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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos. 1151/3/3/10  
1168/3/3/10  
1169/3/3/10

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

8 April 2011

Before:

MARCUS SMITH QC  
(Chairman)

PETER CLAYTON  
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**  
**EVERYTHING EVERYWHERE LIMITED**

Appellants

– v –

**OFFICE OF COMMUNICATIONS**

Respondent

**EVERYTHING EVERYWHERE LIMITED**  
**VODAFONE LIMITED**  
**TELEFONICA O2 UK LIMITED**  
**HUTCHISON 3G UK LIMITED**

Interveners (Case 1151)

**BRITISH TELECOMMUNICATIONS PLC**  
**EVERYTHING EVERYWHERE LIMITED**  
**VODAFONE LIMITED**  
**TELEFONICA O2 UK LIMITED**  
**HUTCHISON 3G UK LIMITED**  
**OPAL TELECOM LTD**  
**CABLE & WIRELESS UK**

Interveners  
(Cases 1168 and 1169)

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**HEARING DAY FOUR**

## APPEARANCES

Mr. Graham Read QC, Miss Sarah Lee and Mr. Richard Eshwege (instructed by BT Legal) appeared for the Appellant.

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

Mr. Javan Herberg QC and Mr. Mark Vinall (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward QC (instructed by Herbert Smith LLP) appeared for the Intervener Vodafone Limited.

Mr. Robert O'Donoghue (instructed by Telefónica O2 Limited) appeared for the Intervener Telefónica O2 Limited.

The Intervener Cable & Wireless UK was represented by internal counsel.

The Intervener Hutchison 3G UK Limited was represented by internal counsel.

The Opal Telecom Ltd did not attend and was not represented.

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1 THE CHAIRMAN: Yes, Mr. Read?

2 MR. READ: Sir, before I call Mr. Kilburn can I mention one matter. As the Tribunal may have  
3 seen, last night (I say last night because it actually was at about 8 p.m. last night) we  
4 received what is called a supplemental bundle for witness cross-examination which contains  
5 a series of articles, some of which are written by Professor Dobbs and Dr. Maldoom. In so  
6 far as that is put to the witness, I can well see that there may be some relevance, although at  
7 present I do not in any way give any undertaking that I will not be objecting. But the other  
8 material relates to a series of articles that have never been mentioned before in this case. We  
9 are simply unclear as to what they go to.

10 Sir, BT's position is really as follows. If this was an ordinary case, it would be  
11 extraordinary for interveners to be serving material like this right in the middle of the course  
12 of the hearing itself. Obviously, I am conscious of what has happened in this case, but BT's  
13 concern remains that in effect because the interveners seem to be doing some more work on  
14 certain areas, it should not actually go beyond the case that we have had to face from Ofcom  
15 to date. It cannot be right that simply because the interveners take over parts of Ofcom's  
16 case they can then unilaterally go beyond it in the course of the hearing itself.

17 As I say, we got this last night. I have not fully digested it. What would be extremely  
18 helpful (and indeed, I am going to be really quite firm on objecting if we do not get this) is a  
19 letter setting out precisely what issues in the case this material goes to. There was a letter  
20 last night, although I understand that it is not attached with the supplemental bundle itself,  
21 which indicates that this may arise out of some of the material, the algebraic equations, that  
22 Professor Dobbs served last night and forms, in part at least, part of the material on which  
23 Professor Valletti and Professor Dobbs reached their agreement.

24 What we say is we need a letter saying what issues in the case are the articles going to? If  
25 we do, it may be that our fears are unjustified and that in fact it is something that really is  
26 proper to be put to the witnesses. I particularly say that given there are two further features.  
27 Firstly, although it is named a cross-examination bundle, I suspect it plainly will not be used  
28 simply as cross-examination but will be used as evidence in the case. There is obviously an  
29 evidential difference between putting a document to a witness which the witness does not  
30 accept, and the effect of that document is different, and then using it as primary evidence in  
31 the case.

32 The second point, sir, is obviously that Dr. Walker has already served a report in this case,  
33 quite late on in the day, to which we did not make complaint because we thought it was  
34 sensible to have the material down on the table, but as long as everyone knew exactly where

1 it was going to (and indeed Dr. Walker's report clearly sets that out) but we do not with this  
2 material. As I say, I am not, at this stage, saying unilaterally that we object to it, but I do  
3 want to understand to what points it is actually purporting to go. That needs to be set out in  
4 a relatively detailed letter rather than the scant one or two paragraphs that I understand were  
5 in the letter that was served on the Tribunal last night. I do, sir, say that we are reaching a  
6 point where I might have to say I have a more principled objection, which I do not want to  
7 do if I can avoid it. But we do need to know exactly what it is that this material is going to.

8 THE CHAIRMAN: Mr. O'Donoghue, do you have anything to say?

9 MR. O'DONOGHUE: Sir, thank you. Sir, to be clear, three of the papers are referred to in the  
10 CVs of Dr. Maldoom and Professor Dobbs themselves. We assume in relation to those  
11 papers, because they have been put in issue by the professor and the doctor themselves, that  
12 there can be no objection to those.

13 Sir, a couple of the papers relate to what we say has been a failure on the part of Professor  
14 Dobbs in particular to observe basic good practice in respect of assumptions as to demand  
15 curve shape and we will be putting the questions to him in any event. We think in fairness  
16 to him it may actually be of some assistance to him to try to have some benchmark as to  
17 what is good practice in connection with assumptions as to the shape of demand curves.  
18 That is the sole purpose of two of the papers.

19 Finally, sir, one of the papers responds to the material we received from Professor Dobbs'  
20 three notes two days before the hearing. We think in fairness we should be allowed to say  
21 something on that. We have given very firm undertakings as to lack of duplication. We are  
22 very conscious of that. The Tribunal has been firm in dealing with cross-examination and  
23 scope so far, if I may say so. We are entirely understanding of the exigencies of this case  
24 and the time pressures that the Tribunal is under. We perfectly understand that. We will be  
25 putting the questions to Professor Dobbs and to Dr. Maldoom, and it may be helpful to all  
26 concerned if there is public, freely available materials that speak directly to what we say has  
27 been a failure of good practice on the part of Professor Dobbs and Dr. Maldoom.

28 THE CHAIRMAN: Would it be possible, Mr. O'Donoghue, to have passages in these articles  
29 identified that Professor Dobbs could read, instead of looking at every part of these articles,  
30 so that we at least save time.

31 MR. O'DONOGHUE: Sir, we will do what we can, but we have given a very clear undertaking to  
32 BT that none of the algebraic formula in the papers will be examined at all. That, with  
33 respect, eliminates a good chunk of the material in the articles. We have made very clear

1 that what we seek to put to Professor Dobbs and Dr. Maldoom is the conclusions in the  
2 articles. We are happy to elaborate on that if it is useful.

3 THE CHAIRMAN: Think it would be helpful so that when you put a point to a witness like  
4 Professor Dobbs, he will inevitably want to familiarise himself with the article at which the  
5 point is being made, and if you can simplify the process by ensuring that he has pre-read  
6 those parts of these papers, and indeed any other material, that you are going to be putting  
7 to him so as to minimise the gap between your question, his reading the material and then  
8 his answer, that would inevitably be helpful.

9 MR. O'DONOGHUE: Sir, we accept the pragmatism of that, and in fact one of the reasons for  
10 giving this advance warning was precisely to give him that ----

11 THE CHAIRMAN: Indeed, I can see that. I take your point that this publicly available  
12 information, and provided it goes to no new point, because that would require an  
13 amendment, and I can tell you now that an amendment would ----

14 MR. O'DONOGHUE: Sir, I can confirm that it does not.

15 THE CHAIRMAN: No, I understood you to be saying that. That, I think, would be the way we  
16 would be minded to proceed.

17 MR. READ: Sir, I think you are saying that, in fact, they should at least write something to tell us  
18 to what the cross-examination is actually going so that Professor Dobbs or Dr. Maldoom  
19 know in advance the passages that are going to be relied upon. I think that is what you are  
20 saying. What I am keen to have is a written letter because although that is on the transcript,  
21 I do not know which parts of which articles relate to what. We just want it formalised so  
22 that we know what it is that is actually going to be relied upon. I think that is what you are  
23 saying, sir.

24 THE CHAIRMAN: I think we are close. I think what I am inviting Mr. O'Donoghue to do is to  
25 identify those parts of the academic articles we have here, which are substantial, which it  
26 would be helpful, given the questions he intends to put, to have the witnesses read. I am not  
27 asking him to go further than that and articulate what questions he is going to be putting.

28 MR. READ: Sir, just for the record, I was not either. I was simply saying that we wanted to  
29 know where the issues were actually going to, rather than how the questioning was going to  
30 be developed.

31 THE CHAIRMAN: We are all *ad idem*.

32 MR. READ: I hope that that will dispose of the problem.

1 THE CHAIRMAN: I hope so too. For our own part, we are quite conscious that the timetable,  
2 despite the assurances that we have had that the parties are actually ahead of the game, on  
3 paper it appears that we are actually rather far behind.

4 MR. READ: We are not, sir. If I can just explain, the intention was always to start, if I can call it,  
5 the more technical evidence next week. We will get to the more technical evidence on  
6 Monday morning with Mr. Myers. I suspect we may not even need the whole of the day to  
7 complete the remaining witnesses today. In that case, I think all parties are absolutely  
8 agreed that it would be pointless Mr. Myers going into the witness box for a very short  
9 period this afternoon. All parties are agreed that he should start first thing on Monday  
10 morning.

11 THE CHAIRMAN: If that is the case that is excellent news. We will keep that under review.  
12 We, in any event, are going to have to rise at 4.20 today, so unfortunately there will not be  
13 any prospect of an extension beyond that.

14 MR. READ: I feel fairly confident myself that we will have the witnesses finished well before  
15 4.20. With that, sir, can I call Mr. Kilburn, who is, luckily for the Tribunal, here today,  
16 rather than at his wife's side.

17 THE CHAIRMAN: Excellent, thank you, Mr. Read.

18 MR. READ: Perhaps not so luckily for his wife, I do not know.

19 Mr. DARREN JOSEPH KILBURN, Sworn

20 Examined by Mr. READ

21 Q You are Darren Joseph Kilburn?

22 A I am.

23 Q And your business address is BT Centre, 81 Newgate Street, London EC1A 7AJ. That is  
24 right, is it?

25 A It is, yes.

26 Q I wonder if you can look at the bundles to your left, and there should be a bundle entitled  
27 core bundle, volume C1 – do you have it?

28 A I do.

29 Q Mr. Kilburn, if at any stage throughout giving your evidence you want any help with  
30 finding the bundles or any documents within the bundles, do say so, because, as you will  
31 appreciate, there are rather a lot of them. They should be readily marked to your left hand  
32 side. Can I ask you to go to tab 17, and it is a statement of yours dated 6<sup>th</sup> April 2009, and  
33 at the end of it on p.22 I think there should be in your bundle a signature – is that right?

34 A That's right.

1 Q I do not think it has, unfortunately, made its way into all the core bundles. Is that your  
2 signature?

3 A It is, yes.

4 Q Is there anything in that statement that you wish to clarify in any respect?

5 A There is, yes.

6 Q Would you like to explain what that is?

7 A In para.19 there is a statement where I say that the NTS formula applies only to BT. During  
8 the production of this statement there was an amount of debate as to whether the formula  
9 would apply only to BT or to all OCPs, and the potential confusion that the *Orange* decision  
10 may have caused. I came down on the side that it applied in practical terms to BT, but all of  
11 the work for subsequent witness statements it clearly shows that the formula to all  
12 originators of NTS traffic.

13 Q Subject to that clarification, do you adopt that statement as your evidence in the case?

14 A I do.

15 Q Can you turn on to the next tab, tab 18. Again, if you go to the end of it, p.19 of that  
16 witness statement, there is, I hope, in your bundle a signature.

17 A There is.

18 Q Is that your signature?

19 A It is.

20 Q Do you adopt that witness statement as your evidence in this case?

21 A I do.

22 Q Can you go on to tab 19, and this is the third statement of yours. It is not paginated, but at  
23 the end of that statement after para.26 is there is a signature there?

24 A There is.

25 Q And is that your signature?

26 A It is.

27 Q Do you adopt that witness statement as your evidence in this case?

28 A Yes.

29 Q Finally, Mr. Kilburn, if you go to tab 20, there is another statement. Again, I think it is  
30 unpaginated, but if you go to the end of it after para.19, is there is a signature there?

31 A There is.

32 Q Is that your signature?

33 A It is.

34 Q Do you adopt that as your evidence in the case?

1 A I do.

2 Q I just want to ask one supplementary question arising out of a question that  
3 Professor Stoneman asked on the second day of the hearing, which, for the Tribunal's  
4 reference, is at p.76 on day 2, lines 1 to 6. The question that was asked is, "Is it right that  
5 currently BT do not charge for 0845 and 0870 calls at the moment, they do not charge for  
6 origination?" Then Professor Stoneman indicated that he had been looking on Google on  
7 the question of prices. Can you shed any light on the situation in respect of 0845 and 0870  
8 calls?

9 A Yes, they're included within the bundle. In as much as they appear in that bundle charge,  
10 there is no meter charge, pence per minute charge for them.

11 PROFESSOR STONEMAN: Does that mean that I was right or I was wrong?

12 MR. READ: I think it means you were right, sir.

13 PROFESSOR STONEMAN: Thank you.

14 MR. READ: I think probably it is better to qualify it as a result of it being in the bundle rather  
15 than being zero rated, full stop. Thank you, Mr. Kilburn, if you wait there you will be asked  
16 some more questions.

17 THE CHAIRMAN: Miss Smith.

18 Cross-examined by Miss SMITH

19 Q I am sorry, Mr. Kilburn, if you could give me a moment, just in the light of that last  
20 question, to check something before I ask further questions. (After a pause) Could I ask  
21 you to turn to your second witness statement, which is in tab 18. You will see there on p.5  
22 in para. 10 you refer to 0845 calls as "Local" or "Lo-call" numbers, however despite this  
23 "not all 0845 calls are charged at Local rate and a call to an 0845 number made by  
24 a mobile telephone user can be very expensive. BT's fixed line customers are  
25 charged the same as though the call were a local geographic call"  
26 you say there. Then you say in para. 11:

27 "0870 calls are charged rates that are the same as BT's national rate with calls  
28 from mobile telephones being particularly expensive."

29 Then you say, last sentence:

30 "Again BT's fixed line customers are charged the same for 0870 calls as if the call  
31 was a national geographic call".

32 A That's right.

33 Q You see that. So you are criticising in those paragraphs the charges made by mobile  
34 operators fees calls as very expensive?



1 A I am not sure it's a criticism, it's a comment.

2 Q A comment. It is also fair that you are commenting or implying in these paragraphs that the  
3 mobile operators do not abide by Ofcom's policy preference that the 0845 and 0870 calls  
4 should be charged at the same as geographic calls, but BT does comply with that policy  
5 preference, that is what you are saying there, is it not?

6 A What I am saying is that BT charges for 0845 are in line with local. BT for 0870 are in line  
7 with national and that other carriers don't necessarily charge in that way.

8 Q Yes, and that alignment between 0845 and 0870 and the equivalent geographic calls, that  
9 alignment you say is in line with Ofcom's policy preference, and other mobile operators are  
10 not in line with Ofcom's policy preference, that is what you are saying there, is it not?

11 A In those paragraphs, certainly with regard 0845 I do not discuss Ofcom's policy preference  
12 at all in relation to 0870 in that paragraph. I will read it out:

13 "This is despite Ofcom's attempts to give consumer's confidence in the 0870  
14 number range."

15 Q Yes, well let us focus in on what you say about BT's charges. You say:  
16 "Bt's fixed line customers are charged the same as if a call was local geographic call", para.  
17 10?

18 A Yes.

19 Q "BT's fixed line customers are charged the same for 0870 calls as if the call was a national  
20 geographic call" – last sentence, para. 11?

21 A Yes.

22 Q So we can agree that is what you say there?

23 A Yes.

24 Q Has that always been the case?

25 A I believe so in terms of the retail price list.

26 Q Can I ask you to get out bundle 24, which should be among those bundles next to you? Tab  
27 11.8, this is an exhibit to Mr. Fitzakerley's statement. "Ofcom Number Translation Services  
28 A Way Forward, Consultation September 2005". Can I ask you to turn in that document to  
29 p.34? You see a section about half way down that page, "B. Retail pricing of 0845 and  
30 0870 calls", and you say at

31 "Since the introduction of the NTS regime in 1996 the retail prices of 0845 and  
32 0870 calls to BT customers have been linked to BT's standard retail call charges  
33 ... for local and national geographic call charges respectively."  
34 Then in para. 4.17:

1 “However, the link has broken down because very few consumers now pay the  
2 standard rates for geographic calls. Most of BT’s residential consumers, for  
3 example, are now on the BT Together Option 1 package, where geographic calls  
4 cost less than the standard rates. This problem does not affect other NTS number  
5 ranges such as 0844 ...”

6 etc for these ranges they are the same. The 4.18:

7 “The breakdown of this linkage has had an adverse impact on the consumer  
8 interest in several respects.

9 \* it has given rise to potentially misleading advertising of 0845 and  
10 0870 numbers as being charged at local and national rates:

11 \* as a result of consumer awareness of the local and national rate linkage  
12 and possibly also from misleading advertising, some consumers feel  
13 they are being overcharged for 0845 and 0870 calls.”

14 So as I understand it, the position then at the very least was that BT was charging its  
15 headline local and national call rates for 0845 and 0870 calls, but because most consumers  
16 were paying for geographic calls by way of a package they were actually being charged less  
17 than the headline rates, so there was this disconnect in BT’s charging between the 0845,  
18 0870 charges and the charges for actual geographic calls, that is correct, is it not?

19 A In terms of how the charges if I can say ended up in the blue bill, yes, but in terms of how  
20 the charges are defined in BT’s retail price list then that is not correct.

21 Q Yes, but Ofcom was not really concerned about the formal in BT’s charge list, was it? It  
22 was concerned about the actual position on the ground and what consumers were paying  
23 and ---

24 A There is essentially a discount being offered.

25 Q Yes, and Ofcom went one step further and thought that this was potentially misleading  
26 advertising of 0845 and 0870 numbers, did they not?

27 A So it says in here, yes.

28 Q So the reality was that BT was actually charging more for its 0845 and 0870 customers than  
29 the actual charges for the equivalent geographic calls was it not?

30 A It was discounting one set of calls in a way that was different to the way that it discounted  
31 08 calls.

32 Q If you can put that bundle away for the moment, and go back to your second witness  
33 statement, core bundle C1, if you turn to para. 25 on p.9, you say in para. 25:

1 “For 0845 ranges a revenue share model exists across the NTS platform. For BT  
2 originated traffic the NTS formula and the Call Origination Condition come  
3 together to derive an out payment in excess of termination costs ...” etc.

4 You mention there both the NTS formula and the NTS call origination condition, if we can  
5 focus first on the NTS call origination condition and that was renewed as I understand it,  
6 and imposed upon BT following Ofcom’s 2009 review of the wholesale fixed narrowband  
7 market. Is that correct?

8 A Yes.

9 Q And in summary that condition limits the amount that BT can deduct from its retail charge  
10 for 0845 calls and 080 calls for originating that call before passing the remainder of the  
11 retail charge onto the terminating communications provider. In a nutshell, that is what it  
12 does?

13 A Yes.

14 Q You also agree that as of 2009 the NTS call origination condition does not apply to 0870  
15 calls?

16 A 0870 calls were moved out of the NTS bucket of services.

17 Q So for the purposes of this case it just is imposed in relation to 080 and 0845 calls?

18 A That’s right.

19 Q So the NTS call origination condition, and that is what we are focusing on at the moment  
20 applies only to BT, is that correct?

21 A Yes.

22 Q And is applied as a result of Ofcom’s finding that BT had SMP in the market for wholesale  
23 call origination?

24 A That’s right.

25 Q I want to very shortly examine with you the actual effect of the NTS formula. In para.26 of  
26 your witness statement you refer in a footnote to Ofcom’s July 1997 Determination. That is  
27 exhibited to your statement, so I will take you to that. Can you get out bundle 27 tab 12.1,  
28 the first exhibit to your second witness statement. This is the 1997 Ofcom Determination  
29 for Interim Charges to BT Standard Services and deals with a number of matters including  
30 the NTS formula. The NTS formula is found on p.27 of the 30. May I ask you to turn to  
31 that. The equation is in the middle of that page at para.8. Do you see that formula?

32 A Yes.

33 Q You were here, I think, in court Wednesday when I took Mr. Fitzakerly through that  
34 equation, is that correct?

1 A Yes.

2 Q So we see that the ONO keeps P (which is the actual retail price) minus D (the deemed  
3 retail price) plus C (the costs of origination), that is the formula?

4 A That's right.

5 Q Let me see if you agree with the following. First, this formula does not impose any  
6 limitation on the actual retail price that can be charged by mobile operators as originating  
7 operators for 0845/0870 calls, do you agree with that?

8 A I do.

9 Q Secondly, do you agree that the effect of this formula is that where the mobile operator's  
10 actual retail price is greater than the deemed retail price, the mobile operator keeps that that  
11 excess?

12 A It does, but there's a subparagraph that talks about the link between an originating network  
13 operator's retail price and an originating network operator's costs of origination.

14 Q Right. I was going to ask you about that. We can come back to that, perhaps. What I  
15 would like to ask you is: would you agree, on the face of this formula, no obligation. on the  
16 face of this document, no obligation is imposed on any originating network operator (apart  
17 from BT) to pass through to a terminating provider any more than the difference between  
18 the deemed retail price and the costs of origination?

19 A In relation to setting the termination rates for BT for the period in question, then yes.

20 Q You put some emphasis on "for the period in question" and Wednesday in re-examination,  
21 you will recall, Mr. Read asked Mr. Fitzakerly about this document, Mr. Fitzakerly  
22 suggested that this was the position in 1996, but the implication was (the answer he gave, as  
23 I heard it) that the situation changed subsequently. You are not suggesting that Ofcom's  
24 regulatory regime changed at any time so that originating operators other than BT were  
25 obliged to retain only cost related charges for originating NTS calls, are you?

26 A I think throughout my statements I am saying the opposite, that as the NTS regime has  
27 developed it's become very clear that the formula will allow an originator to retain their  
28 retail charges, for example, minus their costs of origination. That's what the formula is  
29 telling everyone.

30 Q If those retail charges are greater than BT's retail charges (and that is what we are  
31 concerned about in this case: BT's concern is that the mobile operators are charging high  
32 retail charges) there is no obligation on the mobile operator who charges higher retail  
33 charges than BT to retain only the costs of origination and then to pass everything else on to  
34 the terminating provider, is there?

1 A Sorry, I am disagreeing with that. I am saying there is actually an obligation, or that there is  
2 a construct that exists that facilitates the pass through of collected revenue to terminating  
3 operators.

4 Q You say there is a construct that exists. What I want to focus on is what the regulation  
5 actually provides for rather than what BT's interpretation of it might be, but what the  
6 regulation actually provides for. So we have looked at this document, the 1997 document,  
7 and you have agreed with me that quite clearly this NTS formula allows the originating  
8 operator to keep the excess of their actual retail charge and only to pass on the difference  
9 between the deemed retail price and their origination charges. You agreed with me on that?

10 A That's what it says, yes.

11 Q That is what it says. I have been trying to find where this has changed. So perhaps I can  
12 ask you just to take that point through. The suggestion was made by Mr. Fitzakerly but not  
13 by reference to any actual regulatory documents. Can I ask you to get out bundle 24.  
14 Bundle 24 contains the witness statement of Mr. Fitzakerly of 8<sup>th</sup> October and various  
15 exhibits. Firstly, would you look at tab 11.3, the January 1996 Oftel document, which I  
16 think introduced the NTS formula for the first time. You will see on p.49 of that document  
17 we have the equation: originating network operator keeps P (the actual price) minus deemed  
18 retail price plus costs of origination, and deemed retail price is defined on p.19 as  
19 effectively BT's adjusted retail price for the call.

20 A Yes.

21 Q So that is 1996. The second document behind tab 11.4, the 1997 Determination, which I  
22 think is the one we have just been looking at that was also attached to your statement, we  
23 have the equation at p.36 of that document, the top of the page. Exactly the same equation.  
24 And we have the definition of "Deemed Retail Price" on p.14 which is again BT's retail  
25 price, and the statement on p.14. So it is exactly the same effect?

26 A Yes.

27 Q Then we have tab 11.5, the 1999 statement from Oftel (as it then was). Could I ask you to  
28 look at the bottom of the first page:

29 "Oftel proposed that, in future, terminating operators providing NTS (number  
30 translation services) should be able to determine the retail prices at which their  
31 services were made available to customers. Under the new arrangements  
32 terminating operators would be free to set the termination charge they wanted for  
33 their services. The level of BT's origination charge would be set by Oftel and the  
34 retail price to customers would be the sum of the two."

1 So what I understand the change to be there is that it was only BT's originating charge that  
2 was to be regulated, and instead of just getting the difference between the deemed retail  
3 price and the costs of origination as a termination charge, terminating communicating  
4 providers could set their own termination charge. Is that what you understand to be the  
5 case?

6 A Within the context of this, yes.

7 Q Just for completeness, at para.S.4 on p.2:

8 "These arrangements do not apply to originating operators other than BT. These  
9 operators are free to set their own originating charges and it is up to them to  
10 negotiate with terminating operators the payments required for access to their  
11 services."

12 So BT's originating charges are regulated, everyone else's originating charges are not. That  
13 is the position, is it not?

14 A It is, yes.

15 Q Could I just ask you to turn to tab 11.7, the next document exhibited to Mr. Fitzakerly's  
16 statement, the NTS Call Termination Market Review of 22<sup>nd</sup> October 2004. I would ask  
17 you to turn to p.4 of that document, para.2.7 towards the bottom of that page. Here Ofcom  
18 is summarising the current regulatory regime – that is the regulatory regime that was current  
19 in 2004 – shortly after the European Common Regulatory Framework was introduced, so  
20 shortly after the regulatory regime in the UK changed for telecoms. They say in para.2.7:

21 "Current regulatory policy for NTS calls was established in 1996 ... The policy  
22 is based on the principle that BT, because of its market power in wholesale call  
23 origination, should retain only cost-related charges for originating and retailing  
24 NTS calls, and must pass the remaining revenues over to the TCP on whose  
25 network the call ends. These termination revenues are often sufficient to  
26 support revenue sharing ...

27 2.8 The key elements of this policy were retained following the introduction of  
28 a new regulatory regime ... Oftel carried out a series of market reviews, one of  
29 which covered the wholesale market for call origination. As a result of this  
30 review Oftel concluded that BT has SMP in the wholesale call origination  
31 market and, as a remedy, imposed an NTS call origination condition on BT ..."

32 In 2.9 the BT NTS call origination condition is explained.

33 "2.10 Retail prices for NTS calls are not currently subject to regulation ...

1 2.11 Charges for the termination of NTS calls are not currently subject to  
2 regulation.”

3 So again we see there same position, BT is obliged to retain only cost related calls for  
4 originating NTS calls, and to pass on the remaining reviews on the TCP, but there is no  
5 such regulatory obligation on any other OCP – do you agree?

6 A It says that charges for the termination of NTS calls are not currently subject to regulation.

7 Q Absolutely. So the position has not changed. There is nowhere in this review of the  
8 regulatory documents that shows that at any stage mobile operators were obliged to pass on  
9 their revenues from NTS calls, their higher revenues from higher revenues from NTS calls,  
10 to the termination operator. There is no such regulatory obligation, is there?

11 A You took me to some very specific passages or paragraphs. If we had read on, in a number  
12 of them there is a subsequent paragraph that does talk about the relationship between using  
13 an originating network operator retail rates as long as the originating network operator’s  
14 costs of origination are taken into account.

15 Q I took you, with respect, Mr. Kilburn, to the relevant paragraphs. If there are any other  
16 relevant paragraphs then obviously you will be taken to those. I took you to the relevant  
17 paragraphs that set out clearly what the regulatory regime is, which is that only BT is  
18 regulated as to their originating charges – that is correct, is it not?

19 A That is right, yes.

20 Q Therefore, only BT is obliged to pass on all the rest of the revenue save their cost related  
21 origination charge to the terminating operator – that is correct, is it not?

22 A It is an explicit condition for BT, yes.

23 Q Absolutely, we are talking about regulatory obligations here.

24 A Yes.

25 Q So mobile operators are not required to pass on what they charge for their NTS calls minus  
26 the costs of origination, are they?

27 A I believe they are. I believe that the NTS formula can apply to all. I think in 2.11 of the last  
28 document you took me to, whilst it is talking about termination not being subject to  
29 regulation, the NTS framework is a fair and reasonable way of determining the termination  
30 charge for an 08 service that originates ----

31 Q That is your opinion, Mr. Kilburn, you think it is a fair and reasonable way of working out  
32 termination charges.

33 A That’s right.

1 Q I am trying to focus in on what Ofcom, as regulator, what their view is and what they have  
2 actually put in place by way of the NTS formula, because there are a number of very strong  
3 comments in your witness statements where you say the NTS formula is fair and  
4 reasonable, and you have just said to me that it should be applied. What I am saying to you  
5 is it is not applied to anyone else apart from BT, is it?

6 A Whenever Ofcom and Oftel are given the opportunity to talk about the NTS formula they  
7 talk about it applying to originating network operators. Even in documents pertaining to  
8 BT's standard charges where it would have been simple for Oftel to say BT in a sentence,  
9 they continue to talk about originating network operators, I think it is quite clear.

10 Q We have seen in the last document that Ofcom make absolutely clear that the NTS  
11 condition and the NTS formula applies only to BT?

12 A That's right, the condition applies only to BT. As I say in my statement, the two things  
13 come together.

14 Q I would like to take you back to your statement to see what use you actually make of this  
15 NTS formula. Can you go back to your statement, and put away bundle 24. That is core  
16 bundle C1, your second statement at tab 18, and can I ask you to turn to para.29, p.11. You  
17 say here:

18 "If BT had applied the NTS formula to calculate its termination charges, it  
19 would have charged around 50% more than the NCCN 985 and 986 rates. The  
20 table below shows the charges that would fall out of the application of the NTS  
21 Formula and compares the resulting charges to the NCCN 985 charges."

22 You set out the table, and over the page you use what is in that table to support your  
23 assertion that if the NTS formula is a fair and transparent mechanism to arrive at  
24 termination charges then it would follow that the lower NCCN 985 and 986 must also be  
25 considered fair and reasonable. So you are saying, as I understand it, in those two  
26 paragraphs that if we applied the NTS formula to the mobile operators' charges they would  
27 pay a termination charge higher than termination charge that they would pay under NCCN  
28 985, therefore, the termination charges under NCCN 985 and 986 must be fair and  
29 reasonable. In a nutshell that is what you are saying?

30 A On the basis that the NTS formula and the charges that are derived from it would be fair and  
31 reasonable, then to me it seemed that a lower charge would, in itself, be fair and reasonable,  
32 yes.

33 Q Let us have a look, if we may, at the figures in your table 2. We see in the first column of  
34 the table the various mobile operators, we see in the second column of the table the mobile



1 operators' retail charge for 9845 calls in pence per minute excluding VAT. So you have  
2 effectively taken them from the figures, the headline rates, set out in table 1 above, but  
3 taken off the VAT?

4 A That's right.

5 Q 20p per minute, minus VAT; 40p per minute, minus VAT; and those are the end user  
6 charges you put at the retail charge excluding VAT?

7 A As the headline rate, yes.

8 Q As the headline rate. You take away the assumed cost of origination of 5p per minute,  
9 which is in the third column?

10 A Yes.

11 Q And you arrive at a resulting out payment which is either 12.02p per minute, or 29.04 ppm  
12 and you compare that with a figure in the last column which is the NCCN 985 termination  
13 charge, and you say that the resulting outpayment is greater than the termination charge  
14 under NCCN 985 so NCCN 985 must be a fair and reasonable charge. That is fair, is it not,  
15 that is what you say?

16 A Yes, if one charge is fair and reasonable then another charge is fair and reasonable.

17 Q So the resulting outpayment in the fourth column is the figure that you say results, the  
18 termination payment that you say results from the application of the NTS formula. That is  
19 correct, is it not?

20 A No, that isn't correct.

21 Q Actually, the resulting outpayment is simply the mathematical difference between the  
22 actual retail price charged by the mobile operator and the assumed cost of origination?

23 A Including retail charges, but the reason that I hesitate is because we do not know what the  
24 cost of origination is, so it is illustrative rather than actual.

25 Q So actually it is the fact that you have had to assume a figure for the cost of origination that  
26 made you hesitate there, is that right?

27 A And also in fairness we had to also assume the retail charge.

28 Q Of course because the headline rate is not the same as the average retail price which you  
29 would be using or which BT would require to be used for the application of the NCCNs, is  
30 it?

31 A We do not know for sure because we have not been in a position to conclude any  
32 discussions about what the ARP would actually be.

33 Q We will come back to the ARP but it is helpful that you agree, I think that you cannot  
34 equate the headline rate with the ARP?

1 A Okay.

2 Q But you agree with me, do you that the resulting outpayment on this table is simply the  
3 difference between the retail price, to put it in a neutral term and your assumed cost of  
4 origination?

5 A And assumed cost of origination.

6 Q But as we have agreed, as we have discussed, or as I have put to you perhaps more properly,  
7 that is not what the termination charge would be under the NTS formula for mobile  
8 operators, is it?

9 A Sorry, can you ask that question again?

10 Q What you are doing here is applying the NTS call origination condition, to which BT only is  
11 subject, you are applying that to the mobile operators, and you are saying the operator can  
12 retain the cost of origination but they have got to pass everything else on to the terminating  
13 operator, that is what you are doing in this table?

14 A Yes, sorry, yes it is.

15 Q But mobile operators are not under any obligation to retain only their costs of origination  
16 and pass everything else on to the terminating provider, are they?

17 A They are not subject to the call origination condition, that is right.

18 Q No. So they will never be subject to this resulting outpayment, this termination charge that  
19 you have put in this table. There is no regulating obligation that that is the termination  
20 charge that mobile operators have to pay, is there?

21 A But it is what happens when you apply the formula.

22 Q That is what happens when you apply the NTS call origination condition to the prices  
23 charged by the mobile operators but we have agreed the NTS call origination condition  
24 applies only to BT not to the mobile operators?

25 A The call origination condition, yes, but the NTS formula has some of the same – if not all of  
26 the same – effects in practical terms.

27 Q What you are doing here is you are comparing a termination charge, arrived at as a result of  
28 the application of the NTS call origination condition, you are comparing that with the  
29 NCCN 985 charge, that is correct?

30 A In para. 29 it clearly says: “If BT had applied the NTS formula”, it does not say: “in line  
31 with its call origination condition”, it just says the formula.

32 Q Yes, but I think we have agreed that the NTS formula, the NTS call origination condition  
33 has never been applied to mobile operators?

34 A The call origination condition has not, no.

1 Q In your last statement, if I could take you to tab 20 of the same bundle, you say at para. 5:  
2 "In [both my first and second statements] I looked at what charges would be  
3 appropriate if the NTS formula was the basis for the new charges and given that  
4 the new WTS falls significantly below this level, a level endorsed by Ofcom, then  
5 the WTS is fair and reasonable."

6 But you are not comparing like with like, you are comparing the application of the NTS call  
7 origination condition, which applies only to BT with a termination charge that is to be  
8 applied to all mobile operators. So you cannot in those circumstances draw the conclusion  
9 that the WTS is fair and reasonable, can you, Mr. Kilburn?

10 A You keep taking me back to the call origination condition and I keep thinking that I answer  
11 your question and then I bring you back to the formula which is the actual words that I use  
12 in my statement, I am talking about the NTS formula as a way of calculating a termination  
13 payment.

14 Q I think we have probably done that point to death so perhaps I can take you back to a  
15 different point in your second witness statement, if you can go to p.10, para. 27:

16 "BT therefore decided to introduce the NCCNs that would either encourage the  
17 MNOs to reduce their prices down to a step where they shared less with BT or, if  
18 the MNOs did not, payments would be made along the all chain and all parties  
19 would be able to benefit and ultimately share in the OCP commercial model."

20 So as I understand it, on your evidence you are saying essentially that BT decided to  
21 introduce the NCCNs. There were effectively two objectives, first of all to encourage  
22 revenue share and secondly to encourage the MNOs to reduce their prices down to a step  
23 where they shared less with BT. Is that a fair summary of their evidence?

24 A It is, yes, that's a fair summary.

25 Q And you are saying that that was BT's intention at the time that the NCCNs were  
26 introduced, are you?

27 A Yes, I think that's fair.

28 Q Let us just focus in on what you say in your statement. You say that BT wanted to  
29 encourage the MNOS to reduce their prices down to a step where they shared less with BT.  
30 Now, do you mean by that reduce their prices down to the lowest tier on the ladder, the  
31 charging ladder, that is for less than 12.5 ppm, or just a general reduction in prices so that  
32 they shared less with BT?

33 A What I am saying is that they would reduce their price. I am not saying that they would  
34 reduce their price to the bottom tier.

1 Q Right, because at the time the NCCNs were introduced, BT had not actually carried out any  
2 work to consider what the impact of the wholesale tariff structure would be on MNOs retail  
3 prices, had they?

4 A This witness statement refers to 0845 and 0870 charges, the second set of NCCNs, and at  
5 that stage some work had in fact been done.

6 Q Right. Do you recall what work had been done by that time?

7 A So what I am talking about is rather than having a blanket charge, having something where  
8 it could offer some kind of flexibility in terms of the merit of the tiered structure.

9 Q Let me put that question another way. What was the date on which NCCN 985 and 986  
10 were introduced?

11 A I believe it was 3<sup>rd</sup> October.

12 Q Yes, I am helped, it is set out in para. 5 of your statement, October 2009.

13 A Yes.

14 Q Give me a moment, please. (After a pause) The first witness statement produced by  
15 Professor Dobbs, the first note produced by Professor Dobbs, produced in January 2010,  
16 that is correct, is it not?

17 A Yes, I think that I might be able to help. When I talk about my witness statement and my  
18 work I am talking about the kind of work that I discuss with members of my team, not the  
19 expert witness statements or experts' reports – there is a big difference.

20 Q Yes, the work that you discuss with your team and you are saying documents were  
21 produced within the team?

22 A I am talking about whiteboard sessions where you look at what the tiered structure might  
23 look like, what the effect of that tiered structure might be, the downsides of saying: “This is  
24 the rate”, and the positive aspects of how the choice available to originating operators as a  
25 result of a wholesale tariff.

26 THE CHAIRMAN: Sorry, the timing of these whiteboard discussions would be roughly  
27 when ----

28 A Yes, as part of the process to almost get a decision as to whether to proceed with price  
29 notification and price changes.

30 MISS SMITH: Your colleague, Mr. Richards, says (and I do not think I need to take you to it) in  
31 para.14 of his statement that all the modelling was undertaken after this dispute arose. You  
32 would agree with that?

33 A Absolutely.

1 Q What we are talking about is anything that was produced internally by BT at about the time  
2 the NCCNs were introduced?

3 A Yes.

4 Q You recall you, BT, were subject to a request for information by Ofcom under s.191  
5 Communications Act 2003 and they were therefore legally obliged to produce all  
6 documents requested in that request.

7 A That's right.

8 Q So all documents that were produced by BT at about the time that the NCCNs were  
9 introduced would have been produced by BT in response to that request, is that correct?

10 A Yes.

11 Q Let us have a look, if we may, at one of the contemporaneous documents. Sir, I am not at  
12 the moment proposing to take Mr. Kilburn to any of the confidential information contained  
13 in that document, but if we do stray on to that I will highlight that before we get there.  
14 Could I ask you to look in bundle 23, about two-thirds of the way through this bundle there  
15 is tab 8.1. You refer to this in your statement so you are very familiar with these  
16 documents, Mr. Kilburn. There is the request there, the Ofcom letter of 13<sup>th</sup> April 2010, a  
17 formal notice under s.191 Communications Act from Ofcom to BT at tab 8. Then at tab 8.1  
18 we find BT's response. Could I ask you to look at p.5 we have request 7 from Ofcom:  
19 "Please provide copies of final internal documents (memos ...) that consider the  
20 impact of NCCN 985 and 986 on your business. These may include the  
21 following..."

22 BT's response attaches a Word document which is the internal authority paper that was used  
23 to obtain internal governance for the 0845/0870 ladder rates. It includes details of the  
24 additional revenue forecasts and how the rates were calculated. This is where it gets  
25 difficult because unfortunately this is not numbered at all, but there should be within that  
26 tab (in a different place from where it is in mine) a document entitled "In Confidence - BT  
27 Wholesale Community Only Devolved Authority BT Terminated 0845/0870." I hope you  
28 will have seen it. You refer to it in your witness statement.

29 A Yes.

30 Q You are familiar with the document. Could you flick through and tell me when you find it.

31 A Yes.

32 Q You have got it. I do not think you have, in that bundle, highlighting that identifies  
33 confidential data?

34 A No.

1 Q Effectively, it is the figures that are confidential, I think, so please do not refer to any of the  
2 figures and I will do the same, I will not refer to any of the figures. You see on 1 of 9 (it is  
3 a nine page document) halfway down the page: “Sponsoring GM [General Manager]:  
4 Darren Kilburn” so you are the sponsoring general manager?  
5 A Yes.  
6 Q You see in the Executive Summary the second sentence:  
7 “The charging mechanism proposed will improve margin and revenue for 0845  
8 and 0870 by up to [a certain amount] per annum.”  
9 Do you see that?  
10 A Yes.  
11 Q Then on pp.6 and 7 we have a table setting out what is called “Customer Impact”. I need  
12 only take you to the very last figure in the table on p.7 bottom right hand box we have a  
13 figure which is essentially exactly the same as on p.1?  
14 A OK.  
15 Q Do you see that?  
16 A I will go back to p.1 and check. (Pause) Yes.  
17 Q Page 6 the second column in the table says “Retail Charge”.  
18 A Sorry, can I just stop you.  
19 Q You do not have figures?  
20 A I do have figures, and I’m looking at the right document because I recognise it as being the  
21 right document, but the figure at the end in this is different from the figure at the beginning.  
22 I don’t know whether that affects your question in any way.  
23 Q Yes, we are looking at the same document.  
24 A Page 7.  
25 THE CHAIRMAN: I wonder whether we might -  
26 MISS SMITH: That is the only confidential figure.  
27 A I’m looking at the figures in the box rather than the figures in the paragraph.  
28 Q That is the only figure to which I wanted to draw his attention. Will that be OK?  
29 THE CHAIRMAN: Right. Sorry, I was beginning to wonder!  
30 MISS SMITH: I am sorry. It is a simple point, Mr. Kilburn. There is no suggestion in these  
31 figures that mobile operators’ prices would fall in response to the introduction of the  
32 NCCNs, is there?  
33 A There is not.  
34 Q Not in these figures?

1 A No.

2 Q On the contrary, you put forward the pricing proposal to your Wholesale Executive Board (I  
3 say “you” because you are the sponsoring general manager) on the basis that it would  
4 deliver a particular sum of additional revenue to BT. That proposal assumed that mobile  
5 operators’ retail prices would stay the same. That is correct, is it not?

6 A Not exactly, no. I have to draw your attention to section 2 where this paper is asking the  
7 Commercial Investment Board to endorse a course of action, and it goes on to say that the  
8 Wholesale Executive Board have previously agreed to this proposal. This paper (and I am  
9 sure we are going to refer to it a lot) was a way of setting down in terms of our process the  
10 fact that the decision had been made by one group of people, but there was another group of  
11 people who actually in terms of our process endorsed pricing decisions within BT.

12 Q It is described in BT’s response to the request from Ofcom as being “the internal authority  
13 paper that was used to obtain internal governance for the 0845/0870 ladder rates”.

14 A That is a much more eloquent way of saying what I thought I just said, sorry.

15 Q I was simply asking you that the internal authority paper on the basis of which the BT  
16 Wholesale Executive Board agreed to introduce this wholesale pricing structure proceeded  
17 on the basis that it would deliver a particular sum of additional revenue to BT and that  
18 particular sum was calculated on the basis that mobile operators’ retail prices would stay the  
19 same after the introduction of the wholesale pricing structure.

20 A So the way in which the Commercial Investment Board made their decision was on the  
21 basis of this paper, and this paper doesn’t contain anything within it that says that volumes  
22 would fall, it doesn’t say that.

23 Q It does not say prices would fall either?

24 A It does not, but I would take you to comments towards the end in section 6.

25 Q I do not think there is anything confidential there, so if you want to read out a comment you  
26 can.

27 A You have not asked me a question but I feel that I should explain.

28 THE CHAIRMAN: Please do?

29 A So I am a sponsoring GM here and my role is to get the ultimate signatories within  
30 wholesale to essentially agree with something that I’m sponsoring. So any CIB papers  
31 about putting forward a particular message, if I could be crude about it, telling the story the  
32 way I would like the story to be told, which means there’s a certain bias in the paper, in any  
33 CIB paper, I would say. The second point is, this paper was produced – it’s not got the  
34 detail of a traditional CIB because it’s a way of endorsing a decision that was already taken

1 and getting that on paper as a matter of record so we can look back at it. So it isn't as  
2 robust perhaps as the normal quality of paper that comes out of my team. The point that I  
3 was then going to make was that within it we felt it important to address the issue of 0870  
4 as it had been taken out of the NTS regime. So we mention that in section 6 and the risks,  
5 in addition the new 0870 regulatory regime came into effect. Should any CPs listed above  
6 bring their retail rates in line with geographic prices then obviously that traffic would be out  
7 of scope for this proposal. So it's not fair to say that it ignores everything, but it is fair to  
8 say that it doesn't cover everything.

9 MISS SMITH: I will deal with that point in a moment, if I may, I just want to look at what you  
10 say about 0870 retail prices. It says there:

11 "Should any of the CPs listed above ..."

12 that is the mobile operators –

13 "... bring their 0870 retail prices in line with their geographic prices then their  
14 0870 traffic will no longer be in scope for this proposal."

15 I read that as saying that this proposal will not work if the mobile operators bring their retail  
16 prices down to their geographic prices. If retail prices reduce this proposal will not work,  
17 because we will not get the revenue that I have calculated earlier in the paper. That is what  
18 it says there, does it not?

19 A Well, it says what it says, but it is at this time where things are a little uncertain about 0870  
20 and what actually happens; and what action OCPs will take as a result of that was at that  
21 time unclear. What it means is, if those prices come down to a particular level then it is out  
22 of scope. The rules we're attempting to apply would no longer exist.

23 MR. CLAYTON: The amounts, you are saying, will actually come down, so the amounts that BT  
24 will receive would drop? You do not know how much that would be so you cannot  
25 calculate it?

26 A Yes, but it's also a step further to say that. It's almost, without wanting to get into using  
27 words like "compliance", if all OCPs comply with 0870 rules then there would be no  
28 rationale for charging in this way.

29 Q You say "rules", what rules?

30 A The rule where 0870 rates would be in direct line with geographic pricing.

31 Q Which is the preference?

32 A Exactly, yes.



1 THE CHAIRMAN: Mr. Kilburn, can you turn to the beginning of the document, please, just  
2 under the executive summary and before we get to the confidential figure that I will not  
3 mention, you use the words “by up to”.

4 A Yes.

5 Q Can you explain why you use those words instead of a fixed figure?

6 A Sir, the information used in this paper is forecast information. There are so many  
7 unknowns. For example, if I took you to – if this paper is approved then the formal  
8 notification process goes forward and NCCNs are issued, then with those NCCNs a letter  
9 goes out, and I think it is part of the O2 bundle, and at the end of that letter it actually talks  
10 about, “Look, we have based this on a headline rate based on the only information available  
11 to us, your rates may be different”. So in production of this paper we’ve got volumes that  
12 are unknown. We have average retail prices that are unknown. So we take the information  
13 that we have available to us and, as I said crudely earlier, we tell a particular story, we pitch  
14 it in a particular way. There’s certainly no guarantee of those figures ever being realised as  
15 a result of this tariff schedule.

16 THE CHAIRMAN: Miss Smith, I am sorry, do go on.

17 MISS SMITH: I am very grateful for that. This just clarifies the point that what was unknown at  
18 this stage and your use of the words “up to”, as you have just explained to the Chairman,  
19 was uncertainty about the volumes and the average retail prices – that is correct, is it not?

20 A It’s very much part of it, yes.

21 Q You say there is a certain bias in the paper, that it is trying to get agreement from your  
22 board for a certain wholesale charging structure.

23 A Sorry, there’s certain bias in a paper, this paper ratifies a decision that had already been  
24 made.

25 PROFESSOR STONEMAN: On that particular point, are the meetings of the CIB or the WEB  
26 minuted?

27 A Decisions that CIB take are – I don’t know whether they’re minuted, but if they agree a  
28 paper then that price change comes into effect and that is, therefore, the ----

29 Q No, I am just wondering whether there is any paper documentation of discussions that take  
30 place at these boards, or decisions made at these boards or the basis on which the decisions  
31 are made. You say there is an expectation that you will put a paper to them that is not  
32 completely objective. There must then be an expectation that they will know it is not  
33 objective and will discuss it as such in coming to their decision.

34 A That’s right. That’s absolutely right.

1 Q So what I am asking is, is there any paper trail that shows the attitude that they would have  
2 taken to these things in support of the argument that you are putting?

3 A In this case this paper went to devolved authority which meant that the group of individuals  
4 who normally sit didn't have to sit, and this was approved via email as a result of this paper.  
5 As I say, it was to endorse something that had been agreed at a more senior level within the  
6 WEB, and the Commercial Investment Board is a sub-set of some of the individuals who sit  
7 at the WEB.

8 Q This paper went to the WEB as well, did it?

9 A No, this paper was produced after the WEB had decided to effectively launch new pricing  
10 for 0845 and 0870.

11 Q So what was the documentation on which the WEB made their decision?

12 A I think the decision that the WEB took was on the basis of conversation and debate within  
13 their meetings.

14 Q Which you did not originate?

15 A No.

16 MISS SMITH: I think you have agreed, and I do not need to repeat myself, that in response to the  
17 section 191 response BT would have produced whatever documents were available in  
18 response to Ofcom's questions?

19 A Yes.

20 Q You have agreed with me, I think, that there is no indication in this paper that you  
21 anticipated, BT anticipated, that retail prices would fall in response to the introduction of  
22 this wholesale charge structure – you have agreed with me?

23 A I have, yes.

24 Q To go back to your second statement, para.27, p.10, you provide your explanation of why  
25 there is nothing in that document to that effect, the last sentence:  
26 “However, I would have thought that it was so self evident from the very  
27 structure of NCCNs that it is not something that needed to be explicitly stated.”  
28 So you are saying in your statement, although I think you are saying something slightly  
29 different now to the Tribunal, “We did not need to say prices would fall because it is so  
30 self-evident”. You are aware that BT has now produced 16 expert reports on this issue?

31 A Yes.

32 Q And I simply suggest to you that that does not suggest, does it, that the effect of the  
33 wholesale pricing structure on MNOs' retail prices is self-evident, does it?

1 A I think the structure of the pricing gave the OCPs a clear choice, and given the spread of  
2 retail rates that exist across the industry for these services, it seemed to me to make more  
3 sense that prices would go down rather than go up.

4 Q It seemed to you that it would make more sense. Did you ever discuss this with the mobile  
5 operators as to what they might do in response?

6 A We don't discuss this kind of pricing that affects all carriers in advance of notifications as a  
7 rule, because it applies to everybody and notification and the timescales of notification are  
8 standard.

9 Q You are aware that there is evidence, for example, from Mr. Stone of Vodafone that there  
10 are certain choices available to them in response to this wholesale pricing structure, and he  
11 says that those choices include leaving prices the same and in fact putting retail prices up.  
12 Those are the choices that he has identified?

13 A Yes, but that seems inconsistent with a lot that has been written about how competitive the  
14 mobile industry is and given the enormous spread from, what is it, 15p to 40p at the  
15 headline level that does not seem – again, just in my opinion – that does not seem, I want to  
16 say “rational”, but rational has become part of the words used in this session for something  
17 completely different, but it does not seem like a rational thing to do.

18 Q Were you aware that “competitive” in the mobile industry means competitive across a  
19 number of services, and that there may be certain services within that that are priced higher,  
20 which is in fact illustrated by the point that you have just made that there is a very wide  
21 range of headline rates between the mobile operators for these 08 calls, is there not?

22 A Yes, but there is a difference between somebody who charges at 15p and 40p. You would  
23 not expect them to close the gap.

24 Q What has not happened is that the prices for these calls have all settled at a similar rate.?

25 A That is right, yes.

26 Q If I could ask you, I am sorry, I know you have now closed the document, but if I could just  
27 ask you to come back to that contemporaneous document at tab 8.1. I want to ask you about  
28 the second aspect of what you say in para.27 of your witness statement, which is about  
29 revenue share, and that even if the retail prices did not go down payments from the  
30 increased wholesale charge would be made along the call chain and all parties would be  
31 able to benefit and ultimately share in the OCP commercial model. What I understand you  
32 to be saying in para.27 is that even if retail prices do not go down the effect of the increased  
33 wholesale termination charge would be that more revenue would go to BT, which could

1 then be passed along to the service providers by way of revenue share, that is what you are  
2 saying in essence?

3 A I am, yes.

4 Q Let us look at the “Rationale” on p.5 of 9 of this document:

5 “This proposal is based on the regulatory principle that the OCP is making a  
6 margin on a call where the purpose of the numbering convention is to ensure that  
7 value is passed on to the terminating carrier hosting the number, and providing a  
8 service to the calling party. For the carriers choosing to price above a 12.5 ppm  
9 threshold BT wholesale believe that some form of profit share is a reasonable  
10 approach to pricing, and the structure outlined above offers a manageable and fair  
11 approach.”

12 If we look at the first sentence, we talk about “to ensure that value is passed on to the  
13 terminating carrier ...”?

14 A That’s right.

15 Q And we stop there?

16 A Yes.

17 Q So to ensure that value is passed on to BT. There is no suggestion there that there will be  
18 any pass-through from BT to the service providers, is there?

19 A There is no suggestion of that in the document, no.

20 Q In fact, the rationale is that some form of profit share is a reasonable approach to pricing,  
21 that is a profit share between the mobile operators and BT, is it not?

22 A Well, yes, between originating carriers and terminating carriers I prefer to say, but ----

23 Q If we can just go back to the beginning of this tab, tab 8.1, the actual response given by BT  
24 to Ofcom’s questions, and if you could look on p.2, question 3: “We wish to better  
25 understand your plans for revenue sharing with NTS SPs [Service Providers] going  
26 forward”, and there are various questions: “a) Do you plan to continue or introduce  
27 revenue sharing going forward?” and then various further questions. BT’s response to  
28 question 3a:

29 “We do revenue share on 0845 for some, but not all, customers. We would  
30 consider introducing revenue share for a greater number of customers if this were  
31 commercially viable.”

32 If we can go back on to p.1, response to question 2b, that is asking about current levels of  
33 revenue share – I am sorry we should have started with question 2 rather than question 3.

1 Current levels of revenue share – question 2b) “Revenue share standard pricing is shown in  
2 the tables below.” 1<sup>st</sup> August to 31<sup>st</sup> October 2009 we have ----

3 THE CHAIRMAN: There is confidential material here.

4 MISS SMITH: Right, mine is not marked. (To the witness): We see the figures there, there is no  
5 indication of how many service providers received these various levels of revenue share and  
6 no indication in fact of how many of them actually received any revenue share at all, is  
7 there, so we cannot calculate, for example, the actual volumes of revenue share from these  
8 figures?

9 A No, I don't believe you can.

10 Q And question 3, which I first took you to - I should have taken you to second – your plans  
11 for future revenue sharing you would consider introducing it for a greater number of  
12 customers if this were commercially viable, so is it fair to say that is quite a tentative  
13 response as to what future revenue sharing you might carry out?

14 A Yes, but I think appropriate given where we are today.

15 Q But that was for 0845 calls, for 0870 calls it is correct that after 1<sup>st</sup> August 2009 there has  
16 been no revenue share on 0870 numbers, is that correct?

17 A That's correct, yes.

18 Q And your plans for any future revenue share on those numbers is on p.2 ----

19 MR. READ: I think it better because it is not marked in your document, to actually do this in  
20 closed session.

21 MISS SMITH: Well I have actually put the questions that I want to on that document, so I can go  
22 back to your witness statement. We can put that document away, and put it away for the  
23 last time in my cross-examination of you, Mr. Kilburn, you will be happy to hear. Sir, I am  
24 going on to a slightly different point, would now be a good time take a short break.

25 THE CHAIRMAN: Yes, shall we say five minutes.

26 (Short break)

27 THE CHAIRMAN: Yes, Miss Smith.

28 MISS SMITH: Thank you. Mr. Kilburn, I would like to take you back to your first witness  
29 statement which is at tab 17 bundle C1 p.10 para.28. You talk about the 080 number range  
30 and retail calls, and you explain BT's introduction of NCCN 956, which applied to 080  
31 calls. You are aware that for 080 calls there was a similar contemporaneous document  
32 produced by BT, and there has been a similar contemporaneous document produced by BT  
33 in these proceedings. That was produced to Mr. Fitzakerly on Wednesday?

34 A Yes.

1 Q You were there when that was produced to Mr. Fitzakerly, you were in court?

2 A Can we just check that it was an 0800 paper that was produced, because it looked very  
3 much like the 0845 paper.

4 Q The document I am talking about is at CAT bundle 3 tab 27.2.1.

5 A OK, yes.

6 Q You see there:

7 "This paper outlines a proposal to increase the charges for BT terminating 0800  
8 services to those Communication Providers (CPs) who charge their end users to  
9 access a free to caller service."

10 So this is the proposal to introduce the charges, the NCCN 956 to 08 calls.

11 A Yes, it's an information paper.

12 Q It says: "This paper outlines a proposal to increase the charges".

13 A Yes.

14 THE CHAIRMAN: Miss Smith, this is again a confidential paper.

15 MISS SMITH: Unless absolutely necessary, I want to ask you about what you say in your  
16 witness statement rather than take you to this paper which was, I think, exhaustively dealt  
17 with by Mr. Fitzakerly on Wednesday. Sir, I just simply make the point that in line with  
18 what you said I hope nothing will be taken by the fact we do not also put this in the same  
19 level of detail to Mr. Kilburn.

20 Let us go back to your first witness statement para.28:

21 "BT has for some time been concerned that the level of retail charges imposed by  
22 some OCPs (by the MNOs in particular), has had and continues to have a  
23 detrimental effect on the 080 number range and the retail calls market. BT is  
24 concerned that the MNOs' retail pricing has created a lack of confidence in, or  
25 distrust of, the 080 number range and that the MNOs were and are taking  
26 advantage of the lack of 080 call price competition on mobile networks to earn  
27 significant revenues which they use to subsidise their other activities at the  
28 expense of consumers, including SPs."

29 Could I focus on where you say that BT was concerned about the impact that the mobile  
30 operators' retail pricing has created a lack of confidence in or distrust of the 080 number  
31 range. That, effectively, is your concern about the impact that that pricing has had on the  
32 080 "brand" as Mr. Read described it in opening?

33 A Yes, I think that's a good way of putting it.

1 Q You say BT has therefore: “In the absence of any effective action by Ofcom to address  
2 BT’s concerns and the concerns of others, BT through firstly NCCN 911” That was when  
3 you removed the origination charge, stopped paying an origination charge to operators, is  
4 that correct?

5 A Yes, that’s right.

6 Q Just mobile operators, NCCN 911?

7 A It would have been applied to any calls where - sorry, yes.

8 Q And subsequently you took action through NCCN 956. Leaving perhaps to one side at the  
9 moment the fact that BT is not actually the regulator, Ofcom is, you would agree that  
10 NCCNs 911 and 956 apply of course only to the termination charges imposed by BT? By  
11 definition they can only do that?

12 A Yes, of course, yes.

13 Q On Wednesday Mr. Fitzakerly said that BT has about 25 per cent of the market for  
14 termination of NTS calls?

15 A Yes.

16 Q You recall him giving that evidence?

17 A Yes.

18 Q So you cannot, in the light of that, seriously be suggesting that BT acting alone was  
19 intending to address the lack of confidence in the 080 brand by introducing NCCN 956?  
20 Whatever BT did could only affect 25 per cent of the market?

21 A But the concern remains.

22 Q I am talking about your suggestion – I hope I am putting it fairly – that BT effectively  
23 thought, “Ofcom are not regulating this properly, we should take action to restore  
24 confidence in the 080 brand”, but I am suggesting to you that that could never have been a  
25 realistic intention or in fact an intention at all, given that you only have a small percentage,  
26 or 25 per cent of the market, for termination of NTS calls, and your wholesale pricing  
27 charging structure will, of course, only affect those calls that you terminate?

28 A I think it would be fair to describe it as a good start.

29 Q In fact, the reality, I would suggest to you, Mr. Kilburn, is what you say at the end of  
30 para.28, that you took steps, BT took steps, to endeavour a more equitable share of the  
31 available revenue across the 080 NTS platform. That is BT’s origination charges were  
32 regulated, the ONOs’ were not – origination charges were not – and BT wanted to get a  
33 share of the unregulated revenue – is that fair?

34 A Yes.

1 Q You say in para.29 that NCCN 956 would have provided a mechanism for addressing the  
2 retail level failures identified through, one, essentially ensuring revenue sharing; and two,  
3 encouraging a reduction in retail charges for 080 calls. That is, in summary, what you say  
4 in para.29?

5 A Yes.

6 Q I would suggest to you that these issues, revenue sharing and reducing retail prices, were  
7 actually just an afterthought, they were not what BT's intentions were at the time of  
8 introducing the NCCNs?

9 A Revenue share – I think what you mean is revenue share in relation to service providers.  
10 I'm also talking about revenue share between originators and terminators.

11 Q Between originators and terminators, between the mobile operators and BT?

12 A In this case, yes.

13 Q Just finally on that point, would you agree with me that BT never suggested, and it never, in  
14 fact, had been the case that the termination charges in the NCCNs were caused or justified  
15 by an increase in BT's costs of termination?

16 A No, they're not.

17 Q Can I take you on to a different point. Would you go back one page in your first witness  
18 statement to p.9, starting at paras.24 and 25. I am not going to read it out, but essentially  
19 you make the point there that, as I understand it, the MNOs do not notify callers of the  
20 actual charge for an 080 call at the time of the call, and fail to comply in that regard with the  
21 numbering plan and general condition 14, and you have made calls to certain 080 numbers  
22 and you set out in annex 1 of your statement what you were told when you made those calls,  
23 what recording announcements ----

24 A That's right, yes.

25 Q Could I take you, first, to the National Telephone Numbering Plan, because you say that  
26 mobile operators failed to comply with the requirements of that plan. Can you look at  
27 bundle 24, tab 11.1 right at the beginning. This is the National Telephone Numbering Plan  
28 dated 8<sup>th</sup> March 2010, but I think, for our purposes, it is exactly the same as the 2009  
29 version that was in force at the time of the introduction of the NCCNs.

30 A Yes.

31 Q Could you look at p.13 of that document. We have the requirements. Perhaps we can just  
32 bounce about within this because I would like to address the point 0845 and 0870 as well as  
33 080 while we are here, although your statement at that stage was only referring to 080. I



1 think you make a similar statement for 0845 and 0870 in your subsequent statements. For  
2 0845 we see the designation is:

3 “Special Services basic rate: charged (before discounts and call packages) at  
4 BT’s Standard Local Retail Price for BT customers inclusive of value added tax  
5 (the price charged by other Originating Communications providers may vary).”

6 So we can agree there is no requirement to notify callers of the charges for 0845 calls?

7 A That’s right, yes.

8 Q 0870:

9 “Non-Geographic Number: charged at no more than the caller would pay for a  
10 call to a Geographic Number ... except where call charges have been published  
11 in accordance with General Condition 14.2 ...”

12 You refer to General Condition 14.2 in your witness statement. Can I ask you to keep your  
13 finger in that tab of that document and at the following tab, 11.2, is the General Condition,  
14 and General Condition 14 is at p.30 ----

15 THE CHAIRMAN: Miss Smith, I hesitate to interrupt, but you can this very quickly with this  
16 witness because at the end of the day whether or not the MNOs are in compliance with this  
17 document is really a question for us rather than for this witness, whatever he says in his  
18 statement, and we will reach a view based upon the wording of this document rather than  
19 what the witness says.

20 MISS SMITH: I am very grateful for that. I think I can jump a few questions then. Let us not  
21 look at the General Conditions, I can make submissions on that, if necessary. I would just  
22 finally like to close this subject off by looking at the 080 requirement. We have done 0845,  
23 and 0870. I think this is main point:

24 “No charge to Customer (except where charges shall be notified to callers at the  
25 start of the call).”

26 You do not agree with the proposal that this does not require mobile operators to notify the  
27 caller of the actual charge, just the fact that there is a charge. You would not agree with that  
28 proposal?

29 A I would ask you to replace the word “charges” with “prices”. If it said, “where prices shall  
30 be notified”, then it would clear the matter up.

31 Q So your view of this requirement is that prices should be notified to callers at the start of a  
32 call, the actual price of that call, what that call is actually going to cost?

33 A Yes.

34 Q Do you believe that to be the view of the Regulator, of Ofcom as well?

1 A I believe that's what it says here, and given their involvement in this production then I  
2 would say, yes, but I can only talk about what I think, and that's what I think.

3 Q Can I put to you one document, if I could hand that up to the witness and hand up  
4 documents to the Tribunal as well, just to close off this point. (Same handed) This is an  
5 extract from Ofcom's document, "Harmonised European Numbers for Services of Social  
6 Value", a publicly available document dated 28<sup>th</sup> July 2010. If I could just ask you to turn  
7 to p.3 of the numbered pages, para.2.9:

8 "At present, calling a freephone number from a landline is generally free.  
9 However, it is common for calls from mobiles to numbers in freephone ranges,  
10 such as 0800 and 0808, to be charged. The pre-call announcement must inform  
11 the caller that a charge will be applied, but does not provide information on the  
12 level of the charge. The actual price will depend on a number of elements, such  
13 as the caller's tariff plan [etc]."

14 This, I say, makes it clear that Ofcom does not consider that the pre-call announcement  
15 must inform the caller of anything more than that a charge will be provided?

16 A So I read that as an explanation of what is happening currently.

17 Q "And Ofcom recognises that the actual price would depend on a number of  
18 elements such as the caller's tariff plan and provision of real time tariff  
19 information is problematic, so Ofcom recognises that it may not in fact be possible  
20 to give an actual price at the beginning of the call."

21 You would agree with that, would you, from that document, that is what it says in that  
22 document?

23 A It is a description of what is happening, why Ofcom phrased it in the way that they have, I  
24 don't think I am in a position to comment on, sorry.

25 THE CHAIRMAN: It is there, the document says what it says.

26 MISS SMITH: And I think that that helpful concession at the end, that this is not perhaps for Mr.  
27 Kilburn to comment on. If I could go on then to something you do ----

28 MR. READ: Just before we leave that document I would like to draw the Tribunal's attention to  
29 one fact, I do not know how relevant it is or it is not, but if one looks at para. 2.7 which sets  
30 out the freephone number in the numbering plan. That does not appear to actually  
31 correspond with the words in the document we have just been looking at, that may be a  
32 matter that has to be investigated further, but I thought it was worth drawing attention at this  
33 stage.

1 MISS SMITH: Thank you. Perhaps I can move on to a different point, something that you also  
2 give views on in your witness statement, which is about the practicality of mobile operators,  
3 particularly EE because you are answering Ornel's evidence in this regard. The  
4 practicality of EE being able to calculate an average retail price for the purposes of  
5 implementing BT's NCCNs, so thank you, yes, you can put away bundle 24 for the  
6 moment, and we will go back to your witness statement which is in core bundle C1, and I  
7 would like to take you to your third witness statement, which is at tab 19. In para. 1 of your  
8 witness statement you make it clear that you were first employed by BT in 1990 and, apart  
9 from a short period between 2001 and 2005 you have been employed by them ever since.  
10 You have never been employed by a mobile operator, that is correct?

11 A It is, yes. I think I say as much.

12 Q You do. I am going to take you to para. 6. You say:

13 "I have never worked for a mobile network operator and have no knowledge of the  
14 internal workings of EE. I acknowledge from the outset that Ms. Durie and Mr.  
15 Ornel are better placed to discuss the processes and views within EE than I am."

16 You go on to say that you have general knowledge of the telecoms' industry, and you give  
17 your views on the basis of that, I think?

18 A I do, yes.

19 Q At para.18 of your statement you make a similar caveat, perhaps. Paragraph 18, third  
20 witness statement you turn to the witness statement of Mr. Ornel, and you address that,  
21 but before you address it you give the caveat of repeating that

22 "I have never been employed by an MNO and so the comment that *mobile*  
23 *telecoms business is significantly more complicated than a fixed lines telecoms*  
24 *business* is not something that I can directly contradict."

25 However, you then go on to question certain matters in Mr. Ornel's evidence?

26 A I do, yes.

27 Q In para. 26 of your third statement, you say:

28 "The statements of both Ms. Durie and Mr. Ornel appear to detail problems that  
29 arise as a result of the NCCNs used to charge the 0845 and 0970 termination rates  
30 enforced by some unilateral BT process but this is not an accurate portrayal of the  
31 commercial arrangements. The notional complexity of an ARP calculation that  
32 Mr. Ornel cites as *practically impossible* is nothing of the sort."

1 That is quite a strong statement to make given the caveats you have made earlier, you do not  
2 actually know whether or not Mr. Ornel's statement that it is practically impossible to  
3 calculate an ARP for EE you do not actually know that, do you?

4 A Again in this witness statement taken from the NTS review there is a table that has average  
5 perceived prices and so if Ofcom are happy to put a table together based on the information  
6 it received from the MNOs I have assumed that that information was available in some  
7 form.

8 Q Well I will take you back to that table ----

9 A Okay.

10 Q -- but I just want to make the point that you are actually not qualified to make the statement  
11 that you make in para. 26, are you?

12 A What do you mean by "qualified"?

13 Q You say that Mr. Ornel's evidence is practically impossible to calculate an ARP is  
14 nothing of the sort?

15 A Because I am now looking at a table where there is a ----

16 Q So you rely on the table?

17 A Yes ----

18 Q Okay.

19 A In part.

20 Q Well, let us go back and look at some of the statements you make in support of your  
21 conclusion, including the table, but I would like to start at para.20 of your witness statement  
22 which is one page back. Towards the end you make the point about all communications  
23 providers having to adhere to the national telephone numbering plan, and that is relevant to  
24 take the points you made in previous statements about the national telephone numbering  
25 plan and you rely on those. You say the MNOs do not appear to comply with the  
26 requirement to let the caller know of the 080 call.

27 "This is relevant as Mr. Ornel's statement suggests that such cost is difficult to  
28 quantify but that is something that OCPs are required to do if they depart from the  
29 NTNP designation. Given that EE is required to notify callers of the charge at the  
30 start of a call it is not true to that in relation to the ARP 0845 and 0870 calls, '*This  
31 is not work ...*' that is calculation of the ARP '*... that would ever be carried out  
32 for EE's own business purpose.*' Nor is Mr. Ornel correct when he says: '*The  
33 first demand for this has come from BT as a result of the new charging structure  
34 ...*' when it is clear that the requirement exists for a subset of the 08 number

1 range; not to calculate an ARP but an actual retail charge and to make that charge  
2 known to the calling party at the time of the call.”

3 Let us leave to one side what the NTNP actually requires, but even assuming, as you say,  
4 that the NTNP requires the mobile operator to give details of the actual retail charge, it does  
5 not follow that if the mobile operator knows the actual cost of a call they should be able to  
6 calculate the average retail price for the purposes of BT’s wholesale termination charging  
7 structure, does it?

8 A I believe it does.

9 Q To calculate an average charge, the mobile operator would need to know broadly on the one  
10 hand the net revenues received from callers for calling BT hosted numbers on the relevant  
11 number ranges and, on the other hand, the volumes of calls made by the callers to those BT  
12 hosted numbers on the relevant ranges. It is not enough simply to know the mobile  
13 operator’s total revenues from calls, say, to the 0845 number range as that would include  
14 the calls to non-BT numbers. That is correct, is it not?

15 A Assuming that they differentiate between BT terminating 0845 and, let us say, Cable &  
16 Wireless terminating 0845 numbers.

17 Q We are talking here about a BT termination rate which is based on the average retail price  
18 for those calls, i.e. the calls to the BT hosted number?

19 A Yes, but surely that only comes in as a part of an equation if the charges are differentiated at  
20 the front end, between BT as a terminator and anybody else as a terminator.

21 Q Exactly, the mobile operator would need to link their retail billing systems, which give  
22 information about the revenues that are coming on from their calls, with their wholesale  
23 interconnect systems, their separate wholesale interconnect systems, which record which  
24 terminating operator actually hosts those number ranges, those particular numbers to which  
25 the calls are made, so a link would need to be made between two separate systems, the  
26 retail billing system and the wholesale interconnect system in order to calculate an average  
27 retail price for the BT hosted numbers. That is the position?

28 A If that is how their systems are built and developed then yes.

29 PROFESSOR STONEMAN: Miss Smith, could you clarify for me – it has only just struck me –  
30 are these NCCNs with respect to only the average price of BT hosted numbers?

31 MISS SMITH: That is what we understand.

32 PROFESSOR STONEMAN: Is that specific in the NCCN as it is written? When it says “average  
33 retail price” I was thinking the average retail price charged to, say, 0845, by the mobile  
34 operators across all 0845 calls not just the BT?

1 MISS SMITH: No, the evidence of Mr. Ornelo to the effect - and I think our understanding is,  
2 but we do have in the bundle somewhere the actual NCCN. I will dig them out and see  
3 whether we can make statement good.

4 PROFESSOR STONEMAN: It is rather an important point.

5 MISS SMITH: Yes, it is an important point. Our understanding has always been that it is the  
6 average retail price of the calls to which the termination charge relates, which are only BT  
7 hosted calls. The termination charge obviously does not relate to calls that are non-BT  
8 hosted numbers.

9 PROFESSOR STONEMAN: But the ARP could?

10 MISS SMITH: Sir, yes. I will dig that out, if I may. Our understanding is and my clear  
11 instructions are that it is an average retail price of the BT hosted numbers.

12 PROFESSOR STONEMAN: Your understanding is that the ARP just refers to 0845 numbers  
13 hosted by BT, is that correct?

14 A I don't think we have been prescriptive in any way, so in terms of the way in which we have  
15 asked for engagement and information from the mobile CPs, we've been quite flexible in  
16 how they would get to an average number that we could then use in order to implement our  
17 schedule.

18 Q That sounds a bit vague in fact for a commercial proposition.

19 A It was very much part of making this work, so that if we were too prescriptive, then we  
20 thought we would be over-complicating what was necessary.

21 Q We will see what is written down.

22 MR. READ: It is bundle 23 tab 2 which is the NCCN 985.

23 THE CHAIRMAN: Miss Smith, the meaning of this document is not known?

24 MISS SMITH: Absolutely, sir. I think it is something that we can helpfully come back to you on  
25 perhaps over the lunch adjournment.

26 THE CHAIRMAN: Clearly the ability to calculate is a matter which can assist, but what is to  
27 calculate is a matter of construction.

28 MISS SMITH: Thank you very much for that indication, sir. Can I move on to para.21 on your  
29 statement where you refer to this table that you have taken from Ofcom's Simplifying Non  
30 Geographic Numbers consultation paper. You say underneath that table at the bottom of the  
31 page: In this table Ofcom have clearly been able to establish the average retail price for the  
32 08xx number ranges." As you said in your evidence just now, so the mobile operators  
33 should not have a problem in establishing an average price.

1 This table you have taken from the Simplifying Non-Geographic Numbers consultation  
2 paper and the source of the data in the table is an Analysys Mason report. Did you have a  
3 look at that report, the source of the data, before you put this table in your witness  
4 statement?

5 A I used it as it existed within the NGCS review.

6 Q You did not look behind the table?

7 A I didn't look behind the table, no.

8 Q Underneath the table (I will not take you to the document) it is clearly identified in the  
9 report that the source is the Analysys Mason report, but you have confirmed that you did  
10 not look at the Analysys Mason report?

11 A Yes.

12 Q I would like to take you to that, because it is quite important as to what the data was on  
13 which the table was based. Could I ask you to get out CAT bundle 20. It is Everything  
14 Everywhere's response. Could I ask you to turn to tab 5 in that bundle. It is the Analysys  
15 Mason's flow of funds report. You have already told us that you did not look at this before  
16 you put that table in your witness statement. May I just draw your attention to pp.23 to 24  
17 of that document section 4.2 Limitations of the Analysis:

18 "We have built a flow of funds model on which this report is based. Any such  
19 model is naturally limited by the quality of the input data used. As described  
20 above the input data is from responses to an Ofcom data request to  
21 communications providers."

22 They then set out the limitations of their approach using this data. We see in bullet point 3:

23 "We have received weak responses to numerous questions from some  
24 communications providers at each level of the value chain resulting in the need to  
25 make various important assumptions. [p.24 second bullet point:] Some  
26 communications providers' system have not been able to split revenues, costs and  
27 volumes between certain number ranges, requiring us to make allocation  
28 assumptions. [last bullet point:] The Ofcom data request was designed to  
29 understand flows of funds at a high level and therefore it is not possible to clearly  
30 identify which providers receive payments from which other providers at an  
31 individual communications provider level."

32 Then on p.54 of that document, Section 6 Data and assumptions:

33 "As described in Section 4.2, we have used data provided by communications  
34 providers in response to a data request sent by Ofcom. As noted above, the

1 quality of the input data acquired through this data request naturally has an impact  
2 on our model. In Section 4.2, we noted several main limitations of our model in  
3 this regard. In this section, we describe problems with the data in more detail and  
4 outline the assumptions that we have taken to address these problems.”

5 So in particular over the page on p.57:

6 “Allocation between number ranges. Some communications providers’ system  
7 have not been able to split revenues, costs and volumes between certain number  
8 ranges, requiring us to make allocation assumptions.”

9 Then over the page at the very last page of that document at the top of the page:

10 “Bundled calls. In responding to Ofcom’s data request, OCPs have provided  
11 volumes of retail originated calls retailed in and out of bundle for each number  
12 range. Where calls have originated in bundle, they do not generate incremental  
13 revenue for the OCP. ... However, we have elected to model on an incremental  
14 revenue basis and therefore do not consider any such notional retail revenues.”

15 So they have excluded effectively calls that are in bundles. The second heading:

16 “Origination revenues for MVNOs”, Analysys Mason have had to assume MVNO volumes  
17 and revenues based on market analysis. They have encountered incomplete data sets, and  
18 they make the caveat at the very end:

19 “The Ofcom data request was designed to understand flows of funds at a high  
20 level and therefore it is not possible to clearly identify which providers receive  
21 payments from which other providers at an individual communications provider  
22 level.”

23 So would you agree that the task which Analysys Mason was undertaking in this regard was  
24 very different from what BT’s NCCNs would require the mobile operators to do? They  
25 were working out the flow of funds at a very high level and were not working out an  
26 average retail price for, say, 080 calls to the number ranges hosted on BT’s network. That  
27 is clear, is it not?

28 A They are doing something very different.

29 Q They are doing something very different. In the light of that, just one question: had you  
30 looked at that Analysys Mason report, I suggest to you you may not have included that table  
31 in your witness statement as evidence of how easy it would be for the mobile operators to  
32 calculate an average retail price for the purpose of BT’s wholesale charging structure,  
33 would you?



1 A I would say, given the importance of the NGCS review and the fact that Ofcom felt  
2 confident enough to put in the document, that is at least that has a bearing in calculating an  
3 ARP.

4 Q Can we go back to your third witness statement, paras.22 and 23, you say:

5 “In any event there is a further important point. One of the merits of the  
6 stepped function ... is that a CP does not have to reveal the actual ARP, but can  
7 simply inform BT of the ladder position that is appropriate to its view of the  
8 ARP subject to a simple validation process.”

9 Then you go on in para.23 to outline that simple validation process. You just need it to be  
10 signed by a senior company representative, for example, the Chief Financial Officer:

11 “With a CFO sign-off, BT does not need to be party to any of the information,  
12 calculations or assumptions.”

13 You say at the end:

14 “... I do not accept that some of approximate ARP is ‘*practically impossible*’ ...  
15 [Mr. Orndel’s] statement appears to ignore the limited information BT in fact  
16 seeks.”

17 Can I ask you to take out CAT bundle 20 again, and look at tab 10 of that bundle. It is a  
18 meeting note of a meeting between Orange and BT that was attached to EE’s reply in this  
19 company, 12<sup>th</sup> May 2010, so well after the NCCNs have been introduced. You may not  
20 have seen this document before. You were not at the meeting, but given what you say in  
21 your witness statement about how BT does not actually want to look behind the average  
22 retail price, I would like you to look at this document. We have a meeting between BT and  
23 Orange, and it is BT’s note of that meeting. What it does it relates to NCCN 1007, which  
24 superseded NCCN 956, but also set a ladder of termination charges for 0800 calls on the  
25 same basis and structure as that contained in 956. You can see on the first page of that note  
26 under the heading “Methodology behind Orange’s proposal on ladder position” – have you  
27 got that?

28 A Yes.

29 Q “Orange have proposed, without prejudice to their arguments against the  
30 principles behind BT’s pricing ladder, that recognising their average retail  
31 pricing their position on BT’s ladder should be lowered to the lowest rung.”

32 So Orange were saying, “We should be on the lowest rung of the ladder”. What they have  
33 done, the third bullet point under that heading:

1                    “[Orange’s] pricing position is taken by dividing all their retail 0800 revenue by  
2                    the total volume of 0800 minutes.”

3 PROFESSOR STONEMAN: I am sorry, Miss Smith, that is not just BT?

4 MISS SMITH: That is right, we do not say that is actually the correct way of doing it, and  
5                    Mr. Orandel gives evidence on that. What I am concentrating on this document for is the  
6                    scrutiny to which BT actually puts that statement. Over the page, the second bullet records  
7                    a complaint by Orange:

8                    “They are concerned that in asking about the methodology behind their ladder  
9                    position proposal BT is going beyond reasonableness.”

10 Stuart Murray for BT explained:

11                    “... that these discussions were not unreasonable – but more about asking how  
12                    Orange have factored, for example, ‘all you can eat’ packages into their  
13                    calculations.”

14 So BT want to know, “What methodology did you apply? How did you factor these types  
15 of tariff packages into your calculation?” Do you see that?

16 Q I do, yes.

17 Q Then the next but one bullet point:

18                    “Orange will get a CFO declaration if BT insists but Orange [says] Tom  
19                    Gransalke’s letter should suffice. Stuart confirmed BT would accept a  
20                    declaration by Tom ...”

21 but then the important point in brackets –

22                    “... (subject to agreement on methodology behind statement).”

23 So BT are not, in fact, saying, “We will accept your CFO’s statement as to where you  
24 should go on the ladder rung pricing”, they say, “Actually we have got to be happy with  
25 your methodology before we will even accept the CFO’s statement”?

26 A What it actually says is that Orange will get the CFO – Thomas Gransalke is not the Orange  
27 CFO, so there is a compromise that they will take a letter from Thomas Gransalke. Again,  
28 this is a meeting where people are exploring ideas, but I don’t think that was a fair  
29 representation of what’s on the page.

30 Q What I want to test is your suggestion which you make in para.23 of your witness statement  
31 that “we do not really need much information, Mr. Orandel appears to ignore the limited  
32 information BT in fact seeks, all we need is a validation signed off by a senior company  
33 representative, for example, the Chief Financial Officer”, you say, BT does not need to be a

1 party to any of the information, calculations or assumptions”. That is your witness  
2 evidence.

3 A It is, yes.

4 Q And actually BT is insisting that it needs to understand the methodology, it needs to  
5 understand how various tariff packages have been factored into calculations. Your witness  
6 statement does not reflect what BT has actually done in trying to agree these average retail  
7 prices with the mobile operators?

8 A My witness statement has the person responsible for this product, a decision maker on how  
9 this gets implemented, that is our position. This is a set of minutes for a meeting which I  
10 didn’t attend, and comments from one of the BT team exploring, “You have come to this  
11 position, can we just know how you got there”.

12 Q Can I ask you to look at the eight bullet point, which is about half way down the page  
13 between the two hole punches:

14 “Orange responded that BT can send Orange questions in bullet format and  
15 Orange will use their questions for their own purposes but would not respond to  
16 BT.

17 Stu outlined the sort of things we wanted to go through (around bundles etc).  
18 Orange said they would take that away.”

19 So would you agree that Stuart Murray for BT was saying that there were a number of  
20 things he wanted to go through about the methodology including how bundles would be  
21 factored into the calculation of the average retail price?

22 A Yes.

23 Q I put to you that BT’s own position was that simple validation is not enough, BT wanted to  
24 drill down into the detail of how the number was calculated and have information on the  
25 MNOs’ methodology – would you agree with that?

26 A I think that people were exploring how Orange had arrived at that level at a meeting and a  
27 couple of simple of questions were appropriate. We did not, after all, receive this from a  
28 CFO, for example.

29 Q In fact, BT was discussing in that meeting some of the very issues and problems that have  
30 been raised by EE in these appeals, such as how to factor in calls in bundles, and so on?

31 A Yes.

32 MISS SMITH: Thank you, Mr. Kilburn, those are all my questions.

33 MR. HERBERG: Mr. Vinall will ask a few questions.

34 THE CHAIRMAN: Yes, Mr. Vinall?

Cross-examined by Mr. VINALL

1  
2 Q Good afternoon, Mr. Kilburn. Mr. Kilburn, can I start by perhaps trying to clarify a couple  
3 of the issues that you have discussed with Miss Smith this morning about the regulatory  
4 history of the NTS formula. First of all, can I ask you to find bundle 24, please.  
5 Mr. Kilburn, could you put everything away apart from your witness statement in C1 and  
6 bundle 24, that will be great. When you have got bundle 24 could you turn to 11.5, please?  
7 Mr. Kilburn this is Oftel's statement from December 1999 and Miss Smith showed you  
8 para. S2 of the summary which is on the first page, and in particular the reference to new  
9 arrangements whereby terminating operators would be able to determine the retail prices for  
10 NTS services, and over the page the level of BT's origination charge be set by Oftel, the  
11 retail price to customers would be the sum of the two, and so on. That was put to you and  
12 you, I do not think, disagreed with that. Now, can I ask you to take up bundle A, please,  
13 Mr. Kilburn – do not put the other one away but find bundle A as well.

14 THE CHAIRMAN: Which is bundle A?

15 MR. VINALL: Yes, please, sir. Core bundle A, we are going to the 080 determination at tab 1 of  
16 that bundle, p.16, please, at paras. 2.45 and 2.46, those paragraphs are describing the  
17 document we have just looked at, are they not?

18 A Yes.

19 Q And in particular they quote – well never mind what they quote, but if you have a look,  
20 please, Mr. Kilburn, at the bottom of that page footnote 35, you will see that Ofcom there  
21 notes that that particular new charging arrangement was never adopted, does that accord  
22 with your recollection of whether or not that regime was ever introduced?

23 A Let me just be clear.

24 Q This is a proposal not limited to 0844 and 0871 but more generally on NTS numbers that  
25 terminating operators would be able to determine the retail price, that was never adopted  
26 outside those number ranges, was it?

27 A Outside of?

28 Q 0844 and 0871?

29 A That's right, 4471.

30 Q Thank you. If I can move on to the NTS formula, I think you agreed with Miss Smith that  
31 the NTS call origination condition is imposed only on Bt, that is right, is it not?

32 A It is right, yes.

33 Q But I think you said that the NTS formula still applied more generally to other OCPs?

34 A That's right.

1 Q Let me just clarify, because I think this may assist you with a point that you were seeking to  
2 raise when Miss Smith was asking you questions. Have you got your bundle C1 there and,  
3 if so, could you turn to tab 22, please, Mr. Kilburn? This is the witness statement of your  
4 colleague, Mr. Fitzakerly.

5 A Yes.

6 Q And could you find para.17 of that statement?

7 A Yes.

8 Q That is his account of the NTS formula and, in particular, when he describes the meaning of  
9 D, in the second two bullet points he refers to the retail prices not of BT but of the actual  
10 OCP.

11 A Yes.

12 Q Is that the point that you were seeking to make when Miss Smith was asking you questions?

13 A I was saying it applies to originating network operators and more than that a lot of things  
14 have been written about how it would be appropriate to use the deemed retail rate of an  
15 originating operator so long as allowance was made for originating costs of that operator.

16 Q Right, let me just trace, because Mr. Fitzakerly gets this formula from the document to  
17 which he refers at footnote 7, do you see that?

18 A Yes.

19 Q Which is a reference to the 1999 document, which is in bundle 27 ----

20 THE CHAIRMAN: Mr. Vinall, can I just help, or hopefully help here, again the precise operation  
21 of the formula is going to be a question on which the Tribunal will review on the documents  
22 and whilst I appreciate that this is on the cusp of what is factual evidence, and what is  
23 simply material on which we will reach a construction my sense is that you are on the side  
24 of the construction side rather than the factual side if that assists in keeping ----

25 MR. VINALL: I am grateful for the indication, I am simply conscious that Mr. Kilburn suggested  
26 to Miss Smith, that there was a passage of the document that he was aware of and to which  
27 she had not referred him, and I was hoping that on behalf of Ofcom I could clear that up.  
28 That page is the document to which I am now coming.

29 THE CHAIRMAN: Very well, Mr. Vinall.

30 MR. VINALL: Which is in bundle 27 at tab 12.1. I will start, please, Mr. Kilburn, with p.27.

31 That is the formula that Miss Smith showed you, and you will see that "D", half way down  
32 p.27, is described as "the Deemed Retail Price for the caller as defined in Addendum 5".

33 Addendum 5, which you were not taken to is back on p.12 and that there defines, at least in  
34 respect of lo call services a retail price which is the actual ONO's retail price rather than as

1 in the 1996 and 1997 documents, a price which is based on BT's retail price. Do you agree  
2 with me there?

3 A I do, yes.

4 Q Do you also agree with me that it does not do that in relation to freefone and national call  
5 services?

6 A It says that in the case of freefone services "zero", that is all it says.

7 Q Yes, so if the deemed retail price is zero – this is perhaps a matter of submission. Be that as  
8 it may, Mr. Kilburn, the point is that looking at the regulatory picture today the mobile  
9 network operators are not under any obligation, that is to say Ofcom will not come and  
10 punish them if they do not do this, to apply the NTS formula and pass through revenue in  
11 respect of their costs of origination, are they?

12 A They are not under any direct obligations.

13 Q You are not suggesting, are you, that if the mobile network operators keep more than their  
14 costs of origination that they are liable to be sanctioned in some way by Ofcom?

15 A They have been doing it for a number of years and you have not so far so I guess not.

16 Q Your colleague, Mr. Fitzakerly, in tab 22, para. 12 himself says at the end of para. 12 that  
17 other CPs are free to retain any profits above their costs when calls to 0845 and 0870  
18 numbers originate from their network and terminate on BT network, and Mr. Kilburn, he is  
19 your company's head of narrow band port folio regulation so he ought to know, ought he  
20 not?

21 A Sorry, I missed the reference.

22 Q I am sorry, Mr. Kilburn, tab 22, para. 12, last sentence of para. 12?

23 A Yes, so again in relation to the call origination condition and, if you took that in isolation,  
24 then that is correct, yes.

25 THE CHAIRMAN: Again, Mr. Vinall, this is really a matter for us. Mr. Fitzakerly may be right,  
26 he may be wrong as to what he says here, we will have to look at the document and reach  
27 our own conclusion.

28 MR.VINALL: Very well, sir. Right, Mr. Kilburn, I want to move on to a different topic now.

29 This is the topic that you discuss in your witness statement, a distortion of competition in  
30 the transit market. This is, it is fair to say, not a topic which has been at the forefront of  
31 anybody's submissions before the Tribunal thus far, so I just want to it with you briefly, so  
32 that everybody knows what we are talking about.

33 Can I start by putting this. Mr. Kilburn, you are familiar, no doubt intimately familiar, with  
34 Ofcom's three principles approach, are you not?

1 THE CHAIRMAN: Mr. Vinall, are you going to complete this in a couple of minutes, or will it  
2 take you longer?

3 MR. VINALL: Yes, it is going to take me, I would say, about two minutes.

4 THE CHAIRMAN: Very well.

5 MR. VINALL: Mr. Kilburn, the second bullet point of Principle 2 (which, for the Tribunal's note  
6 is at para.4.10 of the 0845 Determination) is that the charges should avoid a material  
7 distortion of competition among various people including transit operators, yes?

8 A Yes.

9 Q At an earlier stage (para.5.32 and one does not need to turn it up) Ofcom raised concerns.  
10 "There are concerns on transit providers' ability to identify the OCP of some calls  
11 to bill OCPs accurately, for example, when calls arrive via another transit provider  
12 who does not identify the OCP. This may lead to competitive distortion in the  
13 transit market by encouraging OCPs to choose inefficient routing choices to avoid  
14 the payment of higher termination charges."

15 The point that Ofcom was making there was it was concerned that if the termination charge  
16 you pay depends on your retail price then you, as an OCP, might be tempted to route your  
17 calls via a transit provider who will not tell BT where the calls are coming from, or might  
18 make them look as if they are coming from somebody who charges a lower retail price. Are  
19 you with me so far?

20 A I am, yes.

21 Q In your fourth witness statement at para. 17 bundle C1 tab 20 you suggest a solution to this  
22 problem, do you not Mr. Kilburn? You suggest that if one of the MNOs made a decision of  
23 this kind then BT would notice. That is essentially what you are saying in para. 17.

24 A Yes, I don't think I agree that it's a solution, but yes.

25 Q It is right to say (and because of the time I am not going to take you through the  
26 archaeology) that this is the first time that this point has been made, in your fourth witness  
27 statement. It is not something that you said earlier, it is not something you said to Ofcom  
28 earlier?

29 A No, I don't believe it is.

30 Q So the point you are making, just to be clear is BT spot the change in core patterns in terms  
31 of calls arriving from a different transit operator than they had before and then you say: "I  
32 remain confident that BT and Transit CP-B would be able to come to some commercially  
33 agreeable outcome." Yes?

34 A Yes.

1 Q Then if they could not do that, then it could be resolved by Ofcom?  
2 A Sorry, yes.  
3 Q And Ofcom might decide it in a way that is satisfactory to BT, yes?  
4 A Could you point me to that?  
5 Q That is implicit in what you are saying.  
6 A I am addressing an issue that came up in an earlier witness statement where I talked about  
7 transit in relation to other transit providers. The response from Ofcom was that I'd missed  
8 the point because they were actually talking about protecting BT's interests in some way  
9 and I think what I'm saying is BT's - we considered this when we launched the tariff  
10 structure.  
11 Q All right. Mr. Kilburn, I am going to put two propositions to you and then we can all have  
12 some lunch. The first point is since this is your reply statement we do not know, because  
13 none of them are here, what any of the transit operators would say in relation to this point,  
14 do we?  
15 A We don't, but I suppose because this is a reply it doesn't include the nature of the services  
16 that we're talking about. So transit as a market, transit as a service, sits in a particular place.  
17 Its relation to NTS services is slightly different. The product is slightly different. It  
18 requires something that isn't detailed here.  
19 Q You said yourself that you were not necessarily putting this forward as a solution. You  
20 would agree with this, would you not Mr. Kilburn, it depends on a series of possibilities; it  
21 depends on BT noticing that this is going on; it depends on being able to come to a  
22 commercially agreeable outcome either through negotiation or through dispute resolution;  
23 and it depends on that addressing any distortion of competition? Do you agree with that?  
24 A Sir, the thing that troubles me about the question is that I don't agree there is distortion. It  
25 can't address something that I don't believe exists. I say again that the commercials around  
26 transit, where we're happy with them as a company in relation to our wholesale tariff  
27 schedule, I think that's what I'm trying to say in this statement.  
28 Q Thank you, Mr. Kilburn. I have nothing further but I think some other counsel may do.  
29 THE CHAIRMAN: We will rise. Mr. Kilburn, you have probably been told that you can speak  
30 to no-one about the evidence - not, I am sure, that you would be inclined to. One other  
31 point for the parties, I think it would be of assistance if an expanded timetable could be  
32 produced by the parties, dealing with those witnesses that we have not concluded today  
33 which sets out not simply the order in which they are going to be called but the length of



1 time that each party anticipates being with each witness, so that if necessary we can see  
2 exactly where we are progressing in the course of next week.

3 MR. READ: Yes, I do not anticipate we are going to overrun today. I want to make that clear.

4 THE CHAIRMAN: I am grateful. Nevertheless, I think that given the number of issues that the  
5 experts will have, it is salutary for all parties to have an appreciation of how much time they  
6 have agreed in advance they can have between themselves. It would give us an indication  
7 of how matters are progressing.

8 MR. READ: I understand.

9 THE CHAIRMAN: In that case, shall we say 2 o'clock.

10 (Adjourned for a short time)

11  
12 THE CHAIRMAN: Mr. Read?

13 Re-examined by Mr. READ

14 Q Just a few questions in re-examination, Mr. Kilburn. Can I ask you, first of all, about the  
15 document you were referred to in bundle 24 at tab 11.8, which is the "Number Translation  
16 Services: A way forward" document.

17 A Yes, I have got that.

18 Q You were asked in particular about the paragraphs at p.34, namely the issue of BT's prices  
19 and the linkage and the problems of the breakdown of the linkage that were involved. I just  
20 want to be absolutely clear. You were taken to the point that BT were applying a discount?

21 A That's right, yes.

22 Q Was there any question at all of the way where BT could increase its prices at all?

23 A Sorry, BT could increase its?

24 Q Let me ask you this. You were taken in particular to the second bullet at para.4.18 where it  
25 says:

26 "as a result of consumer awareness of the local and national rate linkage and  
27 possibly also from misleading advertising, some consumers feel they are being  
28 overcharged for 0845 and 0870 calls."

29 Do see that?

30 A Yes.

31 Q The question I was positing is: could BT's discounts have resulted in that problem?

32 A The difference between those calls in the option 1 package and 0845/0870 calls would have  
33 resulted in that kind of problem.

34 Q If you go back in this document to para.3.7:

1                   “There were also concerns about the high tariffs for calls NTS numbers from  
2                   mobile phones and payphones.”

3   A    Yes.

4   Q    Which obviously is the issue that lies at the heart, or part of the heart of this case. How do  
5           you understand the number translation services to have looked at that issue?

6   A    I believe that all of that is covered in the application of the formula allowing originating  
7           network operators’ charges to be factored into the termination rates of the TNOs.

8   Q    Moving on to another subject, you were asked, I think, about the pricing paper. I do not  
9           know whether you want to look at it again or whether it is still fresh in your mind. You will  
10          remember it was the 0845/0870 paper. Say if you want to look at it again.

11   A    No, I think I’m happy.

12   Q    The question was put to you – perhaps I ought to just show it to you briefly, it is in CAT  
13          bundle 23, which is the previous bundle, so that there is no doubt about the context in which  
14          I am putting this. It is at tab 8.1 in that bundle, and it is at the back of it, if you recall.  
15          Again, please do not refer to the material marked “Confidential”. Do you have it?

16   A    I do, yes.

17   Q    You were being asked in particular about the words:  
18                  “The charging mechanism proposed will improve margin and revenue for 0845  
19                  and 0870 by up to ...”  
20          and then we have the figure. The question was put to you that what was known was the  
21          uncertainty about the volumes and the ARP, and you answered, “That’s very much part of  
22          it”. Was there anything else that was involved when that phrase:  
23                  “The charging mechanism proposed will improve margin and revenue for 0845  
24                  and 0870 by up to ...”  
25          Was there anything else involved in it?

26   A    We clearly wouldn’t know what actual reaction we would get as a result of the prices.

27   Q    You were asked about par.28 of your witness statement, which is in bundle C1, tab 17,  
28          para.28, p.10. Do you have that?

29   A    I do, yes.

30   Q    In particular, you were asked about BT’s concerns about the level of retail charge, and in  
31          particular the final sentence about the absence of any effective action by Ofcom to address  
32          BT’s concerns and the concerns of the others, it refers to the NCCN 911, and then  
33          subsequently through NCCN 956:

1                   “... took steps to endeavour to achieve a more equitable share of the available  
2                   revenue across the 080 NTS platform.”

3                   It was pointed out to you that BT had 25 per cent of market termination. I think that is the  
4                   figure you accepted in cross-examination?

5   A    It is, yes.

6   Q    You are asked to comment about effectively BT acting alone would not achieve that effect.  
7           Did you have any ideas at all as to what might happen if BT did act alone?

8   A    There was always the chance that other terminators would do something similar. I don't  
9           necessarily mean exactly the same thing, but something similar, or it may well have had,  
10          because it is BT, some kind of effect on mobile pricing.

11   Q    You were being asked about the NCCNs and whether they applied to just BT calls or  
12          whether they applied across the board, and you answered, “The NCCNs were not  
13          prescriptive about price”. Can I just be clear as to this: what did you anticipate would  
14          happen as a result of the NCCNs' introduction vis-à-vis this question of calculating the  
15          average retail price?

16   A    Sir, my submission is that, if we take 0800 as an example, there is an 0800 price on a  
17          particular originator's network and that the average price would be the price that would be  
18          used to work out where in the NCCN pricing ladder that particular ONO would be.

19   Q    Were there any subsequent discussions with any of the MNOs about that?

20   A    There were discussions with all of the MNOs to a greater or lesser extent throughout the 28  
21          days of the notification period and then the period following, leading up to and actually  
22          going past the point where a dispute was raised.

23   Q    Were there any specific discussions about the ARP?

24   A    To my knowledge ARP came up in the determinations rather than – the term “ARP” came  
25          up in the determination rather than discussions that I had with anybody in this regard. I  
26          spoke mostly about positioning the pricing ladder, albeit there were discussions about how  
27          one assumed where in the price ladder you would be.

28   Q    Finally, you were asked about paras.15 to 17 in your fourth statement by Mr. Vinall on  
29          behalf of Ofcom, perhaps we should just very briefly turn it up, it is at tab 20, and this is  
30          the questioning about the possible competitive distortions and the questions were being  
31          asked about in particular difficulties about traffic being routed away from BT – we see that  
32          in para.17?

33   A    Yes.

1 Q Can you give the context in which you have this discussion in your fourth witness statement  
2 as to how it came about that you were discussing this?

3 A In one of the Ofcom documents, so in a previous witness statement I made the point that I  
4 do not believe that the transit market is foreclosed and then set out my arguments. In the  
5 response Ofcom suggested that I had missed the point and that in demonstrating how BT  
6 was covered, if you like, I was demonstrating that BT itself was a victim of what we had  
7 done and here what I am saying is we are clearly not, these kind of things were taken into  
8 account at the various stages of the decision making process to actually implement the  
9 NCCNs.

10 Q I think it was put to you that we do not know what other transit operators would say, can I  
11 ask the question: who would be the other major transit operator and therefore make it  
12 “transit operators”?

13 A I wouldn’t want to offend anybody else but I would suggest Cable & Wireless is the largest  
14 of the rest of the transit operators.

15 Q It is also put to you the question about it depends on BT spotting the problem, does BT have  
16 any systems at all to deal with pool traffic and how it is being routed?

17 A We would recognise, if I might use an example, if EE’s traffic to 0800 or 0845 or 0870  
18 services that we currently see and have been seeing for quite some time suddenly dropped  
19 then we would notice that. If a known transit provider’s traffic increased, then we would  
20 notice that and it would not be difficult to put the two things together and assume that traffic  
21 A was now being carried by carrier B.

22 Q How easy would it be to actually spot that? What are we talking about?

23 A I get a weekly report on traffic volumes. By the time it gets to me it’s actually gone to a  
24 number of people who take the raw data and then do something with it and then it is  
25 constantly being refined, and I get it every Friday. So with a week to 10 days lag we would  
26 notice that something was beginning to change. That would then allow us to put something  
27 in place to actually track it if that is what we decided to do. It is competitive market so  
28 these kind of things could happen all the time.

29 Q Would there be any problem the other way around if it was not BT who was the TCP but  
30 some other party who was the TCP?

31 A Where BT is the transit?

32 Q Well let us take where BT is the transit provider?

33 A I am not sure I understand the question.

1 Q I just wanted to make sure, simply because I have been concentrating on what you, as BT,  
2 was saying so there is no confusion later on about what would be the position if somebody  
3 else who was not BT was terminating the calls. First, you mentioned Cable & Wireless as  
4 being the other major transit provider, but in terms of transit is BT the other major provider,  
5 or not?

6 A Oh yes, sorry, we are.

7 Q And so what would happen if BT, for example, supplied the calls to another terminating  
8 provider as transit provider? How easy would it be for another terminating CP to actually  
9 spot if there was an issue going on?

10 A I can't speak directly as to whether they have the same kind of systems in place, but they  
11 would, I assume see a drop in traffic from a carrier and an increase in traffic from BT; I  
12 make the same assumptions that we would ---

13 Q Would they have anything from BT at all as to how to deal with the issue?

14 A They would be invoicing BT for the traffic, so they would have their traffic records. If you  
15 are asking me about any of those carriers who have begun to replicate them that is a slightly  
16 different issue.

17 MR. READ: Sir, do you have any further questions?

18 THE CHAIRMAN: Mr. Kilburn, thank you very much.

19 (The witness withdrew)

20 MR. READ: Sir, just before I sit down and allow the respective MNOs to call their two  
21 witnesses, can I just make clear from the outset that I think the order ought to be with this  
22 that any other intervener or party who wants to cross-examine the witness should do so first  
23 before I subsequently cross-examine, I think that is the normal procedure that one would  
24 adopt.

25 THE CHAIRMAN: That seems sensible.

26 MISS SMITH: I call Stephen Philip Ornael.

27 Mr. STEPHEN PHILIP ORNADEL, Affirmed

28 Examined by Miss SMITH

29 Q In the box on the desk in front of you there should be a file marked vol. C2, if you could get  
30 that out and turn to tab 33. Also, if you could bear in mind that this is being recorded and a  
31 transcript is being prepared from a record so if you could say "Yes" rather than nod. So this  
32 is your witness statement dated 8<sup>th</sup> October 2010 in your name, is that correct?

33 A Yes.

34 Q And if you turn to the last page it is signed and dated, and is that your signature?

1 A Yes.

2 Q And does the evidence contained in this statement constitute the evidence that you give to  
3 the Tribunal today?

4 A Yes.

5 Q Then if you could look at tab 34 there is a second witness statement dated 20<sup>th</sup> October 2010  
6 and on the last page can you confirm that that is your signature?

7 A Yes.

8 Q And can you also confirm that that is the evidence you give to the Tribunal?

9 A Yes.

10 Q Can I ask you to turn to para. 12 in that witness statement, p.6 just to clarify a point that has  
11 been raised, that was raised earlier today by Professor Stoneman. You say in para. 12,  
12 second line:

13 "BT is asking us to calculate the ARP [Average retail price] of all calls that  
14 originate on T-Mobile's network and terminate on 080 numbers hosted on BT's  
15 network."

16 Can you explain what your understanding was as to how the average retail price was to be  
17 calculated. Was it to be calculated by reference to all 080 numbers or just 080 numbers  
18 hosted on BT's network?

19 A My understanding was always that it would be to 080 numbers hosted on BT's network.

20 Q And what was the basis for that understanding?

21 A It was instinctive, it was commonsense that if I am trying to calculate a rate linked into the  
22 BT price I'd look at BT numbers and, if let's say, Cable & Wireless came along and said:  
23 "What is your average price?" I would look at calls going to Cable & Wireless's network  
24 because they might have completely different mechanisms, a different tariff of ladders,  
25 different ways of calculating so why would I ever, let's say, include Cable & Wireless  
26 volumes into calls to BT or BT volumes if I am calculating the tariff applicable to Cable &  
27 Wireless traffic. To me it was commonsense.

28 Q Does that mean that you charge a different price to the caller, depending on where the call is  
29 being terminated, so that if it is being transferred or terminated by BT, the caller will pay a  
30 different price than if it is being terminated by Cable & Wireless?

31 A No, it doesn't mean that, and in terms of the retail side - so what a normal customer pays -  
32 it's no difference to them if the call goes to Cable & Wireless or BT. But in terms of the  
33 average retail price in the context of the question, the average retail price is about the

1 wholesale tariff, and Cable & Wireless in this example could be having a very different  
2 tariff of charges to BT. Hence, differentiating the Cable & Wireless traffic to the BT traffic.

3 PROF STONEMAN: I thought ARP meant average retail price, not average wholesale price?

4 A Average retail price which is then used on the ladder of charges to calculate the wholesale  
5 tariff.

6 Q Yes, but you are being asked about whether you would be able to calculate the average  
7 retail price. You are saying that that does not differ by provider?

8 A The headline price for a call to an 08 number wouldn't be different if the customer call is a  
9 Cable & Wireless number or a BT number, but because the behaviour of customers and the  
10 nature of those numbers, the average price very much could be different.

11 Q I still do not understand.

12 MISS SMITH: Could you explain what you mean by the behaviour and the nature of numbers?

13 A Yes, if we take an example - I'm not too familiar with who are BT customers and who are  
14 Cable & Wireless customers to use numbers, but this is the thought process in my mind.  
15 Maybe BT is dominant in NHS numbers and Jobcentre numbers and they have that market  
16 sewn up, so to speak, and maybe Cable & Wireless have TV shows which 0845 numbers  
17 and 080 numbers are on. So it is the type of numbers, if the market they are present in is  
18 different when you go to the next layer down, the customer behaviour, the consumer  
19 behaviour, would be different. If the consumer behaviour is different they will be on  
20 different tariffs. Within T-Mobile some of our customers have calls within the bundle,  
21 some of them without, outside of the bundle, some of them have special options etc. So that  
22 could lead to a different average price. So even if the headline price was, say, 40p a call, it  
23 is the characteristics of the consumers making the calls are different, then the average retail  
24 price could be different say between a call to a BT hosted number and a call to a Cable &  
25 Wireless hosted number.

26 Q Thank you, Mr. Orndel, that was helpful. May I ask you to turn to tab 35 of that bundle.  
27 That is the witness statement dated 24<sup>th</sup> February 2001. On the last page of that statement,  
28 is that your signature?

29 A Yes.

30 Q Does the evidence contained in that statement constitute your evidence today?

31 A Yes.

32 Q Can I also ask you, you no longer work for Everything Everywhere, when did you leave the  
33 company?

34 A 24<sup>th</sup> November 2010.

1 Q Can you tell us why you left?

2 A Yes, there was a management reorganisation and as a result of that I left the company. In  
3 terms of my reasons for leaving, I can confirm that they are nothing at all to do with this  
4 case, however they are subject to a compromise agreement which I am unable to discuss  
5 further.

6 Q Thank you.

7 Cross-examined by Mr. READ

8 Q You will probably be glad to hear, Mr. Ornel, that I am not going to discuss it with you  
9 further either! Can I turn to your statement. Would you accept this: that primarily what  
10 your statement is dealing with is effectively that the problems, as you say, of calculating an  
11 ARP? That is primarily what your statement is focused on?

12 A Yes.

13 Q One of the key points, you say, is that there are numerous different packages within  
14 monthly subscriptions?

15 A That's one of the points, yes. There are pre-paid, roaming, wholesale, etc.

16 Q If it is not within the package it is very difficult to calculate effectively?

17 A Yes.

18 Q How many, would you say, of 08 numbers that are actually originated on EE's network are  
19 within the bundle of tariff packages?

20 A There is a range of 08 numbers that are always free to the customer: Telephone Helplines  
21 Association (THA), so for all customers they are free of charge. But the question was how  
22 many are free of charge to customers. It is not how many are free of charge to customers, it  
23 is how many tariffs offer these numbers free or charge. So to a customer who is on the new  
24 Flex tariff then all 0800 numbers would be included within their bundle. But if that same  
25 customer switches tariff mid-month, then from the next day none of the 08 numbers, apart  
26 from the THA numbers I just mentioned, would be within the bundle. So it is not about the  
27 numbers, it is more about the tariff.

28 Q Yes, but you see is not one of the problems that you have got to know how many calls to  
29 080 numbers actually are in the tariff in the first place, have you not? If you are going to  
30 say: this is all terribly complicated, you have got to have some realism about the numbers of  
31 08 calls that actually are in the bundle, a bundle, be it bundle A, bundle B, bundle C?

32 A I'm not sure I catch the question, sorry.

33 Q If an 08 call is outside a bundle, it may be zero rate, it may be 40p per minute, but at least  
34 you know that those are effectively the two alternatives, are they not?



1 A No, there is a third alternative: the call starts within the bundle and finishes outside of the  
2 bundle. So if it was a two minute call the first minute of the call could be within the bundle  
3 (and hence no incremental charge), the second minute could be charged at, let us say, 40p.

4 Q Mr. Ornel, I am perhaps not explaining myself very clearly. What I am putting to you is  
5 that any call that is not within a package, you are going to know what the price actually is  
6 relatively easily, the price of that call?

7 A I'm sure you want to make this very simple, but if we take a pre-pay customer that's  
8 purchased a booster, which would be for a limited volume of calls --

9 Q But --

10 A If a customer has purchased a booster, I don't know from memory exactly how many  
11 minutes but let's say it was 100 minutes for £5, then once they have used up the 100  
12 minutes the next minute won't be free or within that £5 bundle, it will be at 40p. So it's not  
13 quite so straightforward.

14 THE CHAIRMAN: I think counsel is simply asking you: assume no bundle at all, is there a price  
15 on that basis for an 08 number?

16 A OK, so if we take our post pay customers and our pre pay customers, then there is a simple  
17 headline price that would be applicable. If we take our business customers then no, there is  
18 not a simple headline price because, for example, although there may be a headline price,  
19 the business customer may receive an overall credit on the invoice. If, at the end of the  
20 month, the invoice was £100,000 they may receive just a flat rate 15% because that was  
21 what was negotiated with the salesman.

22 MR. READ: Let us try to take this back a stage. The point I was asking you, as the Chairman of  
23 the Panel correctly identified, and I probably did not put the question as well as I should  
24 have done, the starting point for any calculation of an ARP figure is to know how many of  
25 these calls actually fall within some form of bundle discount, be it a business customer or be  
26 an ordinary human customer ringing from his mobile. That is right, is it not?

27 A Yes, that's correct; it is a feature of the calculation.

28 Q Can I ask you to take bundle 13, which I hope should be there on your left and if not it will  
29 be found for you. Can I ask you to go to the rear of that at tab 3.1. The first page of it is in  
30 fact an exhibit page, but if you go over to the other page (just so you know what the  
31 document is it is a document called "Simplifying Non Geographic Numbers" by Ofcom. I  
32 am sure you have probably come across it, have you not? You may not have read it, but  
33 you probably know of its existence.

1 A I am aware of it. It was published since I took a new role, so it is not of primary interest to  
2 me any more, but yes.

3 Q Can I ask you, then, to turn to p.135 in this document. Do you have that?

4 A Yes.

5 Q You can see there table A2.3, and it has got, “Proportion of non-geographic numbers that  
6 are sold in and out of inclusive bundles by number range”. Do you see that?

7 A Yes.

8 Q You can see that it splits it up by numbers 080, 0845 and 0870, and then it tells one on the  
9 right hand side what, for all the mobiles, is the overall percentage of the calls within the  
10 bundles for those particular numbers and those without – do you see?

11 A Yes.

12 Q That rather suggests, does it not, that there is actually a very significant number of calls to  
13 these numbers that have got nothing to do with a package at all?

14 A If you take the entire mobile industry it may suggest that. Obviously I used to work for  
15 Everything Everywhere and this is not a table for Everything Everywhere, but at industry  
16 level, yes.

17 Q Let us have a look at A2.44, the paragraph at the top of the page:  
18 “However, more often than not, NGCS are not included in inclusive bundles  
19 ...”  
20 that is non-geographic calls –  
21 “... and this is the case for both fixed and mobile OCPs. This is supported by  
22 Table A2.3 below which sets out the proportion of calls within bundles ...”  
23 and so on and so forth, and it is talking about the data from the s.135 requests. Then it goes  
24 on in A2.45:  
25 “There are only a few examples where other NGCs are included in standard  
26 bundles, but even then they may use the inclusive minutes at a faster rate than  
27 geographic calls.”  
28 So you see that Ofcom there are saying that effectively most of these calls are outside a  
29 package?

30 A At an industry level.

31 Q If we look at footnote 160 it actually talks about T-Mobile customs, does it not:  
32 “For example, T-Mobile customs on ‘Flex’ price plans, calls to 08 numbers are  
33 included within the monthly allowances. Therefore a call that is nominally  
34 rated at 40 pence per minute could cost a Flex customer 5.16 pence per minute

1 in real terms if the call is paid for out of the customer's month FlexT call  
2 allowance.”

3 It sets out what it actually does. Therefore, it is actually saying that T-Mobile customers do  
4 have some form of price plan that is actually involved there, but they do not comment that  
5 that significantly affects the figures in any way, do they?

6 A They don't, but I'm not sure why they would. They're just explaining how the rather  
7 complicated FlexT tariff works.

8 Q If I can ask you to turn on p.141 in the bundle, table A2.5, and it there sets out “Range of  
9 retail prices for non-geographic number ranges for customers of specific tariffs for each  
10 mobile OCP” – yes. It has got 0 to 40 minutes for T-Mobile in respect of the 0800  
11 numbers. That is because some of the numbers are zero rated and some of the numbers are  
12 paid at their full rate, is it not?

13 A No, it's because some are free and the maximum price charge is 40p. There are prices in  
14 between – let's say a business customer.

15 Q Is the same true of 0845?

16 A I believe so. I believe so. I can't quite remember. I'm pretty sure it is though.

17 Q 0870?

18 A Yes, the same comment as for 0845.

19 Q If we look at footnote 179 it says:  
20 “From our research, the mobile OCPs do not vary their NGC prices between  
21 tariffs – the only distinction is between pre-pay prices and post-pay prices.  
22 Therefore we have not provided details for the tariffs used for the mobile  
23 OCPs.”

24 Do you see that?

25 A Well, no, I'm not sure their research is correct, because we've just spent some talking about  
26 the FlexT tariff, which states that the calls are within the bundle. So that is a difference  
27 between tariffs.

28 Q We know they have specifically noted that, because we have seen it in one of their  
29 footnotes, have we not?

30 A Okay, but you asked me about – I am being pedantic because I want to be accurate – you  
31 asked me about this footnote in isolation, and I don't agree with your summation of this  
32 particular footnote in isolation.

33 Q Let me put it to you like this, Mr. Orndel. You, in your statement, spend a lot of time, and  
34 if you want me to take you to it, please say so, talking about different tariffs for post-pay

1 and different options for pre-pay. You talk about legacy tariffs and you talk about this and  
2 you talk about that, causing immense problems actually calculating an ARP. If we are only  
3 talking about something in the region of 3 per cent of the overall mobile calls, it is not  
4 actually going to be a big figure anyway, is it?

5 A I would agree with you. If we're talking about 3 per cent it's not a big figure, but I  
6 previously said 3 per cent reflected the industry and not the T-Mobile numbers, which was  
7 my responsibility. So 3 per cent represents the five mobile operators plus all the MVNOs,  
8 but I was only talking about one of those operators and, as it happens, one of the smaller  
9 ones.

10 Q We know that this material has been supplied pursuant to a request from Ofcom in the  
11 course of this because they talk about it in A2.44 about s.135 information requests. Would  
12 you have been involved in supplying the information for this?

13 A For this particular one, I don't recall, is the honest answer, but I can say I have been  
14 involved in similar such requests and similar such information, and as mentioned earlier  
15 with the Analysys Mason data, it is typical that we would return incomplete information  
16 because we could not obtain all the information Ofcom required. Sometimes it could be up  
17 to half of the information, as you get to a lower level of detail, could not be provided for the  
18 same reasons as we found it very difficult to calculate the average retail price. It wasn't  
19 available internally at the level of detail – let's say for the s.135 request from Ofcom – for  
20 us to provide the data.

21 Q So you do not think you could put an estimate of an ARP properly to Ofcom is what you are  
22 saying?

23 A Correct.

24 Q Can I ask you to take another bundle, which is bundle B1, the core bundle, and can I ask  
25 you to go to tab 1. Do you have it. You see that it is the Final Determination in the 0845  
26 cases. Again, even if this is a document you may not have read it is at least one you know  
27 about, is it not?

28 A I've read this one.

29 Q You have my sympathy then, the length of it is awesome! Can I turn to p.249. Just to put it  
30 in context, this is actually an annex to the Final Determination, and this annex is dealing  
31 with points arising from the Draft Determination. As you can see at the top of that page  
32 there is in red the heading, "Application of Principle 3". Do you have that? I know what  
33 has happened, you have got an older version of it, it may be p.248.

34 A Yes, I've got it.

1 Q What happened, sir, so that there is no issue about it, once the bundles were being prepared  
2 there was a subsequent copy of the Final Determination supplied. I hope the final copy has  
3 made it into your bundles. If you have 249 as your correct page then you have got the  
4 correct one. If we look at “Application of Principle 3”, we can see “Views of the Parties”,  
5 and then para.5.290.

6 A Yes.

7 Q Let us look at 5.286 to put this in context:

8 “We asked the MNOs to provide us with an estimate of their average 0845 and  
9 0870 retail prices, and all the MNOs have raised concerns about their ability to  
10 derive an estimate.”

11 Then at 5.290:

12 “T-Mobile also provided an estimate. It states that for pre-paid tariffs and  
13 standard post-pay tariffs, the equation is simpler and so, the average charge has  
14 been calculated as ...”

15 I suspect on your version, like my version, it has got a “scissors” sign there.

16 “It argues however that the calculation then becomes more difficult when  
17 looking at the T-Mobile ‘Flex’ tariffs, the 08 booster package and the various  
18 standard and bespoke business tariffs. These tariffs are all set at different prices  
19 account for at least [X] of all 0845 and 0870 calls in March.”

20 So the points that you are effectively raising in your statement were very similar to the  
21 points that you were putting to Ofcom when you were being asked to calculate an average  
22 retail price – that is right, is it not?

23 A It would seem so, yes.

24 Q Can I just then ask you to turn back in the bundle to p.171, para. 9.46 on p.170 in your  
25 bundle, I am having to translate as we go. If one just looks to put this into context you can  
26 see that these are the conclusions of Ofcom, and at the head of it, it has “Assessment of  
27 Principle 3”, and then it sets out principle, and then para. 9.46:

28 “Notwithstanding the parties in dispute have failed to have any meaningful  
29 dialogue on the issue of ARPs. We consider that each MNO should be in a  
30 position to estimate its own ARP for 0845, 0870 calls to an acceptable degree of  
31 accuracy and subject to a reasonable verification procedure, although we are  
32 unable to reach a firm conclusion because further negotiation is required between  
33 the parties as set out in the draft determination.”

1 So, Mr. Orndel, the question I have for you is that T-Mobile raises all its points that you  
2 have set out in your witness statement about the problems of calculating ARP, they are all  
3 put to Ofcom, and then Ofcom in para. 9.46 says that "actually we don't think it is a  
4 problem" - do you see that?

5 A Oh, I see that, but ----

6 Q You disagree with it, do you?

7 A Ofcom is not always right, that's why we are here. (Laughter)

8 Q You see, you accept, I think it is actually a fundamental of all the MNOs cases that the  
9 MNO retail market is a competitive industry and if you are in a competitive industry surely  
10 you need to know the sort of margins you are making on calls as they are actually made on  
11 particular call categories?

12 A You would very much think so. That was not the case, however, in T-Mobile and  
13 profitability was monitored at a higher level than the individual call levels, the data was not  
14 available, so although what you have just said sounds to me very reasonable that simply  
15 wasn't the case within T-Mobile.

16 Q Well I am not suggesting that you might have copper bottomed material, but sure you must  
17 have had something that would have given a steer on the likely level of profitability for  
18 particular types of calls?

19 A It is not even copper bottomed, very, very limited information was shared within the  
20 business, typically revenues would be woefully short of targets and then questions would be  
21 asked, margins would be woefully short of targets and questions would be asked. Way after  
22 the event people would dig in to what is actually driving the cost, so I am afraid it is almost  
23 slightly embarrassing to say but unfortunately it was not the case as you describe that that  
24 information was freely available.

25 Q So what you are really saying is that while the MNOs, or concentrate on T-Mobile because  
26 you are obviously talking about T-Mobile, whilst T-Mobile is making significant margins  
27 on the 080 and 0845 calls, and the 0870 calls, it is not actually concerned to see what those  
28 margins are, it is only if those margins were going to fall that people would start asking  
29 questions?

30 A I have obviously had time to think about this before the case and I like to think of you walk  
31 into Tesco's and you see the baked beans at 5p a can they are not going to make money on  
32 those baked beans at 5p a can, but they know when the customer walks out with ten carrier  
33 bags full of food they have made money, and they monitor it at that level. The difference is  
34 Tesco's will know that they sell at 5p and it probably did cost them 27p. That part in T-

1 Mobile we did not know but overall profitability was managed but not at the detailed level  
2 of individual call types.

3 Q I hope you have still got your witness bundle open, which is bundle C1, have you got that?  
4 A Yes.

5 Q I wonder if you can go on slightly further in that bundle, to tab 48. This is a statement of  
6 Mr. Harding, employed by Cable & Wireless – do you know Mr. Harding?  
7 A No.

8 Q Would you agree that he is somebody who has been around the business quite a lot in terms  
9 of the telecoms market, or do you not know him?  
10 A I do not know him.

11 Q Because if you look at para. 48 onwards on p.11 he is talking about mobile average prices  
12 and the calculations of them, and I want to come back to that in a moment, but if you look at  
13 para. 52 over the page he sets out the position with Cable & Wireless:  
14 “I in my experience it can be difficult to get information with complete confidence  
15 over its accuracy and at relatively short notice but it is rare that we are unable to  
16 get any information when it comes to any significant part of our business. We  
17 have, for example, specifically calculated our average revenue for calls to 0845  
18 and 0870 numbers across the most significant parts of our business in order to  
19 prove that our own prices were in line with the market.”

20 So Cable & Wireless are doing it are they not, and not having a problem, but you are saying  
21 T-Mobile does?  
22 A Correct. And if I can explain, let us go a bit further, Cable & Wireless is primarily a  
23 wholesale business. I do not know how many customers they have, I imagine at most it is a  
24 few thousand, T-Mobile has 16/17 million customers, customers that change tariffs even  
25 within the month, that buy multiple bundles within the month. I was in fact a customer of  
26 Cable & Wireless, one of their largest in the UK typically our tariffs would change very few  
27 years, so I don’t think it is fair comparison.

28 Q You say you do not know Mr. Harding, but if we go back to para.49 he talks about Cable &  
29 Wireless chairing the NGCS Focus Group, does he not? Do you see that?  
30 A Yes.

31 Q Have you read this statement before, have you?  
32 A Yes.

33 Q So I do not need to take you through it at great length?  
34 A No.

1 Q I am grateful for that. He makes reference to this NTS Forum Group. I am just trying to  
2 find the reference where that is in the bundle. It should be bundle 15 tab 14, so I am afraid  
3 you are going to have to have another one of the bundles out. My bundles do not entirely  
4 correspond with the bundles the Tribunal actually has. Divider 14, it should be the NTS  
5 Focus Group of 18<sup>th</sup> March 2010, you have it?

6 A Yes.

7 Q And if we look over the page we can see that one of the agenda items is NCCN 958, 985,  
8 986 and indeed 1007, and you are at this focus group, are you not?

9 A Yes.

10 Q Because we see you are actually on the first page of that together with various others. This  
11 is an industry-wide focus group which meets from time to time to discuss issues and see if  
12 there is a way around them and resolving them, that is right, is it not?

13 A Yes.

14 Q There is discussion about the ladder pricing as we can actually see there, and if we go over  
15 the page to what I think should be p.3 of 4, you were being specifically asked, I think it is  
16 the ninth paragraph down which starts

17 “Sean asked how Stephen [that is you, is it not] was able to prove that the average  
18 rate would move between tariff bands each month if T-Mobile was unable to  
19 calculate its average price.”

20 This arises because you actually say you have done work which shows that it is going to  
21 fluctuate around from month to month. So you are then being asked: why is it that you can  
22 do that, but not actually be able to calculate an average price and you say:

23 “Stephen responded that he had modelled scenarios from an un-assured database  
24 which revealed the various changes across the mix. Such information would not  
25 be robust enough to be signed off by T-Mobile’s Financial Director as being  
26 accurate. When asked by T-Mobile could not take a longer period Stephen  
27 responded that they bill from actuals not approximations. T-Mobile require to be  
28 charged the right amount and not to have to continually catch up in terms of  
29 billing particularly as some of the MVNOs are very sizable with millions of  
30 customers and therefore it has a significant impact. Doubt was cast upon the  
31 difference of pricing between the MNOs and MNVOs.”

32 Just pausing there, you accept from this, do you not, that you were able to make some  
33 estimate of ARP from the figures you had; it is just that, as you say, that is something that  
34 the chief financial officer could not sign off?



1 A Yes, it was what I would call back of a fag packet calculation, if you are familiar with that  
2 term: a very, very rough calculation.

3 Q But it would have been possible, would it not, to come up with something, albeit something  
4 that is not as detailed as you would like or somebody else would like?

5 A Or something that was as detailed as BT would like.

6 Q How do you know?

7 A It's what BT would like. BT said very clearly the number had to be signed off by our chief  
8 financial officer and I can assure you, our chief financial officer would not sign off  
9 guestimates or estimates. I know how that calculation was produced, and it was nothing  
10 other than an estimate/guestimate.

11 Q Can I ask you to take another bundle now. I am sorry to have to keep moving you round the  
12 bundles but the documents are in different places. You can put that one away now, I think.  
13 Can I ask you to take CAT bundle 10. Sir, again I am afraid you are going to have to bear  
14 with me for a little while while I translate my reference. (Pause) I am sorry to take the  
15 Tribunal's time up on it, but I hope it should be tab 10 which should contain a statement of  
16 intervention by Everything Everywhere. Tab 7 is the one that we want. I am sorry, it has  
17 taken some time to hunt it down. Tab 7 and then one page further in there is a letter dated  
18 2<sup>nd</sup> October 2009. Do you see that?

19 A Yes.

20 Q This is a letter from BT to T-Mobile asking about the charges, or pointing out the charges.

21 A Yes.

22 Q Over the page we see at p.2 there is a table and then it says:  
23 "Analysis of T-Mobile's retail charges shows that you charge your callers 40ppm  
24 for calls to 0845 and 40ppm for calls to 0870 standard monthly contract."  
25 Then it sets out on the basis of that, what BT would be charging on the basis of the ladder  
26 you are actually on. Then it adds:  
27 "BT is aware that your actual retail charges may differ from those stated in your  
28 pricelist. If that is the case and you wish to challenge the interpretation of how  
29 your retail rates fit into the ladder proposed BT is willing to discuss this with  
30 you", and you see that.  
31 What discussions did you have with BT following this letter about how to calculate the  
32 ARP?

33 A We did have discussions with BT about ARP. However, I recall they came along later.  
34 Initially our discussions were not about the actual calculation but more primary concerns

1 about the legitimacy of the price in itself. So we never got down to the level of detail of the  
2 calculation in the earlier stages. However, we're talking about a number of NCCNs and  
3 towards the end, certainly with 1007, we had a detailed session reviewing it. So the answer  
4 is yes, we did have detailed discussions about the challenges. I cannot quite place when  
5 they happened.

6 Q Were you personally involved in them?

7 A Yes.

8 Q I see. If we go back to bundle B1, if you then go back to para.946 p.170 (171 in the  
9 Tribunal's version) it says in terms that there has failed to be any meaningful dialogue on  
10 the issue of the ARPs. Do you see that?

11 A Yes, it doesn't say there has been no dialogue; it says there has not been any meaningful  
12 dialogue.

13 Q Effectively, that is the same position now, is it not?

14 A No.

15 Q You do not agree?

16 A I disagree. This document hasn't got a date on it. It was talking about the events at the  
17 time, but since the period covered by this document another NCCN came out from BT and  
18 we had detailed discussions. The principle of the ladder charging and the average retail  
19 price affects all of these different tariffs from BT.

20 Q Anyway, that is not specifically referred to in your statement as such, I do not think, the fact  
21 of the discussions with the NCCN 1007?

22 A I do not think it did.

23 Q Can I ask you to take yet another bundle, I am afraid, C1 in the core bundles there. You can  
24 put the billing one away now. Do you have it?

25 A Yes.

26 Q Can I ask you to go to Mr. Kilburn's first statement tab 17 p.22 para.68. He is talking there  
27 about the MVNOs:

28 "Without understanding whether this is material it has been hard to assess the true  
29 impact, but the BT position has been consistent in that BT is prepared to work  
30 with the MNOs to establish a fair and reasonable approach to setting a notional or  
31 actual average end user charge on the MNO network."

32 Again in his third statement, and I will take you very briefly to this, tab 19, para.23, I think  
33 it is unpaginated statement, he talks about the validation from the CFO, about the fact that  
34 BT does not need to be party to any information or calculations or assumptions, and he was

1 asked about it, and he makes the point that he is not concerned on whether an exact ARP  
2 can be calculated, and says instead that, in fact, some approximate ARP can and, in fact,  
3 should be calculated. Do you see that?

4 A Yes.

5 Q The point I am putting to you, Mr. Orndel, is that you have never really engaged in  
6 meaningful discussions with BT about this whole process of calculating the ARP, and that  
7 is what is reflected in the Final Determination. That is the problem, there has been no  
8 engagement over what the real problems are?

9 A In the context of this particular dispute, we had discussions on the calculation, but not  
10 detailed discussions. However, as I stated earlier, in the context of the subsequent NCCN  
11 from BT, we did have detailed discussions. That may not be in my witness statement, but  
12 that happened.

13 Q Can I ask you this: are you familiar with the Standard Interconnect Agreement?

14 A Familiar, yes.

15 Q You understand, do you, that there is a whole annex devoted to billing issues?

16 A Yes.

17 Q You know that, do you. It is fair to say, is it not, that quite often in the telecoms industry  
18 people cannot give completely accurate information from one party to another, and that  
19 work-arounds have to be found to deal with it?

20 A I think your question is quite general. It is common that they may not agree on exactly  
21 volumes. At the end of a month was 1 billion minutes exchanged from one network, or was  
22 it 1 billion and 15, because you can get small differences. That is absolutely common. Is it  
23 common that they cannot agree the actual price to be multiplied against that volume of  
24 minutes, as in it is it 10b or 11b? No, that's not common, that is always known.

25 Q Would you also accept that there are methods within it for actually dealing with disputes if  
26 there are disputes about what is going on about the billing of it? There are very clear  
27 procedures laid down within that annex to actually deal with how you deal with disputes  
28 over billing?

29 A Yes.

30 Q I think you would also accept this, would you not, that billing has to keep changing with  
31 developments and regulatory intervention. In the telecoms industry it is not something that  
32 stands still, it is constantly moving?

33 A It's a very competitive industry, things always move forward.

1 Q Can I ask you about this, and I will stick with T-Mobile as you are a T-Mobile person by  
2 background: T-Mobile terminated calls that BT had originated to 0800 numbers and 0845  
3 numbers – yes?  
4 A Yes.  
5 Q That had to be done through the NTS formula, because BT is the one originating the calls?  
6 A Yes.  
7 Q That has to be based on averages itself, does it not?  
8 A I have to be clear here, I'm not completely sure. The position of those particular numbers  
9 was the volumes coming into those numbers were extremely low. It was beyond irrelevant  
10 for my particular team. I never got involved in those numbers. The Interconnect manager  
11 did, and, if I recall correctly, he'd receive a letter from BT telling us what we would be  
12 billing them and we would load it into the billing system. We had no further knowledge  
13 than that, and nor should we have, because the volume was so low it wasn't really worth  
14 getting up to speed, so to speak. I can't really give you detailed responses on the detail of  
15 how those numbers were calculated because we never got involved with them. We took  
16 BT's ----  
17 Q Let me just pause there. You never got involved with them – that is right, is it not?  
18 A Yes.  
19 Q You left it to some underling because you thought it was not worth ----  
20 A No, no ----  
21 Q No?  
22 A No, James wasn't an underling. The volumes were very low and we would get a letter from  
23 BT saying what the price would be and we'd implement it. Typically, BT would be chasing  
24 us to answer these letters because we never did because they were a low priority and we  
25 didn't fully understand them. T-Mobile was not in the industry of hosting 080 numbers.  
26 We had them because, for customer services, we offered them and someone clever  
27 internally said, "We should host these ourselves". Actually, we probably shouldn't have  
28 because it was too small for our team.  
29 Q I see. It is another instance where T-Mobile's systems are not up to dealing with a  
30 particular calculation?  
31 A No, not really systems, our knowledge on that particular part. It was irrelevant to us,  
32 frankly.

1 THE CHAIRMAN: Mr. Ornel, presumably, if it had become relevant for some reason because,  
2 let us say, it became commercially more significant, then no doubt you would have engaged  
3 in systems that would have enabled you to compute these things?

4 A I think the first thing is that we would have looked at the matter in hand and learnt a lot  
5 more about the subject. It's not as simple as to say, "We would have got systems". We  
6 might have looked into getting systems, but you have to look at the cost, and actually if the  
7 volume had crept up you might say, "You know what, the complexity, we'll outsource this  
8 to a company", maybe Cable & Wireless, as an alternative, or someone else, to host these  
9 numbers for us. There's a big number hosting industry and I don't think T-Mobile was best  
10 placed to host its own numbers.

11 MR. READ: Thank you, Mr. Ornel.

12 MISS SMITH: I have no re-examination, Mr. Ornel, thank you very much.

13 THE CHAIRMAN: Mr. Ornel, thank you very much.

14 (The witness withdrew)

15 MR. READ: I do not know whether you want a short adjournment, but now would probably the  
16 time to do it.

17 THE CHAIRMAN: That sounds sensible. Do I take it that Messrs. Richards and Reid, their  
18 evidence is simply going to be ----

19 MR. READ: I thought the position had been made clear to you earlier, sir, they are not being  
20 called. I had not realised you had been left out of the loop on that.

21 THE CHAIRMAN: That is fine. Their witness statements stand.

22 MR. READ: I am grateful.

23 THE CHAIRMAN: Five minutes in that case.

24 (Short break)

25 THE CHAIRMAN: Mr. Ward.

26 MR. WARD: Sir, where that takes us to Mr. Stone, one of two witnesses for Vodafone, but the  
27 only one whose evidence is being challenged. Just one point in advance that will, I hope,  
28 help, Mr. Stone has given two statements, one in the 080 case and one in the 0845/070 and  
29 the latter refers back to the former. The substance of them is very, very similar but if you  
30 have not already had the chance, when you read them in full you will see that there is an  
31 overlap but it is very explicitly done that way.

32 THE CHAIRMAN: Indeed.

33 Mr. ROBIN JAMES STONE, Affirmed

34 Examined by Mr. WARD

1 Q Are you Robin James Stone of Vodafone House, The Connection, Newbury, Berkshire?  
2 A I am.  
3 Q Could I ask you to pick up bundle C2 and turn to tab 41? I hope you will see there the  
4 witness statement of Robin James Stone – is it signed on the last page of the copy in front of  
5 you?  
6 A My copy is not.  
7 Q Do you have a signed copy to hand? (Same handed) Thank you very much.  
8 A That is my signature.  
9 Q That is your signature, and do you adopt the contents of this statement as your evidence  
10 today?  
11 A I do.  
12 Q Could you turn to the next tab, you will see a second statement of Robin Stone, and if you  
13 turn towards the back of that - my copy has one document appended to it – the second to  
14 last page, is that your signature?  
15 A Again, it is blank.  
16 Q I am sorry, I thought that one was signed. (Document handed)  
17 A That's my signature.  
18 Q Do you adopt the content of this statement as your evidence today?  
19 A I do.  
20 MR. WARD: Thank you very much. If you would answer the questions.  
21 Cross-examined by Mr. READ  
22 Q Mr. Stone, you will be pleased to hear that I am not going to ask you very many questions,  
23 but can I ask you to look at your first statement because they are, as has already been  
24 indicated, very similar. It is at tab 41. Can I ask you to look at para. 8? You make the  
25 point there about the retail mobile telecommunications market being characterized by strong  
26 competition that has driven reductions in prices, do you see that?  
27 A Yes.  
28 Q You understand do you that Ofcom in this case say it is quite possible for the mobile  
29 network operators to set prices too high even though it is in a competitive market. Do you  
30 understand that? In other words, simply because it is a competitive market it does not  
31 necessarily mean that your prices may not be too high?  
32 A I understand that can be possible, yes.  
33 Q And Professor Valletti, for example, gives two instances of this 08 numbers and also  
34 international roaming?

1 A I have not read Professor Valletti.

2 Q Well if you want me to take you to him I will, but if you are prepared to take it from me that  
3 that is what he talks about in terms of secondary markets and prices being therefore too  
4 high, the two examples he gives are 08 numbers, and international roaming.

5 A I would suggest there is competition in both those markets, particularly with Vodafone we  
6 have options and bundles for people to purchase and on roaming we offer inclusive roaming  
7 packages such as Vodafone passport and in £40 and above we include 25 mgb of data a day,  
8 so I would suggest there are competitive measures in both those markets.

9 Q But there have been issues with international roaming, you would accept that, would you  
10 not?

11 A Certain competitors are charging more than we are.

12 Q The European Union interfered, did it not, in the prices for international roaming?

13 A They did.

14 Q Yes, and that affected your company as much as anyone else, did it not?

15 A Probably less so because we had made some aggressive price moves with \*\* and Passport  
16 prior to that.

17 Q Can I just clarify one point at para.22 in your statement, the same statement. I am just  
18 going to stick on this statement, Mr. Stone, so that we do not have to jump around. It is fair  
19 to say this is in the context of 080 tariffs. You refer to your post pay and pre pay consumer  
20 customers, and then you talk in the next sentence about the rates for business customers.

21 A Some business customers. There are some that were blanked out.

22 Q Yes, sorry, I am reading from the first sentence, just so you are clear about it, first and  
23 second sentences, not all of it, the statement. I do not want to get hung up on semantics of  
24 definition but I just want to be absolutely clear that when you are talking about your  
25 business customers, those are business customers who use your services to originate calls,  
26 including calls to 0800, 845 and 0870 calls?

27 A Could you repeat that question?

28 Q Certainly. In para.22 you are talking here about what you call consumer customers and then  
29 you talk about business customers. I just wanted to be clear that when you talk about  
30 business customers you mean customers whose employees or whoever, use their phones to  
31 ring numbers originating on Vodafone's network?

32 A Yes, that's correct.

33 Q And that may include, and indeed will include, calls to 0800, 0845 and 0870? I just wanted  
34 to be clear about that because the word "consumer" and the like has an important meaning

1 in other areas of this case. Can I ask you now to turn to para.31. Again, I am not going to  
2 refer to any material that has been blanked out in your copy, or may not be blanked out in  
3 your copy (I am not quite sure whether it is or whether it is not). I want to pick up what you  
4 say some way down the middle of the paragraph:

5 “It was not until some months later during the dispute resolution process that  
6 Vodafone discovered that BT had suggested that the wholesale charge applicable  
7 to Vodafone might be determined based on an average Vodafone retail rate.”

8 A Yes.

9 Q BT specifically asked you, when they notified you of the NCCN 956, about giving you an  
10 opportunity to discuss your average retail prices. Would you accept that, or do you want to  
11 have a look at the letter in question?

12 A It would not have been addressed to me. Just to be clear on roles, I look after the retail side  
13 of the business, whereas someone else looks after the wholesale side. So Helen Edwards or  
14 one of her colleagues is likely to be the person.

15 Q Perhaps I can just take you to the letter in CAT bundle 18 the first tab after your second  
16 statement. It is a letter of 2<sup>nd</sup> October 2009.

17 A “Dear Marcus and Helen”, yes.

18 Q If one goes over the page - it is fair to say that this is in respect of 0845 - you see a table and  
19 then it sets out what BT says the Vodafone’s retail charges would be, and then it sets out  
20 what it says BT says the charge will be to Vodafone, and then it concludes:

21 “BT is aware that your actual retail charges may differ from those states in your  
22 pricelist. If that is the case and you wish to challenge the interpretation of how  
23 your retail rate fits into the ladder proposed BT is willing to discuss it.”

24 This letter obviously did not go to you, as you have just observed. Therefore, did you have  
25 any input into discussions with BT about charges?

26 A No, I did not.

27 Q So when you say that it was only some months later during the dispute resolution process  
28 that Vodafone discovered that BT had suggested the wholesale charge applicable to  
29 Vodafone might be determined on the basis of an average Vodafone retail price, you are not  
30 really speaking from your direct knowledge about this, are you?

31 A My understanding was the average price from BT could have been interpreted in several  
32 different ways, and my colleagues were concerned about which way that would be  
33 interpreted.



1 Q But I am asking you whether you had any understanding of the negotiation process that was  
2 going on with BT, if any, about average retail prices?

3 A Only that I was informed at a later stage that it could be that it was average retail prices. I  
4 think I am aware that there was, particularly on the first notification, some confusion about  
5 what would be charged.

6 Q If you go to pra.42 in your statement you are talking here about Vodafone's newly  
7 introduced 080 bolt on proposition. You say:  
8 "Vodafone would consider it appropriate to treat calls made within the bundle as  
9 attracting a zero rate, but BT may not be willing to accept an average retail rate on  
10 this basis."  
11 What knowledge do you have as to what BT might or might not actually accept?

12 A This statement is they may or they may not accept the way we interpret it. So we heard  
13 earlier that there no clear steer on exactly what they intended the average retail rate to be.  
14 In discussions that could have been determined, but I know we disagree with the principle  
15 that was being applied, even before we get to average rates. Our concern with the average  
16 rates was that we would come to an average, because the averages could be calculated in  
17 several different ways, and that would not be what BT would expect. So with BT's  
18 expectation of receiving some monies from us, that may not actually be the case; they  
19 wouldn't receive the amount that they were expecting.

20 Q Let us just unpick that a little bit. You make the point in that answer that Vodafone was  
21 really disagreeing seriously with the principle of these charges, was it not?

22 A Yes.

23 Q Is not the reality, Mr. Stone, that you never got on to the stage of actually discussing or  
24 negotiating what an ARP could actually involve because you were wedded against the  
25 whole principle of this ladder pricing in any event?

26 A That would be more of a question for my colleagues who were having that conversation.

27 Q Who would that have been?

28 A That would have been Helen Edwards or Marcus Webb.

29 Q When we are looking at calls to 080 and 0845 and 0870 numbers, the majority of the calls  
30 are not in some form of package. Is that right?

31 A That would be correct, yes.

32 Q So in fact any problems about calculating the calls within bundle packages would be  
33 confined to a relatively small number of calls?

1 A That is where calculation of the average and step charges become very important. The  
2 problem with step charges is if you believe you are going to be at the bottom of a step and  
3 suddenly you sell a few less bundles than you expected, you could move to the top of a step.  
4 So that could be a 2p cost shock for the business to absorb in that month?

5 Q I want to be quite clear what we are talking about, what you mean by the bottom and the top  
6 of the step. If one has a step let's say at 17.5 ppm, I am just giving a hypothetical example  
7 here, you are talking about crossing between 17.49 ppm into, say, 17.51 ppm, is that what  
8 you are talking about?

9 A Yes, yes.

10 Q I am grateful for that. But would you agree with this, you understand how the Standard  
11 Interconnect Agreement works?

12 A I am focused on retail, I have a reasonable understanding of interconnect, but only from ----

13 Q I see, so you look at it from the retail angle rather than ----

14 A Our business is quite split which is why this is quite complex for us. We have a retail  
15 focused arm, and the various segments who look after customers and then we have  
16 essentially within the wholesale arm people who look at the cost and those two parts of the  
17 business are relatively separate.

18 Q You say that you introduced this tariff bundle because of prices remaining stable, that is  
19 what you say in para. 27 I think it is, if we go back slightly earlier in the statement. You  
20 say:

21 "One of the key factors which enabled us to offer such a tariff at a price of £5  
22 (with a promotional offer £2.50) was the fact that termination charges for calls to  
23 these 080/0845/0870 number ranges had previously been stable."

24 A That's why we selected those number ranges for our bundle prior to the complications  
25 coming out.

26 Q But why should you assume that the costs would necessarily remain stable?

27 A They had been stable up 'til that point. The other numbers within the 08 ranges that we  
28 could have considered including often had revenue share associated with them, and we  
29 didn't want to include those in a bundle. So we were trying to innovate in the market and  
30 offer customers a choice and so we chose those numbers as numbers we didn't anticipate  
31 costs dramatically rising on.

32 Q There is no guarantee that the costs are going to be stable, is there? You cannot guarantee  
33 that, that cannot be a reason for saying that therefore prices should not thereafter change?

34 A It was more that they were felt to be more appropriate to include 0844 and 0871.

1 Q It is also not entirely true to say they were stable because it had been subject, had it not, to  
2 NCCN 911 where you had actually lost payments as a result of BT cutting its payments for  
3 call origination charges?

4 A The size of that was quite small and the impact of that on Vodafone was relatively small.

5 Q You express, I think at para. 31, a number of concerns that the Vodafone systems cannot  
6 readily analyse the 08 calls for the calculation purposes. If you look at the second bullet  
7 point – I am not sure if that is the right reference. Perhaps while I find the reference would  
8 you accept that one of your concerns about this is the fact that it is difficult for you to  
9 calculate the 08 calls for calculation purposes across various segments?

10 A Yes.

11 Q But you must surely have some information about these 080 calls in order to identify them  
12 separately at the moment. There must be information there to identify them?

13 A Yes. So I have calculated averages within my statement to sort of give the best view that  
14 we have, but the reason for complexity for us is again this retail and wholesale split. We  
15 look at all 08 numbers, all 0408 \* numbers, or all 045 and 0871 numbers as groups that we  
16 put them behind something called a “tariff class” so we set a price for all the numbers  
17 within that group. What we do not see is what BT own at the end of that, so all we can see  
18 is 080 numbers as a whole, or things behind a certain price point.

19 Q But you can identify the 08 calls when they are coming from your customer, can you not?

20 A Yes.

21 Q You have the material to do that because we know from para. 21 of that statement generally  
22 your calls have been outside bundles, and so they have to be separately identified in order  
23 for you to charge the customers?

24 A We have that, yes.

25 Q The problem only arises if you are actually charging a terminating provider like BT a  
26 different price to a terminating provider like, say, Cable & Wireless?

27 A We can charge the same retail rate, however, depending on the mix of customers within our  
28 segments, and I particularly say the mix between, let us say, MVNO and corporate and with  
29 our consumer tariffs, that is where you get the discrepancy. So a post-paid customer maybe  
30 paying 20 ppm, an enterprise customer will be paying significantly lower than that, let us  
31 say 5 ppm, so if BT offered 08 calls that corporate wanted to ring then they would be  
32 getting an average rate of 5p. If Cable & Wireless were offering X factor numbers and  
33 things that only consumers wanted to dial then they would be charged 20-. So in order to

1 get it accurate for the end user, that is the problem we have of understanding Cable &  
2 Wireless' and BT's average retail rate.

3 Q So it is the marrying up of the two sets of calls is what you say, or the two sets of  
4 information, is the problem?

5 A Yes.

6 Q But if we take for example, 08 calls, are you seriously suggesting for 08 calls that that is  
7 going to create a serious problem, a serious difference between your prepaid customer, and  
8 your enterprise business customer?

9 A The prices between those two groups are very significantly different.

10 MR. WARD: Sir, I am just asked to remind everyone, including the witness, that of course we  
11 are not in confidential session.

12 THE CHAIRMAN: No, indeed.

13 MR. WARD: And, of course, if Mr. Stone wishes, or there is any relevant question, I do not wish  
14 to stop him giving an answer, but just with that in mind.

15 THE CHAIRMAN: You understand the point, there are various parts in your statement which are  
16 labelled "confidential". You should feel absolutely free to refer to them, but before you do  
17 so let me know and I will ensure that the room is cleared so that only those who should hear  
18 it do hear it.

19 A I am trying to avoid having to do that.

20 THE CHAIRMAN: I understand, but do not feel obliged trying to avoid it. If you feel the need  
21 to refer to this information in order to give a full and clear answer then do let me know, it  
22 takes two minutes to clear the courtroom.

23 MR. READ: I think, just to reiterate, the example you gave earlier was a hypothetical example  
24 rather than a specific example. Can I then move on to para. 32 I think it is of your  
25 statement. In this statement you identify that there is going to be a response effectively to  
26 the wholesale tariff structure, because you say very clearly there that doing nothing is not an  
27 option?

28 A Correct.

29 Q So you say the responses are either going to have to be to increase the prices or to decrease  
30 them?

31 A We could hold the price the same and recover the price elsewhere.

32 Q I thought you were saying in para. 32 that

33 "The first of the courses of action described above in paragraph 30 is simply not  
34 feasible because of the potential impact on Vodafone's margins..."

1 And if we go back to para. 30 – I do not think your statement is paginated, but you can see  
2 at para. 30 the first of your options is do nothing?

3 A So I do nothing, totally do nothing, yes, I agree, we would not be able to do that ----

4 Q I see, so you are saying that there is another option?

5 A -- what I am suggesting is you could raise the rate for 0800, you could reduce the rate for  
6 0800 or you could keep the rate for 0800. However, if you do that you need to recover the  
7 revenues elsewhere, but it is most likely that we would do that “do nothing” option.

8 Q Then in para.36 you conclude that of the two options, Options 2 and 3, you say at the end:  
9 “My experience of setting 080 prices leads me to conclude that an increase of  
10 this kind would be unlikely to lead to any significant fall in demand from  
11 Vodafone’s postpay subscribers.”

12 Yes?

13 A Yes, that is correct.

14 Q In that statement you are effectively saying, “Option 3”, which is increased retail prices, in  
15 para.30, is the more likely option – is that what you are saying?

16 A In principle, in the documents I’ve given, I’ve tried to get across that there are lots of  
17 different factors and those different factors could be different at varying times. For  
18 example, we may be trying to grow market share, which might encourage us to have lower  
19 prices than some of the competitors; we may be trying to improve our customer scores,  
20 which we call “Net Promoter Score”, and that might encourage one behaviour. We may be  
21 trying to maximise revenue or we may be trying to reduce cost. So, depending on each  
22 month, we do tend to have different objectives, and I think it was outlined earlier that we  
23 will be trying to fix wherever the problem in the business is. If I was attempting to  
24 maximise revenue on that particular call number it is likely I would be looking to raise that  
25 price.

26 Q Let me just ask you about the specific point in para.36, which is towards the bottom of the  
27 paragraph:  
28 “My experience of setting 080 prices leads me to conclude that an increase of  
29 this kind would be unlikely to lead to any significant fall in demand from  
30 Vodafone’s postpay subscribers.”

31 Do you see that?

32 A Yes.

33 Q Can I ask what data you have to base that view on?

1 A I have several years' experience where we have looked at these prices in the past. The  
2 reason I've specifically mentioned post-pay customers was that I believe pre-pay customers,  
3 from my experience, may behave slightly differently. I will give you a simple example  
4 here. In terms of substitution products BT are offering on their fixed line inclusive 08, and  
5 most fixed operators are offering the 08 for free. So customers who are extremely price  
6 sensitive will defer their calls or make their calls when they get home. The calls that we are  
7 potentially talking about in 080, customers who are extremely price sensitive have already  
8 taken themselves out of the equation. That means a price increase on the post-pay base is  
9 unlikely to remove a large chunk of these more price sensitive customers.

10 Q The question I actually asked you was what data did you have to base it on? Did you have  
11 any data?

12 A We haven't included any data in here. I don't believe I've got any records. All I have got is  
13 knowledge from when we've previously made price rises in the past. In terms of elasticity,  
14 with each price change we get a slightly different result. It can depend on the price  
15 perception from those customers. A lot depends on the communication of that and a lot  
16 depends on how many customers split into what I would call "pocket money" customers,  
17 who have a limited amount of spend, and Premiership footballers who don't really take into  
18 account what the price is.

19 Q Can I ask you just to move on in the bundle you have got to tab 49. It should be a statement  
20 of Andrew Aspinall – C2, tab 49. Do you have that?

21 A Yes, I do.

22 Q It is Andrew Aspinall's statement. Can I ask you to look at p.5 of that statement, para.16.  
23 You will see that Mr. Aspinall there produces a summary of data that Talk Talk was able to  
24 put together when there had been a change as a result of effectively them including  
25 0845/0870 calls in call bundles in June 2009. Do you see that?

26 A I've got a confidential copy, but they suggested a 20 per cent increase, which I think ties in  
27 with the number I used in my statement.

28 Q Sorry?

29 A I think the 20 per cent actually ties in reasonably well with the number I used in my  
30 statement.

31 Q Sorry, the number?

32 A I used in my statement when calculating ----

33 Q The question I have got for you, Mr. Stone, is what data have you got that corresponds to  
34 this type of data that you have actually produced data?

1 A I haven't provided any data here. We didn't have any data I felt was specific enough to this  
2 case.

3 MR. READ: Thank you, Mr. Stone.

4 MR. WARD: I have no questions in re-examination.

5 PROFESSOR STONEMAN: You bear responsibility for retail pricing?

6 A For post-pay.

7 Q For post-pay, yes. A lot of your discussion here obviously is about the change in BT prices  
8 and the impact upon your retail prices. Apart from a little bit in para.31, you talk as if you  
9 would change your retail prices in response to the change in BT's prices, but you say very  
10 little about the other providers of termination services. It may well be that BT is your only  
11 provider. For example, you might increase your retail prices, but that would be for all calls?

12 A Yes, it would be, we have differentiated.

13 Q That is right. I think what I want to get at is how sensitive would your retail price  
14 discussions be to the reaction of the other suppliers in their price schedules?

15 A Sir, it would be determined by how big a volume, BT are a substantial proportion of the  
16 charges we receive. Based on the bills I've seen, I believe they are of the order of [X].  
17 That is one data point that I received, as I say, from another of the business.

18 MR. WARD: Sir, my client is getting a little concerned that this may stray into confidential  
19 matters.

20 THE CHAIRMAN: Let us clear the court.

21 MR. WARD: I do not wish to stop the line of questioning in any way.

22 PROFESSOR STONEMAN: That is right, I did not think it was – I am not looking for particular  
23 numbers.

24 MR. WARD: Of course, sir, I understand. It is more the answer than the question.

25 THE CHAIRMAN: I would like the witness to be able to answer as fully as he can, so perhaps  
26 those who are not permitted to hear confidential information to Vodafone could leave the  
27 room.

28 (For hearing in private, see separate transcript)

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