins is just looking in the wrong place.

4 So the first point I want to address is that  
5 Mr Parker, why he was right to use BT's pricing data as  
6 his main input in the SSNIP test. Now, the first point  
7 is that the dominant firm's price data is the standard  
8 approach, it is the standard input for the SSNIP test,  
9 and Dr Jenkins conceded that.

10 If we could turn up the Joint Experts' Statement,  
11 {OR-E/49/63}, proposition 5.2.14. It is the very first  
12 sentence at the top of the page:

13 "I agree it is standard practice to use the data  
14 from an incumbent with a large product share as a proxy  
15 for the data that would be available from a hypothetical  
16 monopolist if it existed."

17 So that much is common ground.

18 Now, Mr Parker had the advantage of being able to  
19 run the SSNIP test on the basis of actual pricing data  
20 from BT, and I say it is an advantage because it means  
21 that the SSNIP test is applied in this case to real  
22 world data. It is not confined to a mere framework for  
23 thought. The president described that recently in the  
24 *Hydrocortisone* case as a "speculative thought  
25 experiment".



1           Now, just to illustrate that for a moment. In  
2 a merger context, a competition authority, let us say,  
3 might be looking to see if the product which both firms  
4 supply, let us call them widgets, constitutes a market  
5 worth monopolising. Now, at that stage of the analysis,  
6 pre-merger, price levels may be competitive if a number  
7 of firms are supplying widgets, but the competition  
8 authority wants to know if the merged entity will  
9 acquire market power which would put it in a position of  
10 raising prices in the future.

11           Now, that is the kind of situation where the SSNIP  
12 test may be no more than a speculative thought  
13 experiment, and that means the competition authority  
14 would have to postulate whether the hypothetical  
15 monopolist could raise prices by a small amount above  
16 competitive levels without having direct evidence of  
17 that. So, for example, the competition authority might  
18 carry out a survey that asks customers how would they  
19 respond to a future price increase, and the pitfalls of  
20 those kinds of approaches are well known.

21           Now, Mr Parker, on the other hand, has not had to  
22 fall back on hypothesis in that way. He can just look  
23 at BT's actual prices and the actual increases that it  
24 has driven through over many years, and that enables him  
25 to test whether the hypothetical monopolist could raise

1 price by more than a SSNIP above competitive levels. So  
2 BT's prices are a reliable dataset.

3 But as you know, that is not Dr Jenkins' position.  
4 She objects to the use of BT data in the SSNIP test and  
5 that is because she argues that the HM and BT are not  
6 alike. Her contention is that only BT has a positive  
7 incentive to convert bundle customers -- to convert SFV  
8 customers into bundle customers and she says that makes  
9 BT a fundamentally different creature from the  
10 hypothetical monopolist. So this is the recapture  
11 point, you will recall. So that is the basis for her  
12 objection to BT data.

13 That brings me to the HMM test, the hypothetical  
14 multi-product monopolist test, it was a point that was  
15 well ventilated in the hot tub and it is addressed in  
16 our written closings but I would like to address you on  
17 it briefly.

18 Mr Ridyard honed in on a strong version and a weak  
19 version of the bundles recapture point, which you may  
20 recall you put to me in opening submissions.  
21 Dr Jenkins' evidence had majored on the strong version,  
22 and you can see that most clearly from {IR-E/18/55} at  
23 paragraph 3.64. She says there:

24 "BT had incentives to price SFV and bundle services  
25 so as to encourage switching from SFV to fixed voice

1 services sold in a bundle."

2 That is then contrasted with the hypothetical  
3 monopolist's incentives, to increase the price by enough  
4 to raise profits but not so much as to drive switching  
5 to other products.

6 So Dr Jenkins' logic was that BT has a positive  
7 incentive to convert SFV customers into bundle customers  
8 because selling bundles is a more profitable undertaking  
9 for BT than selling SFV services, and in the Joint  
10 Experts' Statement Dr Jenkins relied on gross margins to  
11 make that argument good.

12 That is the critique that Mr Parker responded to,  
13 and in the Joint Experts' Statement he pointed out that  
14 it is wrong to use gross margins, because his evidence  
15 is that true profitability involves looking at net  
16 margins which account for all the costs caused, directly  
17 and indirectly, by selling SFV services as well as  
18 a contribution to common costs, and when you look at net  
19 profitability, Mr Parker showed that SFV services are  
20 more profitable than bundles.

21 So Mr Parker responded directly to the premise of  
22 Dr Jenkins' claims about a recapture incentive and  
23 explained why she was wrong, particularly in her measure  
24 of profitability. He also made the broader point, you  
25 will recall, that a strategy of increasing your prices

1 to force SFV customers to switch to bundles is a very  
2 risky one, because you might lose those customers to  
3 rivals. I will come back to that.

4 But Mr Parker's response was sufficient to dispose  
5 of Dr Jenkins' objection to the BT price data because he  
6 found there was no financial incentive for BT to bounce  
7 lucrative SFV customers into the fiercely competitive  
8 bundles market. So on that basis, there was no  
9 difference between BT and the single product  
10 hypothetical monopolist in relation to this incentive.  
11 So there was no incentive. So that was sufficient at  
12 that stage.

13 But the weak version of the argument which  
14 Mr Ridyard articulated is that irrespective of positive  
15 incentives, for BT bundles recapture dulls the pain of  
16 SFV losses. In other words, that version, that weak  
17 version, disconnects the point from the comparative  
18 attractions of SFV versus bundles. It might not be more  
19 profitable to serve them as a bundles customer, but  
20 nonetheless they are bringing something to the table  
21 compared to a customer who is lost altogether. That is  
22 obviously right. It is more accurately described as  
23 a recapture effect, not an incentive.

24 Now, it was in response to that question from  
25 Mr Ridyard that Mr Parker identified the relevant

1 literature on how the market definition analysis should  
2 be approached in the situation where firms also benefit  
3 from sales in another product. That literature confirms  
4 that Mr Parker's approach to the SSNIP test and his use  
5 of BT price data for these purposes is the right one.

6 Now, the concept attracts different labels:  
7 hypothetical, cartel, inclusive, monopolist. Mr Parker  
8 refers to it as the hypothetical multi-product  
9 monopolist test, but the basic idea is that you adapt  
10 that test to market realities, not the other way round.  
11 So to adopt Mr Ridyard's language again, what you do not  
12 do is take a consciously blinkered approach to the SSNIP  
13 test. Your conception of it should reflect economic  
14 reality, not ignore it.

15 So where firms supply more than one product in  
16 practice, we should conceive of an HMM which does the  
17 same in order to delineate the market in a realistic  
18 way, because that reflects the HMM's ability to raise  
19 price in the focal product. In other words, you do not  
20 modify the data to fit the test, you modify the test to  
21 fit the data.

22 The conceptual point is covered in more detail in  
23 Parker 5 where he addresses in particular the US 2010  
24 merger guidelines which set out the hypothetical cartel  
25 test and also an illuminating paper from Dr Jenkins'

1 colleagues at Oxera, which is at {E/16.48/47}, just for  
2 your note.

3 So turning back to the facts of this case. We  
4 should conceive of the SSNIP test as asking whether an  
5 HMM which offers bundles as well as SFV services can  
6 increase price by more than 5-10% above the competitive  
7 level. The recapture effect boosts the HMM's ability to  
8 raise price profitably compared to the single product  
9 hypothetical monopolist for whom the blow of lost sales  
10 is not softened.

11 So, far from supporting BT's position, the recapture  
12 effect implies that the market is likely to be narrower  
13 rather than broader, and by using BT's data Mr Parker  
14 has correctly taken account of that effect in his SSNIP  
15 tests.

16 Once one takes that approach, the answer to market  
17 definition becomes very clear. Because here, all the  
18 main bundle suppliers also supply SFV services. So to  
19 cite Mr Ridyard again, as he put it during the hot tub,  
20 that is at {Day10/25:24}:

21 If an HMM covering both SFV services and bundles  
22 imposes a SSNIP, "there is nowhere else for the demand  
23 to go."

24 Now, it is telling that this test is relegated to  
25 a few short paragraphs right at the end of BT's long

1 written closings on market definition and, beyond  
2 a complaint about timing, BT does not have an answer to  
3 it. In fact, its expert, Dr Jenkins, accepted in the  
4 hot tub that it is likely that an HMM could profitably  
5 raise the price of SFV services. That was at  
6 {Day10/30:20-23}.

7 Indeed, BT's written closings, paragraph 314, make  
8 the same point. They say:

9 "It is hardly surprising that this [HMM] is likely  
10 to be able profitably to raise the prices of SFV  
11 Services alone."

12 Now, BT's argument seems to be that this is a vice,  
13 not a virtue of this test. BT says it cannot assist in  
14 deciding whether bundles are in the same market as SFV  
15 services but that completely misses the point of market  
16 definition. It is not meant to be an abstract  
17 philosophical enquiry about whether two products are in  
18 the same market, the exercise is to identify "effective  
19 and immediate constraints" on the focal product -- that  
20 is the Commission's language in its new notice on market  
21 definition -- in order to inform the assessment of  
22 market power.

23 If, in the real world, firms face less pressure  
24 because they benefit from switching then the market  
25 definition analysis needs to factor that in.

1           That is why we note, as we note at paragraph 100(g)  
2 of the CR's written closings, Ofcom approached its  
3 market definition exercise in 2017 on the footing that  
4 a hypothetical monopolist of SFV services would also  
5 supply bundles. So Ofcom also recognised, quite  
6 properly, that market definition needs to reflect the  
7 realities of the market under investigation.

8           Just then a final word on Dr Jenkins' evidence about  
9 recapture. It is obviously a point which she raised by  
10 way of attack on Mr Parker's SSNIP tests and I want to  
11 show you what she said about it in her second report,  
12 {IR-E/18/53}. Could we zoom in, please, on the  
13 footnotes. I certainly cannot read that. Thank you.

14           It is footnote 97:

15           "While the point that the hypothetical monopolist of  
16 the HMT only sells the goods in the candidate market is  
17 sufficiently uncontroversial that it does not receive  
18 any mention in any guidance documents, it is implicit in  
19 descriptions of how to implement the CLA. If one was  
20 supposed to make allowances for the hypothetical  
21 monopolist's ability to profit from diversion to goods  
22 and services outside the candidate market, this would  
23 affect the calculation of the critical loss. However,  
24 no such allowance is made ..."

25           Then she cites Padilla & O'Donoghue for that



1 proposition.

2 So she is saying there it is uncontroversial that  
3 you would only ever conceive of the hypothetical  
4 monopolist as a single product firm, and you see her  
5 quoting another textbook, not her own. BT's skeleton  
6 for trial also made the point that Mr Parker had not  
7 identified any literature supporting his approach to  
8 market definition.

9 Let me then show you, by contrast, Dr Jenkins' own  
10 academic commentary on this point {G/160/24}. It is the  
11 top paragraph. So this is her academic commentary:

12 "The notion of the hypothetical cartel made  
13 a reappearance in the 2010 Horizontal Merger Guidelines  
14 [in the US], which indicate that the concept of  
15 a hypothetical profit-maximising cartel may be used  
16 instead of a hypothetical monopolist if the pricing  
17 incentives faced by the actual suppliers in the market  
18 differ substantially from those of the monopolist  
19 because they sell products outside the candidate market  
20 as well."

21 If we just go back a page to paragraph 3.51.  
22 {G/160/23}, you see there that she describes the  
23 hypothetical cartel test as an idea which is "still  
24 useful when thinking about the principles of market  
25 definition".

1           So I am afraid that academic commentary is not  
2 consistent with her evidence in these proceedings where  
3 she has presented the single product HM, the  
4 deliberately blinkered approach, as uncontroversial.

5           Dr Jenkins proceeded to stick to the script in her  
6 third report on the issue and in the hot tub, refusing  
7 to concede the point, relying on the fact that she is  
8 not aware of any case applying it.

9           Now, this is a theme I will be returning to in  
10 relation to Dr Jenkins' evidence, but we have set out  
11 the Court of Appeal's recent judgment in the *Royal Mail*  
12 case. It is at paragraph 177 of written closings, but  
13 if we could go to it, that is at {G/98.2/60}.

14           If we could have a closer look at -- I think I gave  
15 a misreference, sorry. It is set out in our written  
16 closings but it is paragraph 177 of this judgment  
17 {G/98.2/61}:

18           "The [Tribunal] might also wish to confirm that all  
19 experts understand, and respect, what is entailed in  
20 owing a duty to assist the Tribunal (... duty of  
21 cooperation between the parties and the Tribunal). This  
22 is a duty with bite. The CAT is entitled to be assured  
23 that experts will give full and frank disclosure of  
24 anything, including prior relations with a client,  
25 impacting upon the objectivity and independence of their

1 opinion. The CAT is also entitled to expect experts to  
2 adjust their opinions, even to the detriment of their  
3 clients, in the light of evidence as it emerges. An  
4 expert whose heels remain firmly dug in, might find such  
5 obduracy taken into account, adversely, by the CAT in  
6 the final account."

7 MR BEARD: I am sorry, I am going to just raise an issue  
8 here. If what is being suggested is that Dr Jenkins was  
9 being obdurate, I think it is important to recall that  
10 the points that Ms Kreisberger were referring to were  
11 not put to Dr Jenkins in the course of  
12 cross-examination.

13 THE CHAIRMAN: Thank you.

14 Yes.

15 MS KREISBERGER: Now, she could have accepted that she  
16 failed to reflect her own academic commentary but chose  
17 not to, and BT continues to advance the consciously  
18 blinkered approach of no recapture effect for the HM.  
19 So that deals with why Mr Parker was right to use BT  
20 data.

21 THE CHAIRMAN: Yes.

22 MS KREISBERGER: So with that, sir, I was going to turn to  
23 the SSNIP tests.

24 I do not know, given the early start, if you are  
25 happy to proceed?

1 THE CHAIRMAN: Just give me one moment. (Pause)

2 Yes, what we are certainly going to do, we are going  
3 to break for lunch at 12.30 and resume at 1.30 so we  
4 have the same time period for morning and afternoon. We  
5 would not normally break quite yet, so if you want to  
6 keep going for a bit and then we will stop, yes.

7 MS KREISBERGER: Thank you, sir.

8 So turning to those SSNIP tests, but I am still  
9 taking matters at a high level, I will go into some of  
10 the detail later on.

11 So I would now like to address the central reason  
12 why Mr Parker's application of the SSNIP test is the  
13 right one, and then I will come on to Dr Jenkins'  
14 methodology and show you it is not a reasonable  
15 alternative.

16 First, there is no dispute between the experts that  
17 the SSNIP test is the right way to go. For your note,  
18 that is at {OR-E/49/42}. That is the Joint Experts'  
19 Statement, immediately under the heading "Framework".

20 So setting aside the recapture issue which I have  
21 just addressed you on, Mr Parker and Dr Jenkins are each  
22 asking the same question, which is whether a  
23 hypothetical monopolist of SFV services can profitably  
24 impose and sustain a small increase above the  
25 competitive price.

1           Now, Mr Parker's method for testing that is  
2           straightforward and it is direct. He goes straight to  
3           the BT price data to see if the data shows that BT has  
4           been able to increase its prices by the small increment  
5           above the competitive level, and the answer is  
6           a resounding yes, based on his three SSNIP datasets  
7           individually and taken together.

8           Now, again, by way of overview, and I am conscious  
9           we have already covered a little of this, first,  
10          Mr Parker shows that BT maintained standalone prices to  
11          SPCs that were much more than 5-10% higher than Dual  
12          Play prices for the same products. So that is the SPC  
13          price differential dataset.

14          Secondly, he shows that BT repeatedly raised  
15          the price of Line Rental while the main cost input, WLR,  
16          was falling. That is the familiar graph where you see  
17          sort of alligator jaws with Line Rental going up and WLR  
18          going down.

19          Thirdly, Mr Parker shows a reinforcing effect based  
20          on BT's calls prices.

21          Now, in response to a question from Mr Ridyard about  
22          their relative importance, Mr Parker described the SPC  
23          price differential analysis as the purest version of the  
24          SSNIP tests. That is because it provides a direct  
25          comparison of the standalone prices paid by SPCs against

1 the competitive benchmark of Dual Play prices.

2 Now, that dataset directly answers the salient  
3 question of whether there is any evidence of an  
4 effective price constraint from bundles on the prices  
5 charged to SPCs and it vividly demonstrates that there  
6 is not.

7 As Mr Parker explained in the hot tub, if bundles  
8 exerted any effective downward constraint on SFV prices,  
9 then the large differentials captured by that dataset,  
10 and I will take you to it, but that differential between  
11 prices paid by SPCs and Dual Play customers would not  
12 persist. They would "wither away", as Mr Parker put it.  
13 For your note, that is {Day10/48:1}.

14 So that is what the price differential dataset  
15 shows.

16 Then the other two SSNIP datasets really serve to  
17 reinforce those findings. They demonstrate BT's ability  
18 to drive through relative price increases in each of the  
19 focal products, Line Rental and calls.

20 So taking Line Rental first. The evidence shows  
21 that BT increased the price of Line Rental by 65%  
22 between 2009 and March 2018 when the BT Commitments came  
23 in, and by 129% between January 2009 and April 2023.  
24 That is at paragraph 139 of our written closings.

25 Now, given these vast increases in the monthly

1 prices, the monthly Line Rental prices observed since  
2 2009, against a backdrop of falling costs, there is not  
3 any doubt that an HM, HMM could effect a small price  
4 increase above the competitive level. On that basis  
5 alone, the SSNIP test is met even before you look at the  
6 reinforcing effect from calls.

7 Now, my submission is the Tribunal can therefore be  
8 satisfied, based on the evidence in the three SSNIP  
9 datasets, that the HMM can profitably drive through  
10 small price increases for SFV services taken together  
11 and separately, and that is because BT has done  
12 precisely that on a repeated basis over a period of many  
13 years, resulting on a cumulative basis in very large  
14 increases above the competitive level. That evidence is  
15 sufficient to prove to the civil standard that bundles  
16 did not effectively constrain SFV prices.

17 Now, before I turn to some of the detail in those  
18 datasets, I said I would also address in overview why  
19 Dr Jenkins' approach to the SSNIP test is inherently  
20 unreliable.

21 THE CHAIRMAN: I think that is probably ...

22 MS KREISBERGER: Is that a good moment to break?

23 THE CHAIRMAN: We will take a break, yes. Thank you.

24 (11.11 am)

25 (A short break)

1 (11.30 am)

2 MS KREISBERGER: Thank you, sir.

3 So I am just on Dr Jenkins' approach to the SSNIP  
4 test, and I said I would address you on why it is  
5 unreliable, just by way of overview before I turn to  
6 more detailed points.

7 Now, her analysis of market definition, and in fact  
8 BT's whole case on market definition, depends on  
9 ignoring the evidence on SFV prices and instead  
10 attempting to draw conclusions based on the levels of  
11 switching between SFV services and bundles. Now, that  
12 is the premise for her quantitative analysis, that is  
13 her SSNIP analysis, the so-called CLA, where she  
14 purports to identify price elasticities based on SFV  
15 switching levels.

16 Now, my core submission is that searching for  
17 answers in the switching data is fundamentally  
18 misconceived, and there are two reasons for that. The  
19 first reason is that she is just looking in the wrong  
20 place. Since the SSNIP test asks whether the  
21 hypothetical monopolist, HMM, could sustain small price  
22 increases above the competitive level, then the right  
23 place to look for evidence of increases is in the BT SFV  
24 price data. That is the data which provides direct  
25 evidence of the existence of or the absence of a price



1 constraint.

2 Now, in my submission that is an obvious point and  
3 I have addressed you on that.

4 Now, the second reason is that on the facts of this  
5 case, the switching data is essentially uninformative  
6 for the purposes of working out whether SFV prices are  
7 subject to a constraint, a price constraint from  
8 bundles. The reason for that is that the pricing abuse  
9 takes place against a background of product migration  
10 from Standalone Fixed Voice to bundles, with the  
11 consequence, as I addressed you on at the outset, that  
12 Standalone Fixed Voice markets are in a state of steady  
13 decline.

14 Now, that economic context is common ground and it  
15 finds expression in multiple BT documents. Just to give  
16 you one example, {F/833/9}, that is a July 2017 strategy  
17 document which you have seen, where BT identified that  
18 it should:

19 "... recognise declining markets and price  
20 accordingly to maximise value (eg split purchase  
21 Solus)."

22 Sorry, that is the penultimate bullet point on the  
23 page.

24 Now, the general shift from standalone to bundled  
25 fixed voice services is the secular decline, described

1 by Mr Parker, and we have reproduced Mr Parker's key  
2 graph on this in the written closings, if we could just  
3 turn that up, please. {IR-A/15/66}. It is  
4 paragraph 172. Sorry, have I got a bad reference?  
5 {IR-A/15/66}. Can we try paragraph 172. {IR-A/15/47}.  
6 That is strange.

7 MR BEARD: I think ... I wonder if -- actually, although it  
8 says "Class Representative's Submissions" at the top,  
9 I wonder if in fact those are BT's submissions, which is  
10 why it went to the ARPU -- I do not know whether it is  
11 in the electronic bundling.

12 EPE OPERATOR: Sorry, whose closing submissions are they?

13 MS KREISBERGER: Class Representative's.

14 MR BEARD: But these I think are BT's.

15 MS KREISBERGER: For some reason that has been mis ... Ah,  
16 that is going to create a little confusion as we go  
17 through.

18 MR BEARD: I think if you swap over the numbers, presumably  
19 {A/16} will be the Class Representative, will it? Or  
20 {A/14}? So good they have been uploaded twice.

21 EPE OPERATOR: Was there not a reference to this earlier?

22 MR BEARD: If you go to OR-A.

23 MS KREISBERGER: Let us try {OR-A/15/66}. Thank you very  
24 much, and if we could zoom in on the graph, Figure 3.  
25 Thank you. I will try and stick to the OR.

1           Now, so this is the figure that demonstrates the  
2           slow and steady decline in SFV customers and you  
3           immediately see that that decline is independent of  
4           movements in price, and you may recall Mr Parker  
5           emphasised in particular that you do not see any change  
6           in the rate at which the SFV customer base declined  
7           during the long period in which Line Rental prices were  
8           frozen.

9           Just so you have it, the underlying data on this is  
10          at {OR-H/201/4}. That is the pricing data on the price  
11          freeze period. That is really for your note.

12          If perhaps we could go back to having {OR-A/15/66},  
13          thank you.

14          It is striking when you look at this how constant  
15          the rate of decline is. You see some minor percentage  
16          variations but no significant slowing in the rate of  
17          decline during that period when prices were frozen which  
18          is what you would expect to see if switching were driven  
19          by small changes in price.

20          Now, the secular trend distinguishes these facts  
21          from the ordinary case where you are working out if  
22          product A competes with product B. So just very  
23          briefly, to give a stylised example, let us say you are  
24          working out if cola drinks compete with lemonade. In  
25          the ordinary case, switching to lemonade, observed in

1 response to small price changes in cola, might be  
2 informative for a market definition exercise. But then  
3 let us say there was an increasing perception that cola  
4 carries health risks and the drinks are in long term  
5 decline, whereas lemonade boosts your vitamin C levels  
6 and so is becoming increasingly popular. In those  
7 circumstances, it would be obviously wrong to ascribe  
8 switching to lemonade to increases in cola prices,  
9 because if that switching would have happened anyway,  
10 because of a general shift, then the cola price change  
11 did not cause that switching. That is the same analysis  
12 that applies here.

13 The secular trend away from SFV and towards bundles  
14 means that you cannot treat observed switching levels as  
15 switching which is driven by small price changes and  
16 that is the question under the SSNIP test. So that is  
17 a wrong assumption on these facts because the market is  
18 shifting to bundles as a result of changing preferences.

19 Now, my submission on this point finds direct  
20 expression once again in Dr Jenkins' own textbook. You  
21 might recall I put these passages to her in  
22 cross-examination. It is {G/160/74}, if we could turn  
23 that up.

24 If we could look at paragraph 3.184 and the  
25 paragraph below:

1            "There are markets where consumers migrate from one  
2 product to another over time. Many modern examples come  
3 from the digital world:... analogue TV to digital TV;  
4 from VHS to DVD and Blu-ray [and so on]. Our economic  
5 (and social) activities are increasingly moving online  
6 [and some more examples]. Product migration occurs in  
7 other industries as well ... from wooden and then metal  
8 tennis rackets to ... graphite and other high-tech  
9 materials ..."

10           Below:

11           "Sometimes the shift from one product to the next  
12 happens overnight, but often the old and new products  
13 are sold alongside each other for some time. In  
14 competition investigations, the question that regularly  
15 arises is whether the two products form part of the same  
16 relevant market -- are the old and new products regarded  
17 as close substitutes? As we have seen ... the  
18 hypothetical monopolist test is defined in terms of  
19 relative price changes. Product migration is not (or  
20 only to a small extent) driven by small price changes.  
21 It depends on developments in technology and consumer  
22 preferences. Yet this is not to say that it should be  
23 ignored when defining relevant markets. Product  
24 migration can still have implications for whether  
25 a product is worth monopolising."

1           If we could then go down to the next page, please,  
2           {G/160/75}, she poses the question there in the heading,  
3           "Does the new constrain the old?"

4           If we can look at 3.187:

5           "The other question is whether -- and at what  
6           point -- the new product imposes a pricing constraint on  
7           the old product. An example is the analysis of the  
8           leased-lines market by OPTA ... in 2005 [that is an  
9           example] a leased line is a permanently connected  
10          communications link between two premises ... At the  
11          time, business users had begun to switch from leased  
12          lines to other data services, such as those based on  
13          internet protocol technology. While these newer data  
14          services had more variable capacity and required more  
15          outsourcing of network management functions, customers  
16          considered them a lower-cost alternative ... Having  
17          noted a high degree of migration from leased lines to  
18          the newer data services between ... OPTA nonetheless  
19          concluded that the movement between the products was not  
20          relevant for market definition:

21          "'Switching and migration from service A to B does  
22          not automatically constitute demand substitution.  
23          Demand substitution requires that switching from A to B  
24          is caused by changes in the price difference between A  
25          and B. In this case, there is a price pressure.

1 Migration, however, can result from other factors, such  
2 as the emergence of a ... new service ... or changes in  
3 user preferences. Consumers migrate as a result, where  
4 this migration no longer depends on further small (5% to  
5 10%) changes in the price difference between A and B."

6 Then 3.188, just the first two sentences is fine:

7 "Is this an overly restrictive interpretation of the  
8 [HM] test? What ultimately matters is whether the old  
9 product is a product [that is SFV services] worth  
10 monopolising."

11 Then down to the next page, {G/160/76}.

12 3.189:

13 "Yet some caution is still required ... The  
14 migration process may not be uniform across all groups  
15 of consumers in the market. After the early adopters of  
16 the new product and then mass migration by others, there  
17 may be situations where the consumers who remain with  
18 the old product are those with the highest willingness  
19 to pay or the lowest ability to switch. Because of  
20 these remaining consumers, the old products may still be  
21 a market worth monopolising."

22 In other words, the relevant question is can you  
23 increase the price of the old product above the  
24 competitive level? If so it is a market worth  
25 monopolising, because the price for the old product is

1 not effectively constrained by the general shift away to  
2 the new product. That is precisely the analysis  
3 conducted by Mr Parker.

4 Now, coming back to the facts of this case,  
5 Mr Matthew for BT helpfully confirmed in his written  
6 evidence that product migration is the correct way to  
7 understand the shift we see from the standalone service  
8 to bundles. That is at {IR-E/19/75}. Could I ask you  
9 to please read paragraphs 157 and 158. (Pause). Then  
10 just over the page when you have got to the bottom of  
11 that. {IR-E/19/76}.

12 THE CHAIRMAN: Yes.

13 MS KREISBERGER: So in other words, Mr Matthew is  
14 acknowledging the secular trend, that is switching which  
15 is not price-related.

16 Then could we just turn up {G/162/18}. This is the  
17 Commission's new market definition notice that was  
18 published after these proceedings began. Recital 52 at  
19 the bottom of the page. The Commission stresses there:

20 "By contrast, evidence of customers shifting away  
21 from a product as a result of factors unrelated to  
22 changes in relative supply conditions, such as a change  
23 in preferences or consumption patterns over time, are  
24 less informative for demand substitution."

25 So that is both of BT's experts.



1 MR DORAN: I am sorry to intervene, but is there  
2 a difference here between the SPCs, who were in  
3 a functional bundle in any event and who presumably are  
4 changing for reasons different to the VOCs?

5 MS KREISBERGER: No, because all we know is that the secular  
6 trend is taking in both SPCs and VOCs. So it is right  
7 to say that some VOCs migrate to bundles, in other  
8 words, they decide to take broadband as well.

9 MR DORAN: Would that not be price led? It would be cheaper  
10 to get a bundle than ...  
11 I am posing the question. I have no idea of the  
12 answer.

13 MS KREISBERGER: Sorry, sir, I think you mean the price  
14 level for SPCs.

15 MR DORAN: Yes.

16 MS KREISBERGER: That is why I showed you the secular trend.

17 MR DORAN: That was an SFV graph, was it not?

18 MS KREISBERGER: That is SFV, that is all, all parties, so  
19 that is everybody.

20 MR DORAN: So that is everybody, that is them both together?

21 MS KREISBERGER: Yes.

22 MR DORAN: I suppose the second question is that the  
23 evidence from BT was that responses to price from the  
24 VOC bit of their customer base was not immediate on a  
25 price announcement, but might not be triggered for some

1 while. So you might get a smoothing in the graph?

2 MS KREISBERGER: Yes, and I think Mr Parker responded on  
3 that point that, well, then you might see sort of  
4 ratcheting that is over a couple of months --

5 MR DORAN: So it depends on the --

6 MS KREISBERGER: -- you would still see a connection between  
7 price and switching, not this smooth decline.

8 MR DORAN: Depending on how fine-grained the graph is.

9 MS KREISBERGER: Is it helpful to bring back the price  
10 freeze table which is ... We have seen that.  
11 {OR-H/201/4}. This is all SFV customers and you see the  
12 percentage changes during the price freeze period. That  
13 is for -- you see no change between 17 and 18, that is  
14 the entire year, so that accounts for -- if it was  
15 smoothed out over a few months then you would expect to  
16 see a dramatic decline in switching away during the long  
17 price freeze period and you do not see that.

18 MR DORAN: Thank you.

19 MS KREISBERGER: Coming back to the concept of the secular  
20 decline, BT describes it as an "entirely novel" concept,  
21 but you have seen that Dr Jenkins describes it without  
22 any difficulty in her textbook, Mr Matthew refers to it,  
23 and the European Commission refer to it in their notice  
24 on market definition. So this is well trodden  
25 territory.

1           Now, what I would like to do is show you Mr Parker's  
2 explanation of why his approach to the SSNIP test is the  
3 correct one against this background of secular decline.  
4 If we could go to {Day9/113:1}, please. Picking it up  
5 at line 3, Mr Parker said -- this is in concurrent  
6 evidence:

7           "Yes, so I think I would say the start point for  
8 market definition is looking at whether there is a set  
9 of products over which it is possible to exert market  
10 power if you are a monopolist, and trying to identify  
11 what are the significantly important competitive  
12 constraints that would mean that the hypothetical  
13 monopolist could not raise prices when you expand the  
14 market.

15           "So it is not about identifying what is the closest  
16 substitute, it is about identifying whether any  
17 substitutes are sufficiently close and important to lead  
18 to price constraints. That is just a kind of point of  
19 distinction, I think, between the way we are both  
20 looking at it.

21           "It seems to me that starting from that perspective,  
22 then the question is: if you raise prices as the  
23 hypothetical monopolist, holding everything else  
24 constant, can you do that profitably? If people are  
25 switching away and would switch away in any event, we

1 had a bit of a discussion of this earlier. If people  
2 are going to switch away in any event, then those are  
3 people you would lose in any event. So you should not  
4 think about, as the hypothetical monopolist, you should  
5 not [over the page] think about: those are customers  
6 I am losing because I put my price up. You should think  
7 about all the customers you lose because you put  
8 the price up.

9 "I am going to lose 50% of my customer base anyway,  
10 whether I put the price up or not, so you need to look  
11 at the next change, I think, from changing the price, in  
12 this case of SFV services, and say, well, how much of  
13 that general switching away is to do with the price  
14 change? Because that then tells me what is profitable,  
15 because you are looking at a counterfactual  
16 analysis: I am going to lose 50% of the customers. If  
17 I put the price up 10% maybe I will lose 55/60%. But  
18 I really care about the 5-10% of additional switching,  
19 I do not care about all the 60%, because I am going to  
20 lose that in any event. So that is what I have  
21 described as a secular trend ..."

22 If we could pick it up again at page -- the same  
23 day, page 128, line 24. Sorry, is that page 129?  
24 {Day9/128:24} at line 24:

25 "I think for me the purpose of an analysis of

1 switching is to identify whether the level of switching  
2 that has been observed is sufficient to place  
3 a competitive constraint on the focal product in  
4 question and what this is telling me is I cannot see  
5 how -- I can see if you take this view [there] was all  
6 this price-related switching. How is it that BT has  
7 responded to that by continuing putting up its price."

8 You see there Mr Parker asking himself the same  
9 question which Dr Jenkins set out in her textbook: do  
10 bundles impose a pricing constraint on SFV services?

11 Then if we pick it up again at line 16:

12 "But it seems to me that the point of a switching  
13 analysis in a hypothetical monopolist test is to  
14 understand whether it leads to a competitive constraint.  
15 It is not an end in itself ... I think the discussion  
16 about secular trend, I think we both agreed there is  
17 one. It is a question of how big. To me the relevant  
18 question is: was it enough to prevent BT from raising  
19 its prices and that to me is the ... most important lens  
20 that you need to apply to the level of switching. So  
21 I am not disputing that there was a level of switching.  
22 I just do not think it was enough to constrain BT's  
23 pricing."

24 That crystallises the defect in Dr Jenkins' approach  
25 to the SSNIP test. She is asking the wrong question.

1 She asks if there was switching and how much, instead of  
2 asking: is there evidence of a price constraint? As the  
3 aphorism goes, you cannot get the right answers if you  
4 are asking the wrong questions.

5 She then compounds that error by making  
6 a fundamentally bad assumption. She assumes that the  
7 vast majority of observed switching was, in the words of  
8 her textbook, "switching driven by small price changes".  
9 In other words, she largely dismisses the significance  
10 of the secular trend.

11 This is how she put it in her concurrent evidence.  
12 That is {Day9/122:8}:

13 "I am excluding those for two reasons, as I said.  
14 Part of that is the secular trend part, which is people  
15 who are dying or moving home or moving overseas, those  
16 sorts of reasons, and the other is moving to another SFV  
17 product, because I want to exclude those from my  
18 hypothetical monopolist.

19 "I could work out for you how many are there, but  
20 I am really trying to only include people who are  
21 switching to other products other than SFV in the CLA  
22 analysis."

23 Then Mr Ridyard said:

24 "But you are not including, in the secular trend,  
25 people who switch from a Voice contract to a bundle

1 because the internet has just got more attractive to  
2 them and who would have switched to the bundle even if  
3 prices had not changed?

4 "Dr Jenkins: For those customers I make the 20%  
5 adjustment.

6 "Mr Ridyard: What is the basis for [it]?"

7 "Dr Jenkins: Judgment on -- just saying, okay, it is  
8 hard to know exactly what is going on there."

9 Just pausing there. Apart from the fact that she  
10 obviously misdefines the secular trend, it is a very  
11 strange answer from an empirical micro-economist,  
12 because her answer to the critical question of how much  
13 switching is in fact down to the secular trend is  
14 essentially guesswork, she has not got any empirical  
15 data, and her guesswork just so happens to be very  
16 favourable to her client's case. She is treating  
17 four-fifths of switching as switching which is  
18 responsive to price changes, and she conceded in fact in  
19 the hot tub that on her view of the world, switching is  
20 basically down to price.

21 If we go to -- is it line 2 there? Yes, we are on  
22 the right page:

23 "Now, in my view [she says] price does have an  
24 impact on that decision, and that is shown by the events  
25 study that I did, which showed that when you increase

1 the gap between the Voice Only element and the bundle,  
2 you had a reduction in the amount of switching that went  
3 on in that period.

4 So in a sense, that, yes, there may be things going  
5 on that make bundles attractive and you have price  
6 changing at the same time, so how -- I do not see how  
7 you can disentangle those two things. That is what  
8 is -- the price is an integral part of what it is  
9 driving at."

10 Now, Mr Beard made precisely the same point in his  
11 opening submissions. You might recall that I put this  
12 to Dr Jenkins in cross-examination. He said:

13 "[This is] the first case... that I have ever been  
14 in where an economist says that switching is  
15 price-unrelated in any way, and that intuitively feels  
16 like quite a strange proposition."

17 That was {Day2/133:1-4}.

18 In its written closings, BT says that the secular  
19 trend is an "entirely novel" concept. That is at  
20 paragraph 6, {IR-A/16/4}.

21 Whether or not Mr Beard or BT have come across it  
22 before, I have shown you that both Dr Jenkins in her  
23 textbook and Mr Matthew in his evidence in this case  
24 acknowledge the phenomenon of product migration, as does  
25 the Commission. That is switching which happens



1 independently of price changes.

2 So with that, then, I will move on to the results of  
3 Mr Parker's SSNIP analysis. So now I am going to some  
4 of the detail. That was the overview.

5 THE CHAIRMAN: Yes.

6 MS KREISBERGER: I am going to take them in turn. I am  
7 going to start with the SPC price differential dataset,  
8 the purest version, and given it is central, I will take  
9 you back to it, if I may. So that is {IR-E/3/80}. Just  
10 to remind you of the relevant graphs, that is Figure 7.

11 Now, this is the pre-Commitments phase, Q4 2015 to  
12 Q2 2018, and this -- thank you, that is much clearer --  
13 this compares prices paid by SPCs for standalone Line  
14 Rental and standalone standard broadband compared to  
15 the prices paid for Dual Play bundles made up of the  
16 same products. I am conscious you have spent quite  
17 a lot of time gazing at this graph.

18 The yellow triangles are the Dual Play promotional  
19 prices. They are at the bottom. The blue diamonds are  
20 Dual Play list prices. Then you see at the top the red  
21 squares, that is what SPCs with BT Broadband, split  
22 service customers, are paying. These are Line Rental  
23 prices, I should say. The green dots are SPCs who have  
24 BT Line Rental and TalkTalk broadband which you see  
25 ceased in 2017 Q2.

1           So that is Figure 7, and it is the differential  
2           between the bottom lines and two top lines which show  
3           you that is the differential that Mr Parker said would  
4           "wither away" if Dual Play prices were a constraint on  
5           SPC prices.

6           Now, if we could go to Figure 8 on the next page,  
7           {IR-E/3/81}, that is the same exercise covering the same  
8           period, so still pre-Commitments but this is superfast  
9           broadband, and there you see you also -- you have, if we  
10          could -- thank you. The squares with the cross are  
11          Virgin Media superfast broadband, so that comes in  
12          during this period, and you see again the gulf between  
13          what SPCs are paying and what Dual Play customers are  
14          paying.

15          Then if we could go down to paragraph 4.96(a) which  
16          is on {IR-E/3/82}. So that is the -- you see there  
17          (a) (i), these are the standard broadband list price  
18          differentials in percentage terms and absolute terms, so  
19          these are the additional amounts paid by Split  
20          Purchasers for the identical services supplied in Dual  
21          Play bundles.

22          Then (a) (ii), I cannot read out the figures, those  
23          are the differentials for standard broadband at  
24          promotional prices, and you see there that is an even  
25          bigger gulf. So you have it in Table 8, if we go down,

1 {IR-E/3/83}, that is the full data there. So that is  
2 the full dataset for relative price differences. So  
3 those are the percentage savings that an SPC could make  
4 by switching to a Dual Play bundle both at list prices  
5 and promotional prices for each quarter.

6 If we go down to Table 9, that was the -- Table 8 is  
7 standard broadband. Table 9, that is the same  
8 information for superfast broadband {IR-E/3/84}. Then  
9 let us move forward to the data for the post-Commitments  
10 period, page {IR-E/3/98}. That is Figure 10, you see  
11 there that is 2018 Q2 to 2022 Q2. Those are the  
12 differentials for standard broadband. Again, you see  
13 the very large gulf between the Dual Play prices and  
14 the prices paid by Split Purchasers. TalkTalk comes  
15 back onstream.

16 Then could we go down to Figure 11. So this is  
17 standard broadband, Figure 11 is superfast broadband.  
18 {IR-E/3/99}. Again, you see the large gulf there  
19 between the split purchase and the Dual Play prices  
20 mapped out.

21 To show you the same data, paragraph 4.132(a)(i),  
22 {IR-E/3/99}, there you have the absolute amounts for the  
23 whole period and the relative percentage differences.  
24 So (a)(i), again that is standard broadband with Dual  
25 Play list prices.

1           If we go over the page, {IR-E/3/100}, that is  
2           standard broadband at promotional prices. Then at  
3           paragraph 4.132 (b) (i), that captures the differentials  
4           for superfast broadband at list prices, and (b) (ii) is  
5           superfast broadband at promotional prices. I am  
6           obviously avoiding reading out the numbers. You can see  
7           them there.

8           To complete the picture, Table 10 sets out the  
9           percentage differentials by quarter, {IR-E/3/101}. You  
10          see there very large differentials. That is for  
11          standard broadband, and Table 11 for superfast  
12          broadband.

13         MR RIDYARD: Ms Kreisberger, just so we understand the  
14          premise here, the premise is that if you find -- if you  
15          have got two products, let us call them A and B, and you  
16          have got someone selling those things separately and you  
17          have got someone else selling them as a bundle, A plus B  
18          together, the proposition is that if the price of A plus  
19          the price of B is more than 5% greater than the price of  
20          the A plus B bundle, then there is an excess price, that  
21          shows there are separate markets.

22         MS KREISBERGER: Correct. So it is a really vivid  
23          illustration, when you look at the graphs, of the  
24          differential being more than a SSNIP, and that was  
25          Mr Parker's point. We are only looking at Split

1 Purchasers, obviously. That differential in price could  
2 not be sustained if the lower lines, the Dual Play  
3 bundles, were constraining.

4 MR RIDYARD: Yes, understood. So that is saying that  
5 wherever you have a bundle price -- wherever there is  
6 a bundle discount, if the bundle discount is more than 5  
7 or 10%, then you are always going to get separate  
8 markets?

9 MS KREISBERGER: Yes, because it is not an effective  
10 constraint.

11 MR RIDYARD: Okay, so that is the ... The proposition that  
12 it has to be a SSNIP above the competitive price, can  
13 you also infer from this that that must be above the  
14 competitive price if it is falling foul of this SSNIP  
15 test?

16 MS KREISBERGER: Yes, because the competitive price is the  
17 Dual Play benchmark price, and that is -- actually  
18 I will come on -- I have some references to give you on  
19 where you should be looking.

20 MR RIDYARD: I think the thing that is puzzling me about  
21 this whole analysis is if there were genuine synergies  
22 in providing A and B together, then that is saying it is  
23 less costly to provide A and B together than to provide  
24 A separately from B. So if there is a cost explanation  
25 for this bundle, bundle pricing that we observe, is it

1 still right to say that the price of the individual  
2 components must be excessive, must be above the  
3 competitive level?

4 MS KREISBERGER: That is not the proposition, so I think  
5 that is the point. The point here, because we are just  
6 on market definition, I agree, once you get to excessive  
7 pricing you have to be looking at ARPU and limb 1. The  
8 proposition here is purely whether there is an effective  
9 price constraint, so the underlying costs are irrelevant  
10 for these purposes. The question is: does the low price  
11 of bundles prevent, constrain BT from charging high  
12 prices for Standalone Fixed Voice?

13 MR RIDYARD: The static price difference alone can answer  
14 that question?

15 MS KREISBERGER: Well, you say "static", but we are looking  
16 at it over a long period of time, in fact.

17 MR RIDYARD: Yes, it is static in the sense that at any  
18 point in time, you are saying --

19 MS KREISBERGER: Yes.

20 MR RIDYARD: It is the relative prices at any point in time  
21 which is the clincher for you.

22 MS KREISBERGER: It is the relative prices. So if  
23 Dr Jenkins' proposition were correct, SPCs would switch  
24 to bundles in response to these differentials, which are  
25 so far above the differential, you know, the small price

1           increase, the differential that the SSNIP test focuses  
2           on, BT would not be able to put up its SFV prices to  
3           these levels if it were constrained by bundles.

4           I am not making, at this point, on the basis of this  
5           assessment, a qualitative submission about prices being  
6           excessive, it is simply the question of whether bundles  
7           are exercising an effective constraint on the SFV price.  
8           If they are not, they are not in the same market  
9           according to the SSNIP test.

10          Mr Armitage reminds me that of course the red  
11          squares relate to split service customers who take both  
12          products from BT.

13       MR RIDYARD:   Yes.

14       MS KREISBERGER:  Now, those differentials that I have just  
15          shown you are on access prices, but you may recall, and  
16          I think this is an important point in light of your  
17          earlier question, Mr Ridyard, that Mr Parker also  
18          conducted a sensitivity check to factor in calls prices.  
19          Now, that sensitivity check does not affect the absolute  
20          amounts that I showed you because there is no reason to  
21          think that an SPC customer would have a different level  
22          of call expenditure to a Dual Play customer.  So in  
23          terms of absolute amounts, it is a working assumption  
24          that they cancel each other out when you are looking at  
25          the difference.  But of course factoring in calls does

1 change the percentages that I have shown you here.

2 MR RIDYARD: Yes.

3 MS KREISBERGER: Now, Mr Parker shows that any difference  
4 when you factor in calls in percentage terms, and of  
5 course we are thinking about this against the background  
6 of the SSNIP test, 5-10%, he shows that any difference  
7 is marginal, because the differentials are really vast,  
8 they are way above a SSNIP.

9 If we could turn up {E/5.1/23}, paragraph 3.3.11.  
10 So Mr Parker gives the example there of an SPC in Q --  
11 sorry, page 23 {E/5.1/23}. So it is subparagraph (III)  
12 (b) on that page. So he gives the example there of an  
13 SPC in Q2 2018 paying 99% more than a Dual Play customer  
14 on a promotional package, and this analysis is based on  
15 the assumption that calls are priced at cost, that calls  
16 are at competitive level, which is not Mr Parker's  
17 evidence, so he assumes that in BT's favour for the  
18 purposes of this check.

19 Now, these sensitivity check figures in Parker 5  
20 have not been challenged.

21 MR BEARD: I am not sure that is right. I think they have.

22 THE CHAIRMAN: We will come to it in -- either they have or  
23 they have not and we will come to it in due course.

24 MS KREISBERGER: We can hear from Mr Beard.

25 THE CHAIRMAN: Yes, indeed.



1 MS KREISBERGER: Before I make some points in relation to  
2 those datasets that I have just shown you from  
3 Mr Parker, I just want to show you the equivalent  
4 analysis conducted by Ofcom. That is at {IR-C/2/97} and  
5 it is Figure A8.43.

6 Now, Ofcom conducted a similar exercise, same  
7 framework, essentially, and they looked at the absolute  
8 price differentials between prices paid by SPCs and  
9 prices paid by Dual Play customers. Now, if we start  
10 with the left-hand column, you see prices for standalone  
11 broadband for each of BT, Sky and TalkTalk, and then  
12 Ofcom gives a weighted average price. So that is  
13 standalone fixed broadband. Ofcom explains below that  
14 it was unable to factor Virgin Media in.

15 Ofcom then adds in the cost of BT Line Rental. That  
16 is at footnote 179, a bit lower down on that page:

17 "We use a Line Rental price of £18.99 ..."

18 If we just go back to the table, Ofcom then sets out  
19 Dual Play prices, promotional prices in the third column  
20 and list prices in the fourth column, and you see there  
21 that Ofcom finds that on average SPCs are paying £14.57  
22 more than Dual Play promotional prices. It is at 5, the  
23 bottom of column 5, and £8.01 more at list prices.

24 Then just to show you A8.133 above this table, and  
25 it just summarises the points I have just shown you

1           there:

2           "... on average standalone fixed broadband customers  
3           pay around £20 for a fixed broadband service and  
4           a further £18.99 for Line Rental. Compared to the  
5           average Dual Play prices which Split Purchasers would  
6           pay if they bundled these services, they are paying an  
7           average of just over £14.50 more per month (compared to  
8           promotional ... prices) or £8 more per month (compared  
9           to standard Dual Play prices) by buying them as  
10          standalone services."

11          So it is the same analysis.

12          Could we turn back to Mr Parker's third report,  
13          {IR-E/3/86}, and pick it up at paragraph 4.104.

14          Mr Parker here refers, if we could focus in on the  
15          bottom of the page, 4.104, Mr Parker is referring to  
16          this analysis by Ofcom. So:

17          "Ofcom ... carried out an analysis of the prices  
18          paid for voice and broadband services by Dual Play and  
19          Split Purchase Customers, using price and customer data  
20          collected from various providers to compare prices for  
21          the most frequently purchased packages. Ofcom's  
22          analysis demonstrated that Dual Play prices were  
23          typically significantly lower - particularly on packages  
24          that are most frequently bought by customers - than  
25          the prices paid by Split Purchase Customers. Ofcom's

1 analysis compared the cost of purchasing a Dual Play  
2 bundle including standard broadband, with the cost of  
3 purchasing the voice and broadband components separately  
4 (as a standalone broadband service with BT Standard Line  
5 Rental). Ofcom found that monthly price differential -  
6 i.e. the saving that a Split Purchase Customer would  
7 make from switching to the relevant Dual Play bundle -  
8 in February 2017 was ..."

9 Then Mr Parker actually sets out each of the  
10 relevant price differentials for a BT customer, so he  
11 does not just cite the averages at the bottom of the  
12 table, so for a BT customer, for a Sky customer and for  
13 a TalkTalk customer. So that is each type of SPC,  
14 according to the standalone broadband product they buy,  
15 these are the average price differentials.

16 Then on paragraph 4.105, Mr Parker said:

17 "Ofcom found that savings of a similar magnitude  
18 were available for Split Purchase Customers switching to  
19 Dual Play when it repeated the analysis in August 2019.  
20 The savings estimated by Ofcom are largely within the  
21 range of the estimated savings I report above for Split  
22 Purchase Customers purchasing SFV services and  
23 standalone standard broadband services."

24 So Mr Parker found support for his own conclusions  
25 on price differentials in the Ofcom analysis.

1           Then coming back to Mr Ridyard's question, Mr Parker  
2           also confirmed in the hot tub that the focus of this  
3           differentials assessment should be on the promotional  
4           prices. That is set out in our written closings,  
5           paragraph 133...Actually it is paragraph 133,  
6           subparagraph (c)(iii).

7           I will read it out to you. Page 51, so I think we  
8           need to be in {OR-A/15/51}. Thank you.

9           At the bottom paragraph, this is citing the  
10          transcript:

11          "... Mr Parker explained, promotional prices are  
12          'prices that were being offered in the market that were  
13          sufficiently remunerative' for the firms concerned to  
14          offer them, and so constitute a 'good proxy for  
15          a competitive [Dual Play bundle] price'."

16          You see there also the reference to the Ofcom 2016  
17          Communications Market Report:

18          "... Ofcom observed that the 'prevalence and depth'  
19          of promotional discounts on bundles was increasing, with  
20          95% of all [Dual Play] plans and 98% of triple play  
21          plans including some element of discounts in 2015."

22          So this is not a market where people hang around on  
23          old back book prices. The focus of competition is on  
24          the promotional prices.

25          Subparagraph (iv) there, that captures Dr Jenkins'

1 first report. So Dr Jenkins says -- she makes the same  
2 point, it is common ground:

3 "... 'large promotional discounts' on the  
4 incremental price of broadband [she described as] the  
5 'key driver' of 'strong price competition' prior to the  
6 ASA Ruling ... and that operators continued to  
7 'frequently offer promotional discounts' when  
8 competition 'shifted to the total bundle prices' after  
9 the ASA Ruling (citing evidence that 71% of all DP  
10 bundles offered by [these providers] included  
11 a promotional discount across all individual months  
12 between November 2016 and March 2022, with 65% of all  
13 [Dual Play] bundles including a promotional discount of,  
14 on average, at least £5 a month)."

15 So pausing there. What Mr Parker's price  
16 differential datasets capture is that BT is price  
17 discriminating between SPCs and Dual Play customers,  
18 targeting high prices at the former group only. That is  
19 the gulf between the top and bottom rows, and the top  
20 rows, those prices are not eroded by the competitive  
21 Dual Play prices.

22 Just coming back to the criteria for price  
23 discrimination, and that is where you define markets by  
24 customer group, they are now captured in the  
25 EU Commission's notice on market definition, a very

1 recent notice. That is {G/162/28}, recital 88. The  
2 Commission cites three criteria, three cumulative  
3 conditions for finding a narrower distinct market for  
4 a distinct group of customers. The first is that:

5 "It is possible to identify clearly to which group  
6 an individual customer belongs at the moment of selling  
7 the relevant product to the customer ..."

8 That is the first condition. The second is  
9 arbitrage or trade between customers is unlikely and  
10 thirdly, that the discrimination is non-transitory.

11 The SPC differentials' dataset confirms that these  
12 three criteria are met. As to the first, BT obviously  
13 knows if it is selling someone voice services as part of  
14 a bundle or standalone, and it charges them accordingly,  
15 that much is common ground, and it is also common ground  
16 that landlines cannot be arbitrated.

17 Mr Parker's datasets capture both the scale of the  
18 differentials in prices, much more than the SSNIP  
19 threshold and also their enduring nature. That is (c).  
20 Because these differentials go back to at least 2015.

21 So the data is unequivocal. These are price  
22 discrimination markets which tells you that bundles are  
23 not exerting a constraint.

24 Now, you might recall that Dr Jenkins originally  
25 endorsed the three standard criteria approach adopted by

1 regulators. She did that in the uncontroversial context  
2 of SPCs and VOCs being in the same market  
3 pre-Commitments when BT could not discriminate between  
4 those two groups. So that was a different point which  
5 is common ground between the parties, but to support her  
6 assessment she referred to the three standard criteria.

7 Once she understood that the Class Representative's  
8 case is that BT is discriminating against SFV customers  
9 compared to Dual Play customers she rapidly added some  
10 further criteria.

11 Now, I am not going to go back over those points  
12 which I put to her in cross-examination. They are at  
13 the CR's written closings, paragraphs 117-121. It does  
14 raise a concern that the apparent shifting of the  
15 goalposts was to best serve her client's case.

16 Now, BT in its written closings, so paragraphs  
17 370-379, leans heavily into the distinction between  
18 second and third degree price discrimination that  
19 Dr Jenkins referred to in the hot tub. But what BT is  
20 saying there is that the existence of large amounts of  
21 switching, so we are back to switching, shows that  
22 customers could escape the effects of price  
23 discrimination. This is where I started in opening.  
24 That ignores the fact that millions of SFV customers did  
25 not switch and that migration to bundles that did not

1 occur -- sorry, that did occur, an error, the migration  
2 to bundles, the secular trend, was insufficient to make  
3 the price differential in Mr Parker's Figure 7 and so on  
4 wither away.

5 So it is the customers who continue to pay the  
6 higher price that matters for the purposes of price  
7 discrimination, for the purposes of defining your market  
8 by reference to the customer group. They are the  
9 boiling frogs.

10 That would be a convenient moment to break, sir.

11 THE CHAIRMAN: Yes, just a moment, please. (Pause).

12 Thank you very much. 1.30 then, please.

13 MS KREISBERGER: Thank you, sir.

14 (12.32 pm)

15 (Luncheon Adjournment)

16 (1.30 pm)

17 THE CHAIRMAN: Yes.

18 MS KREISBERGER: Thank you. I just wanted to come back  
19 first to a question Mr Ridyard asked me, which was  
20 whether a 5% discount in a bundle price is sufficient to  
21 find separate markets, and I think my affirmative  
22 response was a little overemphatic.

23 It is not my submission that a 5% difference in  
24 a bundle price, a 5% discount, would be sufficient. My  
25 submission is based on the evidence here, and the



1 evidence here involves two features that I think would  
2 assist on this point.

3 The first is the scale of the price differential  
4 between split purchase prices and Dual Play prices.  
5 These are not at the level of 5-10% that you need for  
6 a market definition test, they are at 50-100%, so my  
7 submission is based on these facts. When you see price  
8 differential data over many years, this data is since  
9 2015, persisting in the market at this sort of order of  
10 magnitude, then that is certainly evidence that these  
11 products are in different markets and the bundles are  
12 not exercising a constraint. So I am not addressing --

13 MR RIDYARD: 11% would get you home, would it?

14 MS KREISBERGER: In a sense, I just do not need to answer  
15 the sort of marginal question. We are so far --

16 MR RIDYARD: I understand that. But in terms of  
17 conceptually the approach, if the SSNIP is about a 5-10%  
18 price rise, then let us put 5% to one side, but 10.5%  
19 would logically get you there, surely?

20 MS KREISBERGER: It would for the price differential, but  
21 I was going to make another point which I thought might  
22 be within, somewhere within your question, which is if  
23 you can point to one discount of 5%, would that be  
24 sufficient to make a market -- I just wanted it to be  
25 clear that is not my submission.

1 MR RIDYARD: That is clear, yes.

2 MS KREISBERGER: These are averages for different --

3 MR RIDYARD: Sustained. I understand that.

4 MS KREISBERGER: So that is ...

5 So with that, I then come on to BT's criticisms of  
6 the price differential dataset, so I will deal with  
7 those in turn.

8 Dr Jenkins has three responses. Her first response;  
9 and really her principal response, is to refuse to  
10 engage with this data. If we call up {OR-E/49/54}, this  
11 is the Joint Experts' Statement. At 5.2.5, you see  
12 there the proposition is Mr Parker's proposition about  
13 price differences amounting to greater than a SSNIP.  
14 She says, absolutely starkly:

15 "I am not in a position to agree or disagree.

16 "I have no reason to doubt the numbers reported by  
17 Mr Parker ..."

18 Then she notes that it does not cover every provider  
19 of standalone broadband.

20 So she has no reason to doubt the numbers, and she  
21 confirmed in concurrent evidence, in response to  
22 a question from the Chairman, that she has not presented  
23 any alternative data.

24 Now, my submission is that is a very serious lacuna  
25 in her evidence. The only question which the Tribunal

1 has to determine on market definition is whether bundles  
2 pose any effective price constraint on SFV services. If  
3 bundles were an effective constraint, as BT alleges,  
4 then you would expect to see, as I submitted, any  
5 differential which emerged between these two sets of  
6 prices to be eroded, not to persist over many years.

7 Now, that is why it is obvious that as an antitrust  
8 economist asking the question whether bundles are an  
9 effective constraint on SFV price, you need to consider  
10 that price differential dataset for yourself.

11 Now, the need to conduct that exercise becomes more  
12 obvious here, on these facts, in circumstances where  
13 Ofcom conducted exactly that exercise in 2017, finding  
14 no evidence of a price constraint from bundles, I showed  
15 you that data. It should have become more obvious still  
16 once Mr Parker had done so in his report for trial,  
17 Parker 3, where he reached the same conclusion as Ofcom  
18 that large price differentials persist, which show that  
19 there was no effective constraint coming from bundles.

20 But Dr Jenkins does not run the analysis, and she  
21 preserved her ability in the Joint Experts' Statement to  
22 say, well, I am not in a position to agree or disagree.  
23 She does not engage.

24 Dr Jenkins' second response to this data under  
25 cross-examination was to insist that the reason why she

1           avoided engaging with this price differential dataset  
2           was that you cannot infer from price list analysis  
3           anything that is useful. For your note, that was  
4           {Day12/152:11-13}.

5           Now, she was referring there to standalone broadband  
6           prices. It is a wholly unconvincing riposte from  
7           someone who did not actually do the analysis, and she  
8           does not explain why the expert regulator thought that  
9           this was a useful exercise, but she says nonetheless she  
10          decided it was not.

11          Now, Dr Jenkins said multiple times in her evidence  
12          that Mr Parker had mistakenly captured non-voice bundles  
13          of broadband with TV or mobile services as buyers of  
14          standalone broadband.

15          So at this stage she began, although it was not  
16          a plank of her evidence, she was arguing that the data  
17          is unsafe, and hinging within it --

18          THE CHAIRMAN: Do you mean in respect of the broadband only  
19          pricing data --

20          MS KREISBERGER: Yes.

21          THE CHAIRMAN: -- as forming part of the two elements of the  
22          SPC bundle?

23          MS KREISBERGER: Yes, that is right.

24          THE CHAIRMAN: The point being made was this might not be  
25          just broadband, is that right?

1 MS KREISBERGER: That is correct. That is exactly the point  
2 she was making. So she was saying there were hidden  
3 non-voice bundles in there.

4 She did accept under cross-examination that she had  
5 not presented any evidence for that hypothesis. That is  
6 {Day12/156:7}. But the problem is worse than that. It  
7 is not just that her position was essentially  
8 speculative, Mr Parker had already rebutted the point  
9 based on facts in the public domain in his third report.  
10 If we go to {IR-E/3/91}, paragraph 4.108(b) I am sorry,  
11 I think we might need to go back a page. {IR-E/3/90}.

12 So:

13 "... BT criticises the assumption that Split  
14 Purchase Customers purchasing SFV Services are paying  
15 standalone broadband list prices, whereas they may be  
16 receiving broadband services as part of a bundle that  
17 includes additional services such as Pay TV and/or  
18 mobile services (for which the bundle price is lower  
19 than the list price of standalone broadband)."

20 So that is the point you made, sir.

21 "Whilst this is possible for some customers,  
22 I consider that it is highly unlikely to make a material  
23 difference to my or Ofcom's analysis. In particular,  
24 Ofcom's evidence shows that the take-up of such bundles  
25 is extremely small. Moreover, both Ofcom's analysis and

1 my analysis focus [on] price comparisons on the services  
2 most commonly chosen by customers ..."

3 Then if we could go down to footnote 312 and 313 at  
4 the bottom of that page. So Mr Parker picks up that  
5 point, because it was made in BT's response to the CPO  
6 application, so this is not a new point. Then the  
7 evidence he cites, you see there:

8 "For example, in 2019, Ofcom estimated that bundles  
9 including fixed broadband services and Pay TV or mobile  
10 telephony services accounted for 8% of all bundle  
11 take-up."

12 He quotes an Ofcom pricing trends document from  
13 2019.

14 You might recall I took Dr Jenkins to the 2022  
15 version of that Ofcom report and in 2022 it showed, for  
16 example, that only 7% of all bundles did not include  
17 a fixed voice service. That is at {Day12/156:23}, and  
18 that is {C/401/1} and I think that was on page 30. That  
19 is the document I took her to there.

20 Once again, Dr Jenkins refused to accept that this  
21 contradicted her contention that Mr Parker's evidence  
22 was unreliable. If we go to page 158, {Day12/158:10},  
23 she said -- I put it to her that contradicts the  
24 evidence she gave in the hot tub about these TV bundles,  
25 and she said:

1           "I do not think it does, because we know that Split  
2           Purchase Customers are actually a relatively small  
3           proportion of the overall market, so that 7% could be  
4           the Split Purchase Customers."

5           She is just speculating that it could all be SPCs.

6           Then she says:

7           "I would need to -- I cannot do the maths ..."

8           Given that Mr Parker had already identified this  
9           point in his evidence back in September of last year,  
10          she had had plenty of time to do the maths. In fact,  
11          she did not need to wait for Mr Parker to bring this to  
12          her attention because she was the expert advancing this  
13          point. She should not have been making unfounded  
14          assertions about non-voice bundles without first  
15          checking the Ofcom data.

16          Now, despite how this came out in the evidence, BT  
17          continues to press this point in its written closings.  
18          Could we turn up paragraph 232 of BT's closings,  
19          page 58. {IR-A/15/58}. I think we need to go to the  
20          OR, it is the same problem. {OR-A/15/58}. It is  
21          paragraph 232.

22          MR RIDYARD: That is the Class Representative's.

23          EPE OPERATOR: They have been replaced over the lunch break.

24          Sorry.

25          MS KREISBERGER: So let us try this, {IR-A/16/59}. Right,

1 so we are back on track.

2 Yes, if I could ask you to read paragraph 232,  
3 please. (Pause).

4 So in its written closings, BT is relying on this  
5 unsupported speculation from Mr Bunt about TV bundles  
6 even though, in concurrent evidence, Dr Jenkins conceded  
7 that she did not have any evidence for the point, and  
8 I put Ofcom's quantitative analysis of non-TV bundles to  
9 her and TV bundles -- sorry, non-voice TV bundles. I am  
10 afraid this is not putting the full picture on this  
11 point before the Tribunal.

12 That brings me to Dr Jenkins' third response. She  
13 then postulated that the observed SPC price  
14 differentials can be explained by price dispersion in  
15 a wider SFV bundles market.

16 Now, the argument seems to be that the Standalone  
17 Fixed Voice service is of higher quality than a bundle  
18 and therefore commands a higher price. It is described  
19 as a "price premium" in BT's written closings. Just for  
20 your note, that is at paragraph 244.

21 Now, there are three reasons why that argument  
22 fails. First of all, as Oxera, her own consultancy,  
23 submitted to Ofcom in 2017, there are no quality  
24 differences because SPCs and Dual Play customers are  
25 buying precisely the same products, just under two



1 contracts rather than one. That is, just for your note,  
2 at {OR-C/6/24} at paragraph 2.2.1.

3 The second reason is that the economic reality and  
4 product migration case is that people remain on the old  
5 product by default, and, as Dr Jenkins puts it in her  
6 textbook, if the old product is not constrained by the  
7 new, those customers who do not shift end up paying  
8 higher prices, so that is not a reflection of quality.  
9 The fact that there might be some SPCs in the group who  
10 prefer to split for whatever reason is not evidence of  
11 a higher quality product which commands a price premium.  
12 They are still just buying a fixed line.

13 Then if I could ask you to turn up {IR-E/18/57}.  
14 This is Dr Jenkins' second report. You see there the  
15 heading at the top of that page, "The evidence on price  
16 dispersion". I wonder if you could just, perhaps most  
17 efficiently, just cast your eye over this section, and  
18 you see there the point I want to draw out. Although  
19 the heading is "The evidence on price dispersion", she  
20 does not actually advance any evidence in this section.  
21 What she does is quote from her own and another  
22 textbook. That is at 3.71, so perhaps if we go over the  
23 page {IR-E/18/58} and 3.72. I will come back to that.

24 Then at 3.73, here she engages in some free-wheeling  
25 speculation that:

1           It could be that they prefer to have separate bills  
2           for the two products ..."

3           So she is offering some thoughts about why SPCs  
4           might split.

5           Then she says:

6           "They may simply have a preference for the  
7           flexibility offered by [two separate] contracts ..."

8           So you see there she is not citing any empirical  
9           data, it is essentially just a hypothesis.

10          Then there is another troubling aspect to this  
11          section which I put to her in cross-examination. So if  
12          we go back to 3.71 {IR-E/18/57} and, sorry, then over  
13          the page to 3.72 {IR-E/18/58} where she refers to her  
14          textbook, she describes her own position on price  
15          dispersion as longstanding, and you see there she cites  
16          a paragraph of her textbook which seems to support her  
17          position, so she bases her longstanding position  
18          directly on the commentary in her textbook.

19          Let us turn it up. {G/160/45}. If we could look at  
20          the top half of the page, please. Thank you.

21          "Are absolute price differences relevant?" The  
22          first paragraph is the one she cites, which seems to  
23          support her position. I am going to read them out, but  
24          just note that this entire section is just two  
25          paragraphs long.

1           "The hypothetical monopolist test is about reactions  
2           to relative price changes between products. It is not  
3           about absolute price differences. Branded soft drinks  
4           may provide a competitive constraint on own label soft  
5           drinks, and hence be included in the market for the  
6           latter, despite being more expensive. Customers make  
7           a price-quality trade-off, so if the price difference  
8           between the two products becomes too narrow they may  
9           switch from own-label to branded (and branded customers  
10          may switch to own label if the price difference becomes  
11          too large).

12          "However [she goes on], just as differences in  
13          product characteristics sometimes provide a useful  
14          sense-check on market definition, so do differences in  
15          price. For example, if you can buy a business ticket  
16          for a flight from ... Heathrow to ... Linate Airport at  
17          7.30 am next Wednesday for £580, while an economy ticket  
18          from ... Stansted to ... Bergamo ... at 7.45 am that day  
19          costs £58, chances are that these two flight tickets do  
20          not provide much competitive pressure on each other.  
21          They seem to be in separate relevant markets. How can  
22          you establish this? It may be that there is a break ...  
23          in the chain of substitution ... Or it may be that you  
24          have to define separate markets along various  
25          dimensions, such as by geography ... or by type of

1 customer ..."

2 That is exactly what Mr Parker has identified here,  
3 different customer groups paying very different prices.

4 Now, when I put this to her in cross-examination she  
5 refused to accept that the example in the paragraph  
6 which she omitted from her evidence was in fact similar  
7 to Mr Parker's approach. She insisted you still have to  
8 look at relative price changes but that is of course  
9 something Mr Parker does as well.

10 So this raises a question whether the omission of  
11 the second paragraph from her written evidence, which  
12 supports Mr Parker's approach, is in line with her duty  
13 to assist the Tribunal.

14 So that addresses Dr Jenkins' responses.

15 Now finally -- that is Dr Jenkins, but finally BT  
16 has sought to criticise the inputs which Mr Parker has  
17 used. Now, that was the central focus, you will  
18 remember, of Mr Beard's cross-examination of Mr Parker  
19 on market definition and it forms a predominant part of  
20 their written closings as well on this topic.

21 Now, my submission is this is inappropriate.  
22 The price differentials analysis was set out in Parker 3  
23 last year and, in fact, Mr Parker referred to the  
24 existence of the large price differentials based on  
25 Ofcom's analysis of that point in his first report.

1 That was back in January 2021, pre-CPO.

2 So you have my submission that Dr Jenkins has had  
3 ample opportunity to comment on it in her reply report  
4 and in the Joint Experts' Statement. If she thought the  
5 analysis was susceptible to attack on the basis that the  
6 inputs were somehow faulty, she chose not to; in fact,  
7 she went further and confirmed that she has no reason to  
8 doubt the numbers.

9 Against that background, Mr Beard's approach to  
10 cross-examination of Mr Parker was impermissible. The  
11 president has specifically deprecated conduct of this  
12 sort in the *BGL* case. That is set out at paragraph 129  
13 of our written closings. To use the President's phrase,  
14 this was pulled "like a rabbit out of a hat" with no  
15 advance notice. It was an ambush, and it was untethered  
16 to any expert assessment from Dr Jenkins. Now, that is  
17 not how the exchange of expert evidence in this Tribunal  
18 is intended to work.

19 In any event, Mr Beard's criticisms in  
20 cross-examination fell flat. Now, we have addressed  
21 this in full at paragraphs 129-135 of the written  
22 closings, so I am not going to repeat all the points,  
23 but I would like to draw out two of them.

24 Mr Beard made an unforced error by criticising  
25 Mr Parker for including Virgin Media's product in his

1 Dual Play category given that Virgin Media did not have  
2 a standalone broadband product.

3 THE CHAIRMAN: Just one second, please. (Pause).

4 MS KREISBERGER: That is in relation to Figure 7. Just in  
5 case it is helpful to have on the screen, it is  
6 {IR-E/3/80}, that is Figure 7.

7 THE CHAIRMAN: Right.

8 MS KREISBERGER: Mr Parker pointed out, when he was probed  
9 about this, that by including Virgin Media's faster and  
10 more expensive products in the Dual Play prices he had  
11 in fact reduced the gap between SPC and bundle prices.  
12 So, if anything, by including it Mr Parker was being  
13 generous to BT. So excluding, just so you have it,  
14 excluding Virgin Media would lower the blue diamonds and  
15 the yellow triangles.

16 THE CHAIRMAN: Sorry, just a moment.

17 MS KREISBERGER: I am so sorry. (Pause)

18 THE CHAIRMAN: Excluding Virgin Media would ...

19 MS KREISBERGER: Would lower the blue diamonds and the  
20 yellow triangles.

21 THE CHAIRMAN: Right, thank you.

22 MS KREISBERGER: Funnily enough, of the many criticisms  
23 which BT now seeks to level at this dataset in their  
24 written closings, it has left this one out.

25 Now, Mr Beard also criticised Mr Parker for not

1 including a couple of data points from Sky in Figure 7.  
2 Mr Parker did cover those data points in his third  
3 report, I have already shown you that. That is  
4 {IR-E/3/87}, paragraph 4.104, (c) and (d). Mr Parker  
5 sets out the price differentials which Ofcom identified  
6 for a Sky customer, and I showed you that Mr Parker then  
7 went on to confirm that Ofcom's findings are in line  
8 with his own conclusions. Those are Ofcom's findings as  
9 set out here, including the Sky findings.

10 Now, the reason why the Sky data points are not  
11 in Figure 7 is that Sky had not consented to disclosure  
12 in these proceedings, and that is -- his Figure 7 is  
13 based on the disclosure of the data provided to Ofcom.  
14 He did not have it.

15 In any event, we have shown in our written closings  
16 it makes no difference on any view, but he has taken  
17 account of it here.

18 Then there is a further stage. BT has sought, after  
19 close of evidence, to introduce new analysis on this  
20 point, and this is something I am going to come back to,  
21 because it is not the only point on which BT has sought  
22 to introduce new analysis in its written closings. It  
23 goes without saying that it is improper to try and do  
24 that at this stage.

25 In fact, we prepared a hand-up. There are three

1 instances and we thought it might just be useful to hand  
2 this up so you have this. (Handed)

3 I am on point 1 on the new price dispersion  
4 analysis. BT has produced what it calls a new Figure 7  
5 and a new Figure 8 in its written closings.

6 THE CHAIRMAN: Just a moment. (Pause)

7 MS KREISBERGER: It is paragraph 239 of BT's written  
8 closings which is at page 60 {OR-A/16/60}, the graphs  
9 are on page 61.

10 So this is the new analysis. Now, we have not been  
11 told who prepared this analysis. We assume it has been  
12 conducted by Dr Jenkins' team but that has not been  
13 specified. It is not supported by a statement of truth  
14 and no underlying data pack has been disclosed. So the  
15 Class Representative's team cannot understand or engage  
16 meaningfully with these graphs and I invite the Tribunal  
17 to reject these attempts to quietly sneak in new  
18 analysis embedded in the written closings at this stage.  
19 The CR's experts have had no opportunity to engage with  
20 this and the Class Representative has no opportunity to  
21 test BT's experts. That is a breach of process.

22 It is particularly egregious here on these figures  
23 given that BT has had Mr Parker's analysis since  
24 September last year, and Dr Jenkins has been at pains to  
25 point out that she has not reviewed Mr Parker's data and



1 cannot comment.

2 I would also observe that BT itself does not have  
3 much -- seem to have much confidence in its new graphs  
4 because at paragraph 239 it introduces them as "data  
5 which would look something like this".

6 To the extent that BT is trying to show that Dual  
7 Play packages were offered at different prices,  
8 Mr Parker made clear in the hot tub that given the  
9 competitive nature of the market, average prices of the  
10 appropriate competitive benchmark, either average  
11 promotional prices where competition is focused or  
12 averages of list and promotional prices, for your note  
13 that is {Day12/37:7-18}, and that addresses the outlier  
14 point. These are averages, it is not based on a single  
15 discount that one might see in the market.

16 So in any event, this analysis appears to make no  
17 difference even taking it at face value.

18 So that concludes my submissions on Mr Parker's SPC  
19 price differential dataset.

20 I am going to deal with his other two SSNIP datasets  
21 just briefly, if I may.

22 So Mr Parker does not just look at these absolute  
23 price differences and percentage price differences  
24 between SPCs and Dual Play customers, but he also looked  
25 at the relative price changes in each of the individual

1 components of both Line Rental and calls.

2 Now, I just want to return, if I may, to  
3 Mr Ridyard's question about ARPU, and the reason I do  
4 that now is really to rephrase my submission on the  
5 point that these datasets are useful and they are  
6 consistent with the ARPU data. I am conscious that  
7 Mr Ridyard described it as something of a puzzle, and my  
8 submission is that it is not puzzling. It is all  
9 consistent, it is all pointing in the same direction.  
10 So if I might just make sure my submission on this is  
11 absolutely clear.

12 So Mr Ridyard asked me today whether the nearly flat  
13 ARPU during the claim period casts some legitimate  
14 questions over reliance on Line Rental and calls  
15 increases at the market definition stage. So you have  
16 now seen the price differentials analysis and the  
17 sensitivity in Parker 5 which shows that the Line Rental  
18 price differentials hold. Even if one factors in calls  
19 at cost throughout the claim period, you still observe  
20 the large, very large differentials, 99%.

21 We also know that before the claim period there was  
22 a marked decline in WLR costs, the wholesale costs, and  
23 since calls volumes were in decline, calls costs were  
24 also in decline.

25 Now, Mr Ridyard's observation today was you are

1 supplying less for the same price, but then my query  
2 about why profits did not go up and up and up, and that  
3 is what I want to address.

4 In fact, the upshot of the points around SFV  
5 profitability, the upshot about SFV profitability is  
6 that it increased substantially before the claim period.  
7 I just want to show you that. {IR-C/2/25}. These are  
8 the Annexes to Ofcom's Provisional Conclusions in 2017.

9 If we could look at Figure A5.10, you see there  
10 estimated gross margins for Line Rental and calls, and  
11 what you see is that all the action, in other words, the  
12 increase in margins, is happening -- has happened. It  
13 is happening by 2015. So that takes you right up to the  
14 start of the claim period.

15 Then within the claim period you see profitability  
16 for SFV services remaining fairly static, and that is  
17 because BT were taking a hit on revenues, the ARPU  
18 revenues, due to lower usage, lower calls usage. But  
19 for precisely the same reason, they were making costs  
20 savings.

21 So we need to consider the static ARPU in the claim  
22 period in the context of Ofcom's scrutiny of the matter.

23 As I said, in the claim period, as I said earlier  
24 today, there was only one Line Rental increase during  
25 the pre-Commitments part of the claim period, so the

1           VOCs part of the claim period, and we know from the  
2           evidence of Mr Bunt that BT's decisions to freeze Line  
3           Rental were as a result of Ofcom looming over BT's  
4           shoulder. That is at paragraph 564 of our closings,  
5           and, just for your note, {Day7/57:7-16}.

6           Just to sum up the point, during the claim period  
7           unit prices, this is for Line Rental and calls, unit  
8           prices continued to go up as they had done for many  
9           years before the claim period, but the reason why that  
10          does not translate into higher ARPU, i.e. revenue, is  
11          because -- so revenue per line -- is because of the  
12          decline in calls volumes during the claim period. But  
13          that does not, of course, offset the increases in  
14          profitability that you see here prior to the claim  
15          period.

16       MR RIDYARD: There were increases in Line Rental to the SPCs  
17          during the claim period?

18       MS KREISBERGER: Yes, it carries on to 2022. But it carries  
19          on this trend and, as I said, it is offset by the  
20          reduction in usage, so profitability stays flat even  
21          though prices continue to go up.

22       MR RIDYARD: Yes. Right.

23       MS KREISBERGER: It does not come back down.

24       MR RIDYARD: No, no. But you do not get -- even with the  
25          Line Rental increases during the claim period to the

1           SPCs, you do not get an increase in profitability.

2           MS KREISBERGER: Because it is offset by the usage, yes.

3           MR RIDYARD: Yes.

4           THE CHAIRMAN: Can I just interject here, and following on  
5           from something that Mr Ridyard asked earlier on, and  
6           I appreciate Dr Jenkins has also done a Line Rental  
7           analysis, but why is ARPU the wrong indicator to use at  
8           the SSNIP test stage? I know it is common ground for  
9           limb 1, but why are we not using it at the SSNIP test,  
10          the market definition stage?

11          MS KREISBERGER: We are, essentially. So Mr Parker's  
12          evidence, and it is in Parker 5, and he made the point  
13          in the hot tub, is he does rely on limb 1 for the  
14          purposes of the market definition analysis. So that was  
15          my point in opening, really. You would not ordinarily  
16          do that full, detailed breakdown of the cost-plus  
17          benchmark and the price at market definition stage  
18          because you would traditionally -- you would look at the  
19          unit prices, which is what Mr Parker has done.

20          THE CHAIRMAN: I follow that. I follow the conceptual  
21          argument that limb 1 could be used to inform market --  
22          the logically prior market definition question.

23                 But leaving that aside, why would you not use ARPU  
24          as the appropriate proxy for price at the market  
25          definition stage?

1 MS KREISBERGER: Yes, so he has. I mean, it has been -- you  
2 follow the data in the reports in relation to limb 1,  
3 but Mr Parker put in his written evidence "I also rely  
4 on that when I am reaching conclusions about market  
5 definition". So he relies on all of it. So it is not  
6 purely a conceptual point.

7 THE CHAIRMAN: No, but his primary dataset, the price  
8 differential is based on the unit price to the  
9 customers, not ARPU.

10 MS KREISBERGER: Yes, but it is not to the exclusion of  
11 taking account of ARPU, so it is -- one way to put it  
12 would be it is ... I hesitate to use the term "rough and  
13 ready", but ... Sorry, I am being beckoned.

14 THE CHAIRMAN: I think you are being asked for  
15 a consultation, yes. (Pause)

16 MS KREISBERGER: I think I would like to add, under  
17 instruction, I am reminded that the Line Rental  
18 analysis, so the price differential dataset, that is an  
19 ARPU analysis because it is unit prices. The monthly  
20 Line Rental is the price charged to customers, yes, per  
21 line. That is per line. So that is an ARPU, that is an  
22 ARPU price.

23 THE CHAIRMAN: But it is not the same as an ARPU that is  
24 flat.

25 MS KREISBERGER: Because it is looking at Line Rental.

1 THE CHAIRMAN: Only.

2 MS KREISBERGER: Yes.

3 MR RIDYARD: Average Line Rental.

4 MS KREISBERGER: Exactly.

5 MR RIDYARD: ARPU is the whole picture, is it not? It is  
6 all the revenue as a consumer that I pay for my annual  
7 contract.

8 MS KREISBERGER: So what Mr Parker has done is he looks at  
9 ARPU for Line Rental because it is price per line, he  
10 then runs the sensitivity -- on the differential dataset  
11 he runs the sensitivity check for calls, so calls are  
12 factored in, and then he looks at relative price changes  
13 for Line Rental and calls separately. So that is --  
14 when he looks at Line Rental, he looks at ARPU for  
15 calls -- for Line Rental on its own, access, and then he  
16 conducted an ARPM and ARPU SSNIP test for calls.

17 So really the key difference is that it is done  
18 separately. The reason why it looks different under  
19 limb 1, as I said, is the usage point, but he is running  
20 an ARPU assessment.

21 MR RIDYARD: I do not -- I can see what you are saying, but  
22 I do not think this really answers the whole -- my  
23 puzzle, as I mentioned earlier. Because the latter, the  
24 comparison of the voice charges year-on-year is  
25 obviously going to be just -- it would be a per minutes

1 type analysis, price per minutes, but it would not take  
2 account of the falling, the effect of falling call  
3 volumes on revenues.

4 I mean, if ultimately what we are worried about here  
5 in the damage calculations in the limb 1 analysis is how  
6 much revenue BT is getting from these customers compared  
7 to how much it is costing them to supply them, that is  
8 the fundamentals of the case, then a market definition  
9 analysis that just looks at Line Rental is only looking  
10 at part of the price. An analysis that just looks at  
11 call prices, call per minute prices is not getting at  
12 the whole picture because volumes are changing  
13 substantially from one year to the other, and it seems  
14 to me that the best way of getting those things all into  
15 one view at one time is looking at total ARPU, in other  
16 words, the total revenue that BT gets from me as  
17 a customer year-on-year and whether that is too much  
18 compared to how much it is costing BT to provide it.

19 MS KREISBERGER: But just to ensure you have the point,  
20 Mr Parker does look at ARPU for calls. That is in  
21 Parker -- I can give you the reference. That was in  
22 response to the Tribunal's request. So Mr Parker looks  
23 at calls on an ARPMs basis, but also uses the same data  
24 and presents it on an ARPU basis. So he has essentially  
25 done the ARPU, he has run the ARPU analysis separately



1           for Line Rental and calls.

2       MR RIDYARD: Right.

3       MS KREISBERGER: I will take you to the evidence on that in  
4           a moment to show you.

5       THE CHAIRMAN: You can come back to this whenever you want.

6       MS KREISBERGER: I am grateful.

7       THE CHAIRMAN: It is a point that has been concerning us or  
8           interests us, and from my perspective, I am sure I am  
9           probably missing something, but if the fact that ARPU  
10          was flatlining, or something like it, is because  
11          notwithstanding the increase in Line Rental or changes  
12          in the call price, the decreasing call usage has an  
13          effect on revenue per customer, then when you are  
14          looking at any given customer in the group at that  
15          particular point in time, overall, and it may be because  
16          they are making choices about not using the phone as  
17          much for calls, but overall those customers are not  
18          going to be paying any more than they were before.  
19          Overall.

20       MS KREISBERGER: The revenue is static, but of course --

21       THE CHAIRMAN: The revenue from each -- the average revenue  
22          ...

23       MS KREISBERGER: Per user.

24       THE CHAIRMAN: Per user, yes.

25       MS KREISBERGER: But that is why I showed you A5.10, because

1           you see this steep incline running up to 2015. Now,  
2           those increases have not been reversed in the claim  
3           period, they are maintained. So the flatlining that you  
4           observe is during the claim period, that is right, and  
5           that is the usage effect, but it is on the back of this  
6           sharp incline in margins prior to the claim period.

7           THE CHAIRMAN: That goes back to the argument that whatever  
8           may or may not have been happening in terms of overall  
9           increases in the claim period, it is already starting  
10          from a point which is too high, putting it bluntly.

11          MS KREISBERGER: Yes, it is.

12          THE CHAIRMAN: Right. Thank you.

13          MS KREISBERGER: Thank you, sir, and I may take you up on  
14          the offer to come back to it.

15          THE CHAIRMAN: Yes, but go back to wherever you were. We  
16          just wanted to raise the point with you again.

17          MS KREISBERGER: No, I am grateful.

18                 If we could turn up {OR-E/49/247}, that is the Joint  
19                 Experts' Statement. This is the -- I am so sorry, I may  
20                 have a bad page number. It may be 246. It is the page  
21                 before. {OR-E/49/246}. That is the one.

22                 Now, this is the very familiar Line Rental price  
23                 increase chart which I described as the jaws of the  
24                 alligator, and you see there WLR coming down over the  
25                 period while the Line Rental prices are going up.

1           Please turn up our written closings at  
2 paragraph 139. Page 53. So we should be safe with  
3 {IR-A/15/53} now, I think. No, we need to go to  
4 page 53. Yes, paragraph 139. I think we need to go  
5 over the page. So there we are setting out the price  
6 increases and you see there the numbers for VOCs.  
7 {OR-A/15/54}. So these are the percentage increases in  
8 the price of Line Rental, 65%, and the absolute amounts,  
9 £11.50 to £18.99, and for SPCs Line Rental prices  
10 increased by 129%, that is £11.50 to £26.35.

11           Now, it is trite to say that the SSNIP test only  
12 requires small price increases above the competitive  
13 level. It is obviously met by increases of this order  
14 of magnitude against a background of decreasing costs.

15           Now, Dr Jenkins tried to tackle this one by  
16 confining the price increase to the claim period, which  
17 for VOCs is only 2.5 years, during which time there was  
18 only one price increase. Albeit still above the SSNIP  
19 level, it was 5.6%.

20           If we turn up {OR-E/49/52}. That is JES 5.2.3.  
21 That is where Dr Jenkins refers to -- she isolates  
22 a 5.6% increase between October 2015 and March 2018.

23           Now, as well as masking the full extent of the price  
24 increase by taking it by that time period, that is an  
25 unprincipled approach to the SSNIP test. The SSNIP test

1 does not depend on showing a small increase to  
2 prevailing prices during the period under investigation.  
3 The question it poses is whether the prevailing price  
4 can be raised by more than 5-10% above the competitive  
5 level. So it does not matter at all whether any actual  
6 price rise takes place during the claim period or takes  
7 place before it and is then maintained during the claim  
8 period with no increase in costs. That is addressed in  
9 our written closings at paragraph 142.

10 Now, Dr Jenkins' determination to confine her  
11 evidence to price rises during the claim period rather  
12 raises the question of whether she was just looking for  
13 ways to reduce the very large price increases identified  
14 by Mr Parker. She even refused to accept, under  
15 cross-examination, that price increases before the claim  
16 period which are sustained during the claim period are  
17 relevant to the SSNIP test. When I put that to her on  
18 a hypothetical basis, that is a very basic proposition  
19 which she did not accept.

20 MR RIDYARD: Do you have a reference for that?

21 MS KREISBERGER: No. I will come back to you with that in  
22 cross-examination, if I may. It is right at the start  
23 of cross, so we can get that quite quickly.

24 So that deals with Line Rental.

25 Moving on then to calls prices, I would like to make

1 five short points on Mr Parker's assessment of calls  
2 prices for the purposes of the SSNIP test.

3 First, Parker 5 shows, as I have already raised,  
4 that even where calls are included at cost, the gulf  
5 between SPC prices and Dual Play prices are far, far  
6 greater than a SSNIP. Now, we do not think that  
7 sensitivity check has been challenged, and this is the  
8 answer to BT's point that BT charged the same prices for  
9 calls to SFV and bundle customers. Parker 5 shows that  
10 even if you assume calls were competitive, the SSNIPs  
11 hold on a percentage basis.

12 That is my first point.

13 My second point is given pre-Commitments, VOCs and  
14 SPCs were charged the same price, those findings must  
15 apply to VOCs as well as SPCs. It is a point that  
16 Mr Parker made in his evidence. You take the SPC  
17 dataset and you reason backwards to VOCs from that.

18 My third point comes back to the point which the  
19 Chairman has just put to me, and that is that  
20 Mr Duckworth's limb 1 analysis, based on ARPU for calls  
21 and access, is well above the competitive level, far  
22 above a SSNIP, and that data demonstrates, as Mr Parker  
23 put it, a reinforcing effect from calls. So that is  
24 consistent.

25 My fourth point is that Mr Parker also conducted

1 a SSNIP test in relation to BT's ARPMS for calls. That  
2 measures the unit price which customers pay, the price  
3 for calls per minute, and it is therefore an effective  
4 price relevant for market definition.

5 Just on that, on that data, Mr Parker used BT's own  
6 ARPMS data which show that BT's ARPMS are far above  
7 rival ARPMS, and that is in the Joint Experts'  
8 Statement, the chart, and that data is consistent with  
9 the other evidence on calls. It shows BT calls prices  
10 are above competitive levels.

11 Now, as you know, Dr Jenkins criticises the ARPM  
12 data even though it is based on BT's own structured  
13 data, and she criticises it on the basis of Ofcom's 2019  
14 reallocation, but she has not produced any data to  
15 support her position. So I am coming back to my topic  
16 of new evidence and so it may be just helpful to have  
17 a hand-out. (Handed)

18 THE CHAIRMAN: Yes.

19 MS KREISBERGER: What BT is now attempting to do is to  
20 introduce some new points on the reallocation, again,  
21 after the close of evidence. You might remember  
22 Dr Jenkins referred in the hot tub to doing some further  
23 "digging" on the point. We do not have any insight into  
24 that digging, no instructions were disclosed, and BT has  
25 now put forward some speculation, really, about the

1 basis for the reallocation. That is covered at BT's  
2 written closings at paragraphs 280-283, and BT there  
3 purports to offer an explanation for the discrepancy  
4 between BT's ARPMs and those of rivals. That analysis  
5 was set out in a letter from BT's lawyers, Simmons &  
6 Simmons, which also post-dated the close of evidence.

7 So that is the second point in the hand-out. Now,  
8 this is obviously inadmissible.

9 Dr Jenkins in her first report positively asserted  
10 that BT's structured data was reliable and to be  
11 preferred to Ofcom's. I will give you the reference.  
12 It is {IR-E/17/119}, footnote 165. If I could ask you  
13 to just have a read of that.

14 So she there refers to BT's revenue data as  
15 reliable. She says:

16 "... I do not rely on ... Ofcom ..."

17 So BT has had ample opportunity to explain why it  
18 has now changed its mind in the light of Mr Parker's  
19 ARPMs analysis, and now takes a different view that its  
20 data is not reliable.

21 MR BEARD: Sorry, we do not say our data is not reliable.

22 MS KREISBERGER: The Class Representative is unable to  
23 understand or test this new analysis. It is covered in  
24 our written closings at paragraph 146. In any event,  
25 the ARPMs data which Mr Parker relies on is consistent

1 with all the other data in the case which shows  
2 a reinforcing effect for calls, and, as I said,  
3 Mr Parker has presented the same analysis based on ARPUs  
4 for calls, which also show a gulf between BT and other  
5 operators' ARPUs, and that gulf increases over time.  
6 I will just show you that, it is {OR-H/201/1}. If we  
7 could go to page 3, please, so that is the letter.  
8 {OR-H/201/3}.

9 There you see, if we could zoom in on Figure 3, the  
10 gulf between BT call ARPU based on the internal BT data,  
11 and there you have the BT call ARPU based on the Ofcom  
12 data. It is the percentage difference between BT and  
13 other providers' call ARPU which is the key figure.

14 So that is my fourth point on calls prices.

15 My fifth point, if we could bring up {IR-E/17/175},  
16 this is Dr Jenkins' evidence. If we could look at the  
17 table at the bottom of the page. According to this  
18 table prepared by Dr Jenkins, in 2020/21 BT's gross  
19 margin on calls was [redacted]. Sorry, I may have  
20 just -- that may need to come off the transcript.

21 THE CHAIRMAN: Yes.

22 MS KREISBERGER: It is outer ring so it should come off the  
23 transcript, with apologies for that.

24 THE CHAIRMAN: But the line you wanted us to look at is  
25 under, what, "BT Total"?



1 MS KREISBERGER: So if you look at --

2 THE CHAIRMAN: On "Gross Margin"?

3 MS KREISBERGER: If you look at "Calls & Other", "GM %", so

4 the column is "GM %".

5 THE CHAIRMAN: Sorry, the penultimate line.

6 MS KREISBERGER: Yes, "Calls & Other", penultimate line.

7 THE CHAIRMAN: Yes.

8 MS KREISBERGER: So that is the gross margin on calls.

9 MR RIDYARD: So what does that -- I know the information is

10 confidential, but what does it tell us?

11 MS KREISBERGER: It is telling you something about the price

12 compared to the competitive benchmark. That is very far

13 above cost.

14 MR RIDYARD: Do we know what the competitive benchmark for

15 calls on its own is?

16 MS KREISBERGER: Not -- I will need to come back to you, but

17 I am adding it to all the other four items of evidence

18 to show that, on any view, that is a very high figure

19 for calls gross margin. So my submission is you have

20 a reinforcing effect from calls, and that is consistent

21 with it compared to, say, margins on broadband which you

22 can see here.

23 MR RIDYARD: The gross margin is higher on calls than it is

24 on broadband.

25 MS KREISBERGER: Yes, much.

1 MR RIDYARD: Right.

2 THE CHAIRMAN: Is that a convenient moment?

3 MS KREISBERGER: It is. Thank you, sir.

4 THE CHAIRMAN: All right.

5 (2.37 pm)

6 (A short break)

7 (2.50 pm)

8 MS KREISBERGER: If I could just begin by giving Mr Ridyard  
9 the reference to the cross-examination transcript. This  
10 is the point about Dr Jenkins not accepting the  
11 hypothetical example of the pre-claim period SSNIP which  
12 holds in the claim period. It is covered in our written  
13 closings, paragraph 142(a). That is {IR-A/15/55}. The  
14 relevant bits of the transcript are at footnote 298 on  
15 {IR-A/15/55}. So you have them, it is {Day12/133:7}, to  
16 {Day12/142:15}, because it was a fairly tortured  
17 exchange, so it runs over a number of pages, I am  
18 afraid.

19 So now I turn to Dr Jenkins' case on market  
20 definition and I am going to address three elements of  
21 it: her CLA, her VOCs events study, and her conflicting  
22 theories of migration intent and bundle pricing fallacy,  
23 briefly.

24 So Dr Jenkins described the rationale of her CLA.  
25 I will give you the reference, it was {Day10/70:17-22}.

1 She said the rationale was to be:

2 "... inferring something about price responsiveness  
3 of customers ... trying to calibrate how responsive  
4 a customer would be to a shift in the relative price of  
5 SFV services and bundles ..."

6 My submission is that that is an inference that she  
7 cannot draw in any reliable way, because the very thing  
8 she is trying to prove is an unknown, so a Rumsfeldian  
9 known unknown.

10 I will develop that submission. She has no idea  
11 what the levels of switching would be at competitive  
12 price levels, so she cannot work out how many customers  
13 would switch in response to a small price increase above  
14 the competitive level. She only has available to her  
15 switching information at BT's high price levels, the  
16 prevailing prices, and you cannot work backwards from  
17 those. That is the cellophane fallacy problem.

18 When you combine that with the secular decline  
19 issue, it holds her CLA below the waterline. For your  
20 note, this point is covered in the CMA's Market  
21 Definition Guidelines, {G/137/21}.

22 The CMA says:

23 "Switching patterns [at prevailing price levels] may  
24 not be a reliable guide to what would occur in normal  
25 competitive conditions."

1           Dr Jenkins conceded this point in the hot tub. It  
2 is {Day10/78:9-10}:

3           "I do not have good counterfactual switching data,  
4 I do not have that and I am clear about that."

5           She said the same thing under cross-examination on  
6 {Day12/201:19}.

7           I put to her:

8           "Dr Jenkins, you say you accurately addressed  
9 price-related switching, but it is still the case, as  
10 you made very clear in the hot tub, that you do not have  
11 good counterfactual switching data, yes?"

12          Her answer was:

13          "I do not have data for what people would have done  
14 if they faced those prices [that is competitive], so  
15 I have to make an inference on the data I have."

16          It ends at line 25.

17          Now, her attempts to control for this central defect  
18 are also inherently unreliable. She assumes that 20% of  
19 switching is unrelated to price, as I showed you  
20 earlier, or alternatively, as a sensitivity, 40%. Those  
21 assumptions are nothing more than guesswork, albeit  
22 guesswork which is heavily weighted in her client's  
23 favour. It completely ignores Mr Parker's evidence on  
24 the secular trend, the graph that I showed you, and the  
25 table showing that the rate of decline in SFV customers

1 was not affected by a price freeze.

2 Then you might recall her other sensitivity which we  
3 covered in cross-examination. Salami-slicing her  
4 elasticities into six periods and choosing the lowest  
5 one is simply picking one tainted result out of six.  
6 You might recall the analogy I put to her with  
7 Lance Armstrong's records on performance-enhancing  
8 drugs; picking the slowest does not address the problem.

9 Now, during the concurrent evidence, the Chairman  
10 put the question whether a CLA is ever useful in this  
11 sort of situation. Now, as ever, one needs to be  
12 cautious about trading in generalities, but my  
13 submission is that a CLA is very unlikely to be of any  
14 assistance in an excessive pricing case. Now, that is  
15 a point that the European Commission made in the  
16 *Slovak Telekom* case which we cite in our written  
17 closings at paragraph 74.

18 If we could just turn it up, that is {G/124.1/61}.  
19 It is recital 158 of this Commission decision:

20 "In cases which are brought under Article 102 ...  
21 the SSNIP test would need to be applied using the  
22 competitive price as a starting point for the  
23 measurement of margins and demand elasticities. A SSNIP  
24 test which starts from observed prices would tend to  
25 lead to market definition that is wider than what one

1 would find if the SSNIP test was performed at the  
2 (lower) competitive price if, as it will be typical in  
3 cases brought under Article 102 ... the observed price  
4 is already inflated relative to the competitive price.  
5 This is because margin and demand elasticity faced by  
6 the hypothetical monopolist would typically be lower at  
7 the competitive price than at the observed price.  
8 A SSNIP analysis starting from the correct competitive  
9 price would therefore tend to find narrower markets than  
10 the SSNIP analysis which (wrongly) starts from the  
11 (inflated) observed price. The fact that a SSNIP test  
12 analysis starting at an already inflated price will tend  
13 to lead to the wrong conclusion of wide relevant markets  
14 is called 'cellophane fallacy'. For this reason, the  
15 Commission does not normally rely on the SSNIP-test  
16 exercise in the context of cases [under] 102 ..."

17 So that is the reason I have just set out, and it  
18 applies with particular force to these facts where  
19 the price increases which form the abuse go back over  
20 many years. So what that means is that unpolluted data  
21 on switching levels at competitive prices simply is not  
22 available.

23 Then coming back to the Chairman's question, it does  
24 not mean a CLA is never useful, it is in these  
25 situations. Contrast it with a merger case where the

1 investigation relates to a competitive market pre-merger  
2 where there is no concern that prevailing prices are  
3 inflated by market power. That is far removed from the  
4 data available to Dr Jenkins. This explains why  
5 Dr Jenkins identifies such high price elasticities which  
6 are frankly implausible.

7 Mr Parker in the hot tub on {Day10/91:8-10} put it  
8 this way:

9 "... if BT is losing more customers than its own  
10 critical loss, why would it be putting prices up to such  
11 a high level?"

12 In contrast, as we have set out at paragraph 92 of  
13 the written closings, the cellophane fallacy is not an  
14 issue for Mr Parker because he identifies narrow markets  
15 through his analysis of the pricing data. He is also,  
16 of course, not looking at elasticities, he is looking  
17 directly at the price which I addressed you on.

18 So if the true position is that the relevant market  
19 is narrower than identified by Mr Parker, if there were  
20 a cellophane fallacy, then there would be a market for  
21 BT SFV services alone, BT would be a monopolist, but we  
22 do not go that far.

23 So that is Dr Jenkins' CLA.

24 The second point I wanted to address you on is her  
25 events study. Now, her CLA, as I said, comes up with

1           these implausibly high elasticities and they are also  
2           contradicted by her own evidence in her VOCs events  
3           study. She relies on that study under limb 2 and that  
4           is -- she makes a somewhat curious argument: SFV  
5           customers have benefited from BT's excessive prices.

6           But staying with market definition, she describes  
7           the events study as an econometric analysis of the  
8           impact of the Carmen discount on the rate of switching  
9           between SFV services and bundles. We address this at  
10          paragraphs 150-154 of the closings. But in short,  
11          Dr Jenkins finds that the rate of decline in VOCs  
12          decreased as a result of the Carmen discount, so the  
13          decline slowed, and she found that the number of VOCs  
14          was, as a result, 21% higher than it would have been  
15          absent the discount.

16          Now, if one simply runs those numbers against the  
17          30% Carmen discount, you get a price elasticity of minus  
18          0.7%. So that means, on the basis of Dr Jenkins' own  
19          assessment, VOCs are price-inelastic, which, by  
20          definition, means that a 10% SSNIP on VOCs would be  
21          profitable for BT.

22          Her response to this was to argue that it is the  
23          product of asymmetry, some asymmetry, but that is just  
24          a bad -- that is a bad point. Because the analysis is  
25          not looking at whether customers who used to be VOCs but



1 switched to bundles, then switched back to the VOC fold.  
2 It is not looking at that. This is her assessment, she  
3 should know this. Her assessment is focusing on the  
4 reduction in the rate at which VOCs switch away to  
5 bundles, on her evidence, as a result of the discount.

6 So the asymmetry point is not an answer. It is not  
7 about switching back to the VOCs.

8 THE CHAIRMAN: What, because it is not about switching back,  
9 it is the prior reduction in the switching over to  
10 bundles?

11 MS KREISBERGER: Yes, it is the slowing of the switching.

12 THE CHAIRMAN: Just a moment. (Pause). Yes.

13 MS KREISBERGER: Then lastly and briefly I will deal with my  
14 third point on Dr Jenkins' evidence on market  
15 definition. This also picks up the Tribunal's  
16 question 10 which is:

17 "What, if any, commercial constraints prevent BT  
18 from price discriminating between SFV and bundle  
19 customers ..."

20 Perhaps it is useful to have the whole question.  
21 I can read it out. I do not as yet have an Opus number  
22 for the Tribunal's questions but I am sure you recall  
23 it.

24 "What, if any, commercial constraints prevent BT  
25 from price discriminating between SFV and bundle

1 customers, e.g. by increasing Line Rental prices for all  
2 voice customers whilst simultaneously reducing the gap  
3 between SFV and bundle prices? And what does this mean  
4 for market definition and ... dominance?"

5 Three short responses to that. First, the question  
6 of whether BT was constrained from targeting different  
7 prices at SPC and bundle customers, well, that is  
8 a matter which can only be answered by reference to an  
9 analysis of the price data and, in particular, the SPC  
10 price differential analysis shows that there were no  
11 material constraints, no effective constraints.

12 So to the extent that BT has come up with some  
13 explanation as to why it is constrained, that is not  
14 very interesting because it is contradicted by the hard  
15 data which shows no constraint.

16 Now, in any event, this argument was described by  
17 Mr Bunt in an email regarding BT's interaction with  
18 Ofcom as an argument which "might", emphasised in stars,  
19 be credible, and he agreed under cross-examination that  
20 his email was not helpful to BT's case in these  
21 proceedings. That is at paragraph 591 of our closings,  
22 citing {Day5/138:10-12}.

23 THE CHAIRMAN: Sorry, 591?

24 MS KREISBERGER: Sorry, paragraph 591, yes. Thank you, sir.

25 THE CHAIRMAN: Yes.

1 MS KREISBERGER: So that brings me to my second point. It  
2 seems to be a reference to that argument which is  
3 Dr Jenkins' migration intent theory. Now, migration  
4 intent is not a constraint. On BT's own telling of this  
5 theory, it is a reason why BT says it puts its SFV  
6 prices up to push people into bundles, push price. Even  
7 if that were true, and the evidence tells us otherwise,  
8 but even if that were true, it is not a constraint. It  
9 is not bringing the SFV price down and therefore it is  
10 not relevant to the question which arises under market  
11 definition.

12 Dr Jenkins referred to this idea of an incentive to  
13 push SFV customers on to bundles as an "upward pressure"  
14 on SFV prices, not a constraint. That is  
15 {Day10/126:11-14}.

16 So for the same reason, my response to question 12  
17 posed by the Tribunal is that the Tribunal does not need  
18 to measure -- it does not need to determine the correct  
19 measure of net profitability in relation to market  
20 definition, because that was a matter, you will recall,  
21 that was raised in the context of Dr Jenkins' arguments  
22 about recapture. I have addressed you on the recapture  
23 effect, but this was raised in relation to whether there  
24 is a recapture incentive, and I say that is not  
25 a relevant -- it is not a downward pressure, so it is

1 not relevant to market definition, it is not  
2 a constraint, even on BT's case.

3 My third and last point in relation to question 10  
4 is to the extent that the Tribunal also has in mind BT's  
5 argument that Line Rental price increases applied across  
6 the board, that is the labelling fallacy, because any  
7 Line Rental prices did not feed through to the  
8 competitive prices on offer for Dual Play bundles. To  
9 use Mr Ridyard's term, BT could always "neutralise"  
10 a Line Rental price increase by tweaking the incremental  
11 broadband price or the overall bundle price, however you  
12 want to refer to it. I do not think I need rehearse the  
13 evidence on that. You have seen many times Dr Jenkins'  
14 graphs which show the plummeting incremental broadband  
15 price.

16 The way in which BT happened to treat Line Rental  
17 increases as a matter of its own internal systems has no  
18 connection with the economics of this case and it  
19 provided no constraint at all on BT's ability to charge  
20 high prices to the SFV groups while remaining  
21 competitive in the bundles -- in the bundles market.

22 That completes my submissions on market definition  
23 and I can move to dominance.

24 THE CHAIRMAN: Yes.

25 MS KREISBERGER: Dominance I am going to deal with briefly,

1 if I may, not only because the points are  
2 comprehensively addressed in writing, but the analysis  
3 of dominance is actually very straightforward.

4 If it is right, as the CR submits, that SFV services  
5 constitute distinct product markets, the evidence that  
6 BT enjoys a position of dominance in those markets is  
7 frankly incontrovertible.

8 There are five main categories of evidence which are  
9 probative of BT's significant market power over SFV  
10 customers and they are as follows. The first is market  
11 shares. The threshold for the legal presumption of  
12 dominance is 50%. Sorry, dominance can of course be  
13 found on facts at lower levels, at lower market shares,  
14 and the authorities say that a share of between 70-80%  
15 is in itself a clear indication of the existence of  
16 a dominant position. For your note, that is in the  
17 *Aspen* decision, the Commission decision, at {G/133/15},  
18 and the authorities conveniently cited in the footnote  
19 in that decision. That is well established.

20 Now, BT's shares of SFV markets are far in excess of  
21 the threshold for a presumption. Please turn up  
22 {IR-A/15/85}. (Pause)

23 I have had a request to go to OR where possible but  
24 I think I will play it safe with IR on this one. So  
25 that is paragraph 235, and you see there the shares.

1           So in the pre-Commitments period, BT had a market  
2 share of 82-85% for the supply of SFV services to VOCs  
3 and SPCs. That is measured by revenue.

4           In the post-Commitments period, you see that BT's  
5 shares in the market for supplying SFV to SPCs were  
6 consistently above 95%, and market shares for the supply  
7 of calls were around 84% by revenue and 63-71% measured  
8 by number of minutes.

9           For share of lines, perhaps for your note, for  
10 speed, {IR-E/3/119} at paragraph 5.33. The share of  
11 lines for VOCs and SPCs pre-Commitments BT had 74-85%,  
12 and post-Commitments its share of lines was again 95% or  
13 above. So it is stating the obvious to say these are  
14 extremely high market shares in absolute and relative  
15 terms, both of which are relevant to the assessment of  
16 dominance. I refer you to our closings, paragraphs 226  
17 and 242 on that.

18           In relation to SPCs post-Commitments, BT's position  
19 comes close to pure monopoly. On {Day11/65:6-7},  
20 Mr Parker replied to Mr Ridyard:

21           "It is essentially all BT at that point. A tiny  
22 amount of other stuff."

23           In the ordinary course, such large market shares  
24 will usually reflect a very strong market position, so a  
25 compelling proof of dominance.

1           Now, in theory, it is possible that a firm  
2 dominating a market in this way does not have SMP if  
3 that market is highly contestable. It is not something  
4 one observes very often in practice. But that  
5 theoretical model of contestability is very far removed  
6 from the facts of this case. The theoretical model of  
7 high market shares but low market power is describing  
8 a type of hit-and-run market with very low barriers to  
9 entry, but in a situation of extreme contestability of  
10 that sort you would not expect high market shares to  
11 persist over time.

12           That brings me to my second category of evidence on  
13 dominance which is the enduring nature of BT's market  
14 shares. They are not transient. They were not recently  
15 acquired. The reason why BT dominates SFV markets in  
16 this way is because of its statutory past. As Mr Parker  
17 put it, it literally started off with the whole country  
18 as its base. That is why these shares have endured  
19 since at least '09, the year of full deregulation, and  
20 over the past 15 years BT has preserved its high share  
21 of this legacy base of customers.

22           That is not a hit-and-run market, it is a market  
23 with a long lasting advantage for the ex-incumbent, and  
24 really the analysis of dominance could just stop there,  
25 but it is confirmed and explained by my third item of

1 evidence which is high barriers to entry and expansion.

2 The incumbency advantage also explains the high  
3 barriers to entry and expansion faced by rivals.

4 Mr Parker explained, and it is covered in our closings  
5 at paragraph 245, that BT never had to incur the cost of  
6 competing for SFV customers. This meant that  
7 competitors faced a cost asymmetry which made it very  
8 hard for them to get a real foothold in the market, as  
9 reflected in their submissions on this point to Ofcom.

10 These customer acquisition costs are described as  
11 the decisive barrier to entry and they explain why BT  
12 has enjoyed this privileged position of high market  
13 shares for so many years.

14 Now, it is perfectly true that the Post Office made  
15 some inroads and BT was certainly cognisant of some SFV  
16 churn to the Post Office. If we could just turn up our  
17 written closings, {IR-A/15/91}. It is paragraph 258(a)  
18 and (b). Could I ask you just to read paragraph 258  
19 with both subparagraphs, please. (Pause)

20 THE CHAIRMAN: Yes. Are you going to go over the page?

21 MS KREISBERGER: Yes, please, to (b), thank you.

22 {IR-A/15/92}. (Pause).

23 So this degree of competition from a rival is not  
24 incompatible with significant market power. The  
25 Chapter II threshold is not monopoly, although, as



1 I have said, BT is essentially there post-Commitments  
2 for SPCs. But having a strong market position does not  
3 depend on the complete stamping out of all competition.

4 What is really telling about the Post Office example  
5 is that despite the fact that it undercut BT on price  
6 for long periods, BT still retained this much, much  
7 higher market share.

8 As the general court observed in the *AstraZeneca*  
9 case, it is cited at paragraph 230 of our closings:

10 "An undertaking's ability to 'maintain higher prices  
11 than its competitors, while retaining a much higher  
12 market share, shows that it [is] able to exercise market  
13 power in respect of price ...'"

14 So that is my third point on barriers.

15 My fourth point is the long tenure of SFV customers.  
16 That reflects and confirms the evidence on barriers. It  
17 is covered at paragraph 250 of the closings. That is  
18 {IR-A/15/89}.

19 If we just look at the subparagraphs, you see there  
20 at the bottom of the page:

21 "Ofcom analysis showing that 77% of BT ['SFV', there  
22 is a missing F], customers reported that they had been  
23 supplied by BT for more than 10 years ..."

24 Then over the page {IR-A/15/90}:

25 "An internal BT document from February 2020 noting

1           that 83% of BT's 1.6 million landline-only customers had  
2           a tenure of over 10 years."

3           There was some debate about whether there is  
4           a frothy top in the evidence, but it is common ground  
5           between the experts that at least 78.5% of customers, BT  
6           SFV customers, in 2022 had been customers in 2014. So  
7           BT has been largely serving the same group of SFV  
8           customers for a very long time. That confirms the  
9           evidence of high customer acquisition costs.

10          Finally, SFV profitability. That brings us back to  
11          limb 1 again. Mr Parker explained in his evidence that  
12          looking at market shares and the low barriers here is an  
13          indirect method of testing market power, whereas looking  
14          at the ability to charge prices significantly above the  
15          competitive level, that is the direct method, and that  
16          is, in terms, the economic test for significant market  
17          power, the ability to charge prices significantly above  
18          the competitive level. That is the test. So that is  
19          the direct method.

20          The combination of BT's high market shares and high  
21          SFV profitability leads to the irresistible conclusion  
22          that BT enjoys a pretty unassailable position of market  
23          power in SFV markets. It may seem like a statement of  
24          the obvious. Ofcom arrived at the same conclusion on  
25          the data.

1           With that, I would like to turn quite crisply to  
2           BT's rebuttal points on dominance. I have got five  
3           points on that.

4           THE CHAIRMAN: Just one moment, please.

5           MS KREISBERGER: Thank you, sir. (Pause).

6           THE CHAIRMAN: Yes.

7           MS KREISBERGER: My first point is given the evidence I have  
8           just taken you through, BT's denial of dominance has an  
9           air of unreality. BT could have accepted at any point  
10          that if the Tribunal finds that the markets are SFV  
11          only, then it accepts it has a dominant position within  
12          them in line with Ofcom's finding in 2017, just as the  
13          Class Representative accepts that his case depends on  
14          establishing that bundles do not constrain SFV prices.  
15          We do not argue for dominance on the wide market.

16          Now, BT does contest dominance. But as the Tribunal  
17          observed in these proceedings, BT's denial of dominance  
18          is really, in substance, a denial of the prior finding  
19          that bundles are not an effective price constraint.  
20          Now, that was always clear from Dr Jenkins' reports,  
21          because she never actually engages with SFV-only markets  
22          in her evidence, she just makes some points in generic  
23          terms about barriers and so on.

24          If one just thinks about what she needed to do as an  
25          expert looking at market power, she needed to say: on

1 this view of the world, an SFV-only market, BT has very  
2 high shares. She would then need to go on to explain  
3 why it is that despite these very high shares, she does  
4 not find SMP for whatever reason. You do not find that  
5 in her evidence. She does not actually grapple with the  
6 analysis on a narrow SFV market, she avoids saying that.

7 Then in the hot tub she actually conceded that her  
8 objections are, in truth, objections to market  
9 definition. That was {Day11/59:20} and following. You  
10 see there the Chairman put that point to her. It is  
11 a re-run of the argument in the context of market  
12 definition.

13 If you just go over the page, {Day11/60:1}, I think  
14 we need ... If you want to see the complete ... I think  
15 it goes over the page again {Day11/61:1}. I may need to  
16 check that reference. I will come back to the reference  
17 rather than delay it.

18 Now, in their closings BT continues to make points  
19 about switching to bundles, which goes to their case on  
20 market definition, not dominance. But that is a pretty  
21 half-hearted refutation of dominance, and we cover this  
22 in our written closings where we refer to Dr Jenkins  
23 struggling with the thought experiment in the narrow SFV  
24 market. But that is the issue which arises at the  
25 dominance stage of the analysis, it is on the basis of

1 an SFV-only market.

2 So that is my first point on BT's rebuttal, it is  
3 really a rebuttal of market definition.

4 Taking their other points in turn. Their second  
5 point is there is competition from the Post Office.  
6 I have addressed you on that just now.

7 Their third point is price leadership. Now, we have  
8 addressed that in our closings in the context of  
9 fairness, and Mr Parker made clear that price leadership  
10 does not form a critical part of his assessment of  
11 dominance. But to the extent that BT rely on the point  
12 in relation to dominance, then Mr Bunt conceded that  
13 BT's internal documents did show that it was a price  
14 leader and that BT misled Ofcom on that point.

15 BT's fourth rebuttal is: "look at all the evidence  
16 of people switching". Well, I have addressed you on the  
17 irrelevance of switching.

18 BT's last point is to repeat the migration intent  
19 theory.

20 Now, apart from that having been addressed at the  
21 market definition stage, the argument seems to be -- as  
22 I said, the argument seems to be the need to compete for  
23 bundles exerted an upward pressure on SFV prices. Well,  
24 in line with my submission to you in relation to this  
25 point on market definition, if it is right that bundles

1 is what caused BT to put up its SFV prices, well, that  
2 is an indicator of market power in bundles, so it  
3 supports the Class Representative's case. It is  
4 essentially a re-run of the recapture point.

5 Sorry, market power in -- I should have said in SFV,  
6 not bundles. I am sorry.

7 So in short, high market shares added to high  
8 profitability, in other words economic profits, is,  
9 taken together, highly probative of a position of great  
10 market strength.

11 To conclude on dominance, there is a final point we  
12 should not lose sight of which is this: Ofcom's  
13 jurisdiction to intervene in BT's SFV prices in 2017  
14 depended on its finding that BT enjoyed a position of  
15 SMP, significant market power, in SFV markets.

16 Now, if BT thought that finding of SMP was  
17 susceptible to challenge, it is rather implausible that  
18 BT would have offered up the Commitments. It is  
19 reasonable to assume that BT would have fought its  
20 corner in the Tribunal to oppose Ofcom's intervention  
21 rather than rolling over with voluntary price caps which  
22 are in place to this day.

23 MR BEARD: Sorry, I do not recall that ever being put to any  
24 of the witnesses either.

25 THE CHAIRMAN: I think you can make those points later on,

1 Mr Beard, because I prefer just to have, I am sure you  
2 will note, I prefer just to have Ms Kreisberger run  
3 through. Thank you.

4 MR BEARD: Yes, will do.

5 MS KREISBERGER: Thank you, sir.

6 So that completes dominance.

7 THE CHAIRMAN: Yes.

8 MS KREISBERGER: If I may then move to the cost-plus  
9 benchmark, and with an eye on the time I will cover  
10 legal principles on how to estimate and allocate costs  
11 for these purposes, and then I may make a start on the  
12 2009 RFS, and that will probably bring us -- we are  
13 finishing at 4 pm today, I think, sir?

14 THE CHAIRMAN: Yes.

15 MS KREISBERGER: So starting with legal principles, it is  
16 frequently the case in excessive pricing cases that the  
17 cost data available is imperfect for the purposes of  
18 working out the costs of supplying a particular product  
19 under limb 1. Many of the excessive pricing cases  
20 grapple with this issue. The answer is never to throw  
21 up one's hands in despair. It is axiomatic that  
22 a pragmatic approach be adopted, and the starting point  
23 is *Napp*. It is covered in our closings at  
24 paragraph 396, IR-A-- actually we could go to  
25 {OR-A/15/140}. If we could hone in on the bottom of the

1 page, please.

2 "As the Tribunal observed in *Napp*, 'measuring  
3 whether a price is above the level that would exist in  
4 a competitive market is rarely an easy task. The fact  
5 that the exercise may be difficult is not, however,  
6 a reason for not attempting it.'"

7 So that is the starting point.

8 Now, Mr Beard's whole case under limb 1 hangs on  
9 a very particular construction of the phrase "costs  
10 actually incurred", which you find in *United Brands*,  
11 paragraph 252. He put that repeatedly to Mr Parker in  
12 cross-examination in a rather spirited fashion, and to  
13 Mr Duckworth as well, but Mr Beard is imbuing that  
14 phrase with a meaning which is not only contrived, but  
15 it is flatly contradicted by the case law.

16 His construction of "costs actually incurred" seems  
17 to be that you have to have precise cost data for the  
18 product in question from the dominant firm during the  
19 time period in question. He reads all of that into the  
20 single word "actually" at 252 of *United Brands*.

21 Now, that submission, his position is wrong in law.  
22 The authorities make clear that a pragmatic approach,  
23 doing the best one can, involves making sensible  
24 estimations, allocations, and using the best available  
25 benchmarks. I have already addressed you on the broad



1           axe in opening, but I am now going to show you the case  
2           law on excessive pricing. The broad axe in collective  
3           proceedings, I should say, on liability.

4           If the data is not available then what you have to  
5           do is use a sensible approximation. This was made clear  
6           by the Court of Appeal in *Phenytoin* which emphasised the  
7           need for flexibility in relation to the benchmark,  
8           including that it need not be based on the costs of the  
9           dominant firm at all.

10          Let us turn that up. {G/73/39}, paragraph 125.  
11          Paragraph 125 at the bottom.

12          So this is Lord Justice Green's judgment:

13          "In my view by the nature of the abuse in issue  
14          there needs to be 'a' benchmark. But, in the first  
15          instance at least, the choice of benchmark is for the  
16          competition authority to choose and can be based upon  
17          the costs of the undertaking being investigated or it  
18          can be based upon comparables such as the prices charged  
19          by the same or different undertakings in the same or  
20          different geographical markets or indeed any other  
21          benchmark or combinations thereof capable of providing  
22          a 'sufficient' indication that the prices charged are  
23          excessive and unfair. It follows from the above that  
24          assuming the Tribunal was mandating the use in all cases  
25          of a hypothetical benchmark price which did not include

1 the costs of the undertaking or some other benchmark  
2 related to the undertaking, then I respectfully disagree  
3 with the Tribunal."

4 So the rigidity which Mr Beard advocates is  
5 a legally wrong approach. It is not a territory for  
6 a counsel of perfection, or back-off if you do not have  
7 perfect data, it is the art of the possible.

8 Mr Beard goes further in his closings. He levels  
9 the following accusation. I will read it out. For your  
10 note, it is paragraph 452.

11 He says:

12 "The CR has not been able to point to any case  
13 where, in assessing whether prices are excessive by  
14 reference to costs, the actual costs of production of  
15 the products in question have not been used."

16 He says at 477:

17 "The CR has identified no cases where the assessment  
18 of excessiveness was done using a Cost Plus benchmark  
19 but on the basis of non-actual costs."

20 I am just going to show you one. It is at  
21 {G/114/33}. This is the *Deutsche Post* excessive pricing  
22 judgment. Sorry, it is a Commission decision,  
23 thank you. Thank you, to Mr Williams.

24 If I could pick it up at paragraph 158. So:

25 "DPAG [that is *Deutsche Post*] maintained that its

1 average cost for delivering an item of incoming  
2 cross-border mail is at least 80% of the domestic  
3 tariff. The 80% estimate advocated by [*Deutsche Post*]  
4 and the other REIMS II parties in their notification to  
5 the Commission is an average of the estimated costs of  
6 all the parties to REIMS II. This average cannot be  
7 used as a basis for estimating [*Deutsche Post's*] costs,  
8 [*Deutsche Post*] argued."

9 So it is objecting to this tariff based on all  
10 parties' costs.

11 Paragraph 159 {G/114/33}:

12 "According to the case law of the Court of Justice,  
13 the fairness of a certain price may be tested by  
14 comparing this price and the economic value of the good  
15 or service provided. A price which is set at a level  
16 which bears no reasonable relation to the economic value  
17 of the service provided must be regarded as excessive in  
18 itself, since it has the effect of unfairly exploiting  
19 customers. In a market which is open to competition the  
20 normal test to be applied would be to compare the price  
21 of the dominant operator with the prices charged by  
22 competitors. Due to ... DPAG's monopoly, such a price  
23 comparison is not possible ... Furthermore,  
24 [*Deutsche Post*] has only recently introduced  
25 a transparent, internal cost accounting system and no

1 reliable data exist for the period of time relevant to  
2 this case. Consequently, the Commission is not in  
3 a position to make a detailed cost analysis of  
4 [*Deutsche Post*'s] average costs for the services in  
5 question during the relevant time period. An  
6 alternative benchmark must therefore be used."

7 Then could we go over the page, please, {G/114/34}.

8 "In their notification to the Commission of the  
9 REIMS II agreement, DPAG and the other signatories  
10 argued that the average cost of forwarding and  
11 delivering incoming cross-border mail (including  
12 a reasonable profit margin) may be approximated to 80%  
13 of the domestic tariff. In its decision on REIMS II ...  
14 the Commission accepted -- in the absence of reliable  
15 cost data -- the principle of linking terminal dues to  
16 domestic tariffs and concluded that ... the domestic  
17 tariff represented the most appropriate yardstick for  
18 assessing the cost of delivery."

19 It is a yardstick.

20 "[*Deutsche Post*] has neither substantiated the claim  
21 that its estimated average cost ... exceeds the 80%  
22 estimate ... previously submitted to the Commission, nor  
23 has it indicated the percentage which it considers to be  
24 accurate for Germany.

25 "For the purposes of this Decision [this is the

1 excessive pricing decision] and in the absence of  
2 reliable cost accounting data, the Commission finds that  
3 the estimated average cost of delivery for incoming  
4 cross-border mail expressed as a percentage of the  
5 domestic tariff and as submitted by [*Deutsche Post* and  
6 the other parties] may serve as a benchmark to estimate  
7 [*Deutsche Post's*] costs in this respect."

8 Then there is some detail on the points in that  
9 case.

10 The Commission is making clear that it did not have  
11 reliable cost accounting data at all in that case. I am  
12 not suggesting we are remotely in that position here.  
13 I will come on to my submissions on the facts. But in  
14 the absence of reliable cost accounting data, they used  
15 a yardstick of 80% of the domestic tariff, and that was  
16 a tariff based on average costs from a number of  
17 parties.

18 So pragmatism is the watch word in the  
19 jurisprudence. So it is reminiscent of the broad axe  
20 which is wielded more generally in collective claims.

21 You can immediately see the policy which undermines  
22 the pragmatic approach -- sorry, which underpins the  
23 pragmatic approach. A requirement for precision in cost  
24 data would make it all too easy for a dominant firm to  
25 avoid liability for an excessive pricing abuse under

1 Section 18(2)(a) by simply pointing to deficiencies in  
2 its own cost data. Now, that would be contrary to the  
3 fundamental purpose of the prohibition which is to  
4 protect consumers from harm caused by firms who exploit  
5 their market power over them.

6 Against that legal framework, you see that the RFS  
7 is a compelling data source, the 2009 RFS, projected  
8 forwards. It is not entirely perfect because it is  
9 projected forwards, but it imports a far greater level  
10 of precision than demanded in the authorities, and  
11 critically, there is no dispute between the parties as  
12 to its level of precision and its granularity for SFV  
13 services. BT's only objection to the 2009 RFS data is  
14 that it relates to an earlier period. But compared to  
15 cost estimates drawn from cost data supplied by other  
16 firms altogether, it is the Crown Jewels.

17 Sir, I think I have ten minutes to move on to the  
18 RFS.

19 THE CHAIRMAN: Yes, certainly.

20 MS KREISBERGER: I will not address direct costs because  
21 they are agreed, so I address the RFS in relation to  
22 indirect costs.

23 Now, I know the Tribunal is very familiar with the  
24 2009 RFS and has reviewed it, for which we are very  
25 grateful. As you know, the Class Representative relies

1 on the evidence of Mr Duckworth who considers the RFS to  
2 be the most reliable source of data available to him on  
3 the indirect costs of SFV services.

4 Now, Mr Duckworth is a telecoms costings expert. He  
5 gave detailed and precise evidence on the underlying RFS  
6 methodology, grounded in his particular expertise. Now,  
7 BT has not advanced evidence from an expert in telco  
8 costing. Dr Jenkins' field of expertise, like  
9 Mr Parker, is antitrust economics.

10 Now, just briefly, as these aspects of the RFS are  
11 not in dispute, you heard from Mr Duckworth six key  
12 points in relation to the RFS, so I am not yet looking  
13 at uprating, and that is why I say it is not in dispute,  
14 and we have set the points out in detail in the  
15 closings.

16 But the RFS was conducted by the business itself.

17 It was an audited and public exercise.

18 THE CHAIRMAN: These are the six points?

19 MS KREISBERGER: These are the six points, sir, thank you.

20 THE CHAIRMAN: Yes.

21 MS KREISBERGER: It was produced on the basis of a fully  
22 allocated cost standard which proxies LRIC+. That means  
23 that the key principle for allocating -- I am still on  
24 my third point -- indirect costs was cost causality.

25 It was conducted under statutory obligations,

1 regulatory obligations.

2 My fifth point is it provides for an extremely  
3 granular breakdown of costs and providing that breakdown  
4 involved a very detailed costly and documented exercise,  
5 and, as the Chairman canvassed at trial with  
6 Mr Duckworth, you are able to see the underpinning  
7 methodologies and exercises they undertook, like the  
8 surveys.

9 Now, Dr Jenkins accepted that if this same cost data  
10 were available for the claim period then, to quote her,  
11 there would not "be anything wrong" with using that RFS  
12 as the data source for the costs benchmark. For your  
13 note, that is at {Day14/33:12-23}.

14 She also accepted in the Joint Experts' Statement at  
15 7.1.15 that the 2009 RFS is a good proxy for BT's costs  
16 on a LRIC+ basis in 2009.

17 BT objects only to Mr Duckworth's projection forward  
18 of the data. Equally, Mr Duckworth agrees that had  
19 a more up to date version of this data been available,  
20 he would have used it. But since it is not, the 2009  
21 RFS is his preferred source of data. It is the best  
22 available alternative.

23 So that is why, in Mr Duckworth's expert opinion,  
24 the most reliable approach to the cost benchmark is to  
25 project the RFS data on indirect costs forwards in order



1 to arrive at an estimate of costs in the claim period  
2 and he does that using CPI.

3 Before I address you on why Mr Duckworth's CPI  
4 uprating is a reliable method, I would like to address  
5 a more fundamental point on the cost data which BT has,  
6 and has not made available in these proceedings. Now,  
7 sir, I am in your hands. It would be quite good not to  
8 break in the middle of this point.

9 THE CHAIRMAN: Just bear with me one moment. (Pause).

10 Because this is going to take some time presumably, yes?

11 MS KREISBERGER: Well, it may take more than seven minutes,  
12 I think we have got six minutes so it may take just  
13 a little more. It is not very long, so ...

14 THE CHAIRMAN: Look, you are presumably on schedule at the  
15 moment in terms of ...

16 MS KREISBERGER: I am doing quite well.

17 THE CHAIRMAN: You are doing quite well.

18 MS KREISBERGER: Yes.

19 THE CHAIRMAN: Good. We can draw stumps a little early  
20 today.

21 Can I just raise one matter with you, please, which  
22 is we have had this spreadsheet from BT on the rival  
23 pricing time series with a number of tabs in which  
24 I think, when we got it at least, the letter said it was  
25 not something you agreed. Is that something that can be

1           agreed? I am not asking for an answer now, but perhaps  
2           you can consider it overnight.

3           MS KREISBERGER: Yes, thank you.

4           THE CHAIRMAN: Just bear with me on one other matter.

5           (Pause).

6           Let us stop there for today and, on the basis you  
7           are running on time, it will be 10.30 tomorrow morning.

8           MS KREISBERGER: Thank you, sir.

9           THE CHAIRMAN: Thank you all very much.

10          (3.55 pm)

11          (The hearing adjourned until Tuesday, 19 March at 10.30 am)

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