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IN THE COMPETITION

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 January 2008

Before:
VIVIEN ROSE
(Chairman)

ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED (“H3G”) and OFFICE OF COMMUNICATIONS (“OFCOM”)	1083/3/3/07
AND	
T-MOBILE UK LIMITED (“T-MOBILE”) and OFFICE OF COMMUNICATIONS	1089/3/3/07
AND	
BRITISH TELECOMMUNICATIONS PLC (“BT”) and OFFICE OF COMMUNICATIONS	1090/3/3/07
AND	
HUTCHISON 3G UK LIMITED (“H3G”) and OFFICE OF COMMUNICATIONS	1091/3/3/07
AND	
CABLE & WIRELESS UK & OTHERS (“CABLE & WIRELESS”) and OFFICE OF COMMUNICATIONS	1092/3/3/07

HEARING DAY FOUR

APPEARANCES

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared for H3G.

Mr. David Anderson QC, Mr. Graham Read QC, Miss Anneli Howard, and Mrs. Sarah Lee (instructed by BT Legal) appeared for BT.

Mr. Jon Turner QC and Meredith Pickford (instructed by Regulatory Counsel, T-Mobile) appeared for T-Mobile.

Mr. Matthew Cook (instructed by Olswang) appeared for Cable & Wireless.

Miss Elizabeth McKnight and Mr. Stephen Wisking (Partners, Herbert Smith) appeared for Vodafone.

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared for Orange.

Miss Kelyn Bacon (instructed by SJ Berwin) appeared for O2.

Mr. Peter Roth QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for OFCOM.

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1 THE CHAIRMAN: Good morning everybody. Miss McKnight, I gather there is something you
2 want to tell us about this morning?

3 MISS McKNIGHT: Yes. Thank you. I simply wanted to mention that there has been a factual
4 development which we thought we should draw to the tribunal's attention. We note that in
5 the second witness statement of Mr. Russell, adduced on behalf of H3G, Mr. Russell makes
6 reference para. 31 to a statement put out by Ofcom proposing to alter the arrangements for
7 number portability that apply in the U.K. Although Mr. Russell does not appear to place
8 great reliance on what Ofcom proposes, we felt it was only appropriate to draw to your
9 attention that Vodafone yesterday launched an appeal before this tribunal, challenging the
10 appropriateness/validity of Ofcom's decision to change the number portability
11 arrangements. Therefore, that may be something that H3G, in particular, wish to know
12 about for the purposes of this part of the case.

13 THE CHAIRMAN: Thank you. Another administrative point is in relation to an application by
14 H3G to add Rosamund Brown of Baker & McKenzie to the confidentiality ring. Does
15 anybody have any objections to that, or wish to take further time to consider? (After a
16 pause): We will make that order in due course.

17 We have considered carefully the points that were raised at the close of proceedings
18 yesterday. The tribunal has concluded that now that we have finished the SMP part of the
19 case, the tribunal should set a clear timetable for the remaining days. Having regard to the
20 tribunal's guide to the conduct of proceedings we note that substantially longer has been
21 allocated to this hearing than is usually allocated, even to heavy cases. We consider that two
22 days is ample time to devote to the issue of whether any price control should be imposed.
23 We have had six expert reports exchanged, and we have had substantial written witness
24 statements that we have read carefully. So, today, we will have the cross-examination of
25 Dr. Littlechild, Mr. Myers, and Dr. Walker. We expect that the themes will emerge fairly
26 clearly from that cross-examination. H3G will then make submissions for the rest of the
27 day, and until 11.00 a.m. tomorrow morning. At 11.00 a.m. tomorrow morning we will
28 then move to Ofcom and the interveners, and we will sit until 5.30 tomorrow afternoon to
29 finish them. If there is time tomorrow afternoon we will have the H3G reply. If there is not
30 time then that reply will be in writing. Ofcom and the interveners should decide amongst
31 themselves what the programme should be for that slot of time from 11.00 a.m. until
32 whenever they need to finish tomorrow afternoon.

33 On Friday morning we will start the TRD appeals, and we will devote the whole of Friday
34 and Monday up to 3.00 p.m. for submissions from the various appellants. We expect that the

1 appellants will include in their submissions their submissions as appellants and as
2 interveners. Again, we would ask those parties to work out for themselves what the
3 timetable is for that period, and notify the tribunal so that we can make sure that people
4 stick to it. At 3.00 p.m. on Monday we will then move to Ofcom's submissions. They will
5 then have the rest of Monday and the start of Tuesday, and then there will be the interveners
6 taking up the rest of Tuesday on the TRD appeals. The SIA construction then goes off to
7 the next tranche of days (the overflow period).

8 It is, of course, entirely up to the parties to make what submissions they wish during the
9 time that is now allotted to them. But, we draw to your attention that we do not need to be
10 taken to paragraphs in the various decisions. It is enough for you to make your submissions
11 on what conclusions you wish us to draw from those paragraphs, and direct us to the
12 relevant paragraph. We also do not need the uncontested witness evidence read out to the
13 tribunal.

14 We have prepared a timetable to be passed around. The parties, as I say, should let us know
15 how they wish to allocate the time when we have allocated a block of time to a group of
16 parties.

17 MR. COOK: Madam, the parties have drawn up a timetable which, miraculously, is very similar
18 to the one you have laid down this morning. We can adjust that to reflect the specific
19 timings you have made and get that back to you very quickly.

20 THE CHAIRMAN: Thank you very much. I think we move now to calling Dr. Littlechild to
21 give evidence.

22
23 DR. STEPHEN LITTLECHILD, Sworn

24 Examined by MISS ROSE

25 Q Dr. Littlechild, I hope you have there with you a set of files, including a file labelled K.

26 A. Yes, I do.

27 Q Can I ask you to open File K? You will see at Tab 1 a document headed 'Expert Statement
28 of Dr. Littlechild'. Is that your signature at the back of that statement? A. Yes, it is.

29 Q Then, at Tab 2, a second expert statement, also with your signature? A. Yes, that is true.

30 Q Then the third statement behind Tab 3, also with your signature? A. Yes.

31 Q Can I ask you to wait there? There will be some questions for you.

Cross-examined by Mr. ROTH

1
2 Q Dr. Littlechild, one thing we will need to be careful of is that some figures in your reports
3 and in some other documents I might take you to are confidential, and some passages are
4 confidential. I hope they have been marked up in yellow highlighting in the report. There
5 are not very many, but there are some - similarly in the basic statement. If we need to refer
6 to that, I think the way that it is sensible to do it is to say, "It's the figure in para. 7" or
7 whatever, "in the next sentence that follows", and then those within the confidentiality ring,
8 and the tribunal, can see what you are referring to, but the figure is not then in open court.
9 I think the issues have now narrowed through the exchanges of reports between you and, in
10 particular, Mr. Myers. So, I need not go through everything in your first report by any
11 means. Just to clarify some points on which I think everyone is agreed, and to be clear, first
12 of all, this whole discussion is on the assumption that H3G is found to have significant
13 market power. A. Yes, that is the case.

14 Q They challenge that, but if in fact they do not have significant market power and the tribunal
15 so concludes, all the work you have done in your reports and Mr. Myers, and indeed Dr.
16 Walker, all become, sadly, irrelevant. So, that is the basis on which this discussion
17 proceeds. A. Are you asking me for a view on that, sir?

18 Q I am just explaining that I think it is common ground that that is the position. That is the
19 basis on which I will be questioning you. A. I take it that ---

20 THE CHAIRMAN: Yes, that is just by way of explanation.

21 MR. ROTH: Secondly, we are not concerned in this hearing with the level of price control on
22 H3G, whether in isolation or relative to the other MNOs. The question for discussion now
23 is whether, when a price control is imposed that now extends to all the other MNOs to cover
24 3G termination, should there be any price control on H3G at all? That is the basis of the
25 discussion. A. I believe that to be case.

26 Q Thirdly, Dr. Littlechild, we are not dealing here with the merits of a CPP system as opposed
27 to an RPP system or indeed a *Bill and Keep* regime, which I know you are a strong advocate
28 of – very interesting issues – but they are not for debate in this hearing. You understand
29 that? A. I understand that.

30 Q Dr. Littlechild, I think the position is, as I understand it, reading through your report, and
31 particularly the second report, that you are not making a positive statement that there should
32 be no price control on H3G. Your position is that Ofcom's MCT statement is an inadequate
33 basis, a matter of economic analysis, for reaching such a conclusion that there should be
34 price control on H3G? A. That is my primary argument, yes. It does seem to me that the

1 arguments for a price control are not sufficiently strong to justify that as an obvious
2 conclusion.

3 Q Yes, as you put it, I think the analysis is incomplete? A. Yes.

4 Q And Ofcom did not sufficiently identify and weigh up all the positive and negative effects
5 of its decision for the competitive process. I think that is how you put it? A. That is
6 correct.

7 Q In particular, Ofcom did not look at the detriments of regulating H3G? A. That is correct.

8 Q Regarding the benefits of regulation, Ofcom considered those as you saw under the five
9 headings that are set out in the statement and the welfare model that you criticise for
10 applying to all the MNOs without any calculation specifically of the welfare model for
11 H3G, in fact that is directed at only one of those five heads, the inefficient structure of
12 pricing? A. That is correct.

13 Q If we turn to your second report, which you have in this bundle K at tab 2, one sees that on
14 the third page, paras.5 and 6, the last sentence of your para.5, Ofcom's welfare model:

15 "He [Mr. Myers] explains that, for these reasons, the welfare model was only one
16 aspect ... to impose regulation.

17 Mr. Myers and I seem to be in agreement on these points ..."

18 Then you set out some reservations. Then you go on to refer in para.8 to certain matters
19 that you say Ofcom fail to consider, and you quote in para.8, para.29 of your first report.
20 You see that? A. Yes.

21 Q And in there you set out a number of matters that you say should have been considered and
22 were not, and I am reading from the quotation:

23 "For example, Ofcom does not seek to consider what impact its decision might
24 have on the variety of terms offered by existing mobile operators ..."

25 Just to understand that, I think you expand on that in your third report. Have I got this right,
26 this is the point that you make in your third report about increased competitive pressure
27 from H3G on the other mobile operators? A. That is correct.

28 THE CHAIRMAN: So the terms referred to there are the terms of retail offerings to subscribers?

29 A. Yes, that is what I had in mind there.

30 MR. ROTH: It is a point you explain in your third report more specifically in response to

31 Dr. Walker, and so I shall leave that to the counsel for T-Mobile to take up if he thinks it
32 appropriate. The second one that you identify here in the quoted paragraph is the nature of
33 such investment and innovation, and I think that is investment and innovation in existing
34 and new services that you are referring to, if one goes back to your first report, para.29,

1 which you are here quoting – that is on p.8-9 of your first report, tab 1. Do you have that,
2 para.29, and what you quoted in your second report is the last part of that paragraph,
3 beginning “For example”. A. Yes.

4 Q About the last eight lines or so, and it is there, “for the nature of such investment and
5 innovation”, and I take it that refers to investment and innovation as mentioned just above,
6 investment innovation in existing and new mobile services? A. Yes.

7 Q That is the “such”. Mr. Myers has responded to this criticism, and one sees that in his
8 second report, which you find at tab 7, and it is in his annex 2, p.19, para.A2.3(b) – do you
9 see that? A. Yes, I see that.

10 Q It says:

11 “Ofcom considered effects on investment and innovation in determining the cost
12 benchmarks and in its analysis of the glide path and the financial impact on H3G.”

13 I do not know if you have got your own copy of the statement that you want to refer to, or
14 whether you want to use the one in the bundle. It is in bundle B, I think, tab 1. For
15 example, picking up one of those references, if we look at 9.208, p.180 within the document
16 itself. 9.207:

17 “H3G expressed the view that the proposed charge level is too low and fails to take
18 into account dynamic investments and competitive effects.

19 In making its charge control decisions, Ofcom has been careful to take into account
20 dynamic investment and competitive effects, as discussed [above]. Ofcom has
21 decided to impose an initial one off cut in year one followed by a glide path to cost
22 over the remaining three years of the control because it considers that this approach
23 strikes a better balance between the short-term interests of consumers and
24 investment incentives compared to an immediate reduction to cost in year one.

25 Ofcom also notes that in seeking to encourage efficient investment, the most
26 effective regulatory mechanism is to set input prices at the level that would occur
27 in a competitive market, namely a cost-orientated price allowing for a reasonable
28 return on invested capital.”

29 Whether you agree or disagree with Ofcom’s conclusions do you agree that they did take
30 into account the effect on investment and innovation? A. Well, I see that they claim to
31 have done so here. I see no evidence in the rest of the report of having done that. For
32 example, I see no discussion of what other investment decisions might be made by other
33 companies, and how that might be impacted by this particular decision to regulate this
34 company.

1 Q You are saying that you do not think the reasoning is fully set out, but you accept that they
2 did have regard to that factor? A. Well, I am not convinced that they have done that. I
3 see no evidence that they have done that. Basically the Ofcom line is that it would be
4 wrong to distort the market by giving differential treatment, and that distortion, they say,
5 would have an adverse effect. So, it is more in the nature of an assumption than it is of a
6 considered view of what the impact would be and whether this would be adverse, or not.

7 Q The adverse effect and distortion is something we will come to. I am dealing specifically
8 with effect on investment and the criticism you made that Ofcom have not had regard to it.
9 That was your para. 29 which you reiterate in your second report - that they left it out of
10 account. What they are saying is that they take it into account. Indeed, in setting the level of
11 the charge control and the glide path, which you will recall is more generous for H3G than
12 for the other MNOs, it is having regard to dynamic investment. So, they are alert to the
13 point, are they not? A. Well, you made the point earlier, sir, that we are looking here at
14 the decision whether to impose a control, rather than on the decision of what the level of
15 that control would be. In looking at the second point, I am not taking issue with what they
16 are saying there. I am saying, in deciding whether to impose the control -- I am not
17 convinced that they have done that. The reference that they make here is the cross-reference
18 back to 1.193. That specific paragraph does not address itself to that point.

19 Q 1.193 and the following section ---- A. Yes. 193 is basically saying "What would be the
20 impact on H3G rather than the impact on other operators?"

21 Q Yes. We are talking about the effect on investment on H3G here. A. We are talking here
22 about the impact on other companies.

23 Q Not on H3G. A. That's what I thought you were taking me to in my statement.

24 Q I thought that was the first point that you made and in your para. 29 was other companies.
25 The second one was investment and innovation, more particularly by H3G. A. Well, I
26 mean, my point would apply to both, but I thought we were agreeing there that we were
27 talking about other companies. I am sorry if I have misunderstood you, sir.

28 Q I just want to be clear what you were saying. If it is other companies, then it is very much
29 the same point as a variety of terms, is it? It is the effect of competition in the retail market?
30 A. I suppose introducing new products and new services would be a part of the new terms,
31 yes.

32 Q It comes back to the same point. You say this is in s.9, which is dealing with the level of
33 price control. That is the point you made in response to Mr. Myers in your third statement.

1 If we go to Tab 3, your para. 34, you are here responding to Mr. Myers' Annexe 2. You see
2 that in your para. 34. A. Yes.

3 Q Aspects of competition not addressed. There is (a) and then there is (b) - impact on
4 investment innovation. Mr. Myers says that Ofcom considered effects on investment in
5 determining the cost benchmarks, and so on, and he gives cross-references. You refer to the
6 cross-references and what they cover. Then you go on, about five lines from the end. You
7 say,

8 "In their context, these discussions are unobjectionable but they pertain to the
9 subsequent decisions as to what level to set the price control, how to determine the
10 glide path to the final cost reflective price, but they do not provide much, if any,
11 insight into the impact of a decision to regulate H3G, and they are not adduced as
12 part of that decision".

13 That was the point you were making - that they come in the discussion as to level and not
14 the discussion of whether to impose price control. A. Yes.

15 Q When you say it is unobjectionable, is the point that you are saying it comes in the wrong
16 part of the reasoning? A. These are considerations that it is relevant to take into account,
17 but they do not seem to have been adduced at the time of deciding whether to impose a
18 price control on H3G.

19 Q If we look at the section where they do discuss whether to impose a price control -- Could
20 you look at para. 7.28 at p.110? Ofcom's response to points raised by H3G. This deals
21 with net benefit and effect on H3G. Then, over the page,

22 "Ofcom's analysis of the financial effect ON 33 suggests that the proposed remedy
23 will not undermine H3G'S overall financial position, and, moreover, H3G's reduced
24 MCT termination revenue will be small compared to its overall revenues. Therefore,
25 for reasons argued here and in s.9 Ofcom considers that there are material overall
26 welfare gains from the regulation of H3G".

27 Are they not there incorporating the reasoning of s.9 into their response to H3G points in
28 s7? A. I think that is more of a legal point than an economic one. I would take advice on
29 that - as to whether they are incorporating that, or not. That, it seems to me, is a relatively
30 limited argument about the impact on H3G's overall financial position. (a) It is looking at
31 the level of the control rather than whether to impose it, and it is, in effect, saying that it is a
32 small part of their total revenue, and therefore it will not have much effect, whereas what
33 we find from other witness statements is an argument that H3G was in fact led to withdraw

1 a particular service that it offered. That is not acknowledged, or even investigated by
2 Ofcom.

3 Q I am not asking you whether you think the conclusion is right or wrong. I am just asking
4 you whether your criticism that they did not consider this point in deciding whether to
5 impose price control on H3G is right, given that they say, “For the reasons argued here and
6 in s.9 ----“ Are they not saying that they are relying on the reasons set out not only in s.7
7 but also in s.9 - just as a matter of English, not law? Is that not what they are saying? A.
8 That is what they are saying. I am saying that I do not see much evidence of the kind of
9 consideration that I would expect to see. They say they do that. My view is that there is not
10 the kind of consideration that I would have expected.

11 Q The third criticism that you make in your para. 29, if we go back to para. 8 of your second
12 report at Tab 2 on p.3, para. 8, where you quote your first report -- “Ofcom does not seek to
13 consider what impacts its decision might have ----“ We have talked about the nature of
14 investment, innovation. The third is on the nature and extent, and timing of new entry, or,
15 for that matter, exit in the mobile sector. “Ofcom does not explore these implications for
16 competition.” That is what you say. Mr. Myers responds to that, again in the Annexe 2 to
17 his second report, which is at Tab 7. If you turn to p.19,

18 “Ofcom assessed the prospects for exit, and concluded that its decision would not
19 undermine H3G’s financial viability”.

20 We will come on to the other points That is the first point that he makes in (c) - his general
21 point. You respond to that in your third witness statement at Tab 3, p.13, at (c)

22 “Impact on nature and timing of new entry (or exit): Mr. Myers says [and you quote
23 from what we have just looked at]. I accept that this effectively addressed the
24 possibility of H3G exiting, but again this was a consideration in deciding the level of
25 the control rather than whether to regulate H3G”.

26 You see that. That is your response. A. Yes.

27 Q Again, could you look at para. 7.28, “Second, Ofcom’s analysis of the financial effect on
28 H3G at paras. 9.204 et seq. suggests that the proposed remedy will not undermine 33s
29 overall financial position and, moreover, H3G’s reduced MCT termination revenue would
30 be small compared to its overall revenues”.

31 That is very firmly part of the rationale for a decision to impose price control, not the level,
32 is it not? It is in s.7. This whole s.7, Dr. Littlechild, is dealing with the question of whether
33 or not to impose price control, not the level? A. Yes, I think I would accept that. I accept
34 that Ofcom did look, in setting the level of the control, at in effect the possibility of exit.

1 You say that that was brought into the decision on whether to impose a control in the first
2 place, and if that is the case then I must accept it.

3 Q I am seeing even without referring to s.9 they conclude here – s.7, I think you accept, that is
4 the section of the statement that deals with whether to regulate or not, the way it is
5 structured, and you have obviously been through it many times. You see that on p.105, the
6 start of s.7, it goes through market definition, market power, countervailing buyer power
7 and then impacts and regulation or not. Then eventually it comes to what sort of regulation
8 and then levels. A. That is true.

9 Q Would you agree that, in fact, they did take this into account. You may say it is a wrong
10 result, but they did take it into account? A. The possibility of exit, yes.

11 Q The next point that Mr. Myers makes in response to your (c), if you go again to tab 7, p.19.
12 Then, if you go over the page to p.20, (c)(i):

13 “To the extent that Dr. Littlechild is referring to entry assistance for H3G (which
14 he might call promotion of competition), Ofcom considered this and concluded
15 that the glide path already took into account H3G’s specific circumstances and that
16 it would not be appropriate to go beyond this.”

17 So that is his point (c)(i) – do you see that? A. Yes, I do.

18 Q You respond to that – perhaps keep your finger at that page, and go back to your third report
19 at p.13, (c)(i), Mr. Myers said, and you quote, and you refer to the paragraphs.

20 “The referenced paragraphs indicate that Ofcom interpreted this as ‘argument that
21 the regulator should deliberately favour H3G over the incumbent MNOs’, which it
22 rejected because the proposed controls already take H3G’s specific circumstances
23 into account, and ‘Ofcom does not consider that it would be appropriate to go
24 beyond this, given the importance of competitive neutrality’. Thus, in this section
25 Ofcom did not look at the impact of its decision to regulate H3G on the potential
26 for other operators to enter the market in future.”

27 That is correct, but what Mr. Myers is referring to responding to your criticism to the extent
28 that it refers to entry assistance for H3G. Do you accept that in those paragraphs they do
29 indeed consider the effect of entry assistance to H3G? They do not for other operators, but
30 that is not his (c)(i) – do you that? A. I see the question you are asking.

31 Q You are running the point that he is not making? A. You are saying that he is not arguing
32 that Ofcom took account of the impact on the entry decisions of potential future entrants.
33 You are saying that is not the point. The question is whether they looked at the possibility
34 of entry assistance to H3G, and I am saying that they did not look at that in any detail,

1 anything very specifically related to H3G. What they essentially said was it would not be
2 appropriate to give entry assistance to H3G, and therefore we do not need to examine
3 precisely what that would mean for H3G.

4 Q I thought you were saying in (c)(i) that your responses in this section:

5 “Ofcom did not look at the impact of its decision to regulate H3G on the potential
6 for other operators to enter the market.”

7 Is that not what your response is? A. I am saying that, and you are asking me about my
8 response on the first question, the impact on H3G, and I am saying I do not see any detailed
9 examination of that either.

10 Q That is not, I think, what you say there. Shall we look A 15, point 61, Bundle B, tab 1.

11 A. That is where?

12 Q Annex 15 starts at p.330. A. That is in the statements.

13 THE CHAIRMAN: What paragraph in the statement, Mr. Roth?

14 MR. ROTH: A15.61, p.342. Have you got that:

15 “H3G’s argument its high CARS costs as a new entrant should be included in
16 wholesale termination charges can be characterised as entry assistance. That is, it
17 is an argument that the regulator should deliberately favour H3G over the
18 incumbent MNOs in regulating mobile termination charges, in order to offset the
19 higher costs associated with entry that H3G argues it faces.

20 Ofcom’s proposals for charge controls already take into account H3G’s specific
21 circumstances set out in s.9. Ofcom does not consider that it would be appropriate
22 to go beyond this, given the importance of competitive neutrality.”

23 In other words, they are saying that in setting within account of whatever particular
24 circumstances H3G has as later entry levels, it is not appropriate to go beyond that in saying
25 no charge control at all? A. I see that they are saying that. What I am saying is they have
26 not looked at the impact on H3G of giving it assistance or not in a very general
27 comprehensive way. They have essentially said it is not appropriate for us to look at that
28 impact.

29 Q We will come on later to the impact on H3G. The second point that you make – and again
30 we go to Mr. Myers in annex 2 at p.20, Bundle K, tab 7, para. A2.3c(ii):

31 “To the extent that the effect is relevant ...”

32 and this is now the entry of other third parties (c)(ii) is entry assistance for H3G. CQ is
33 third parties.

1 “... Ofcom explicitly considered it. The statement did not impose regulation on a
2 new entrant; however, the regulation of H3G could be a signal to a new entrants.
3 In my first statement I provided quotations from paras.2.128 and 9.129 setting out
4 Ofcom’s views on the regulation of a new entrant’s termination charges.”

5 You comment on that back at p.13 of your third statement under (c)(ii) again mirroring
6 Mr. Myers:

7 “Mr. Myers says that Ofcom explicitly took account of the effect on entry, and set out
8 Ofcom’s views on the regulation of a new entrant’s termination charges at Ofcom’s
9 statement paras.3.128 and 9.129. Both of these paragraphs affirm Ofcom’s view that new
10 entrants should not be favoured by not being regulated like incumbents. But neither of them
11 provide much if any reassurance that Ofcom actually looked at who potential entrants might
12 be, what distinctive services they might provide, what market conditions and regulatory
13 stance might encourage or discourage them.”

14 They did not look at who potential entrants might be and what services they might provide.
15 Indeed, they do not set that out. Are you saying that they should be identifying the likely
16 entrants who should be encouraged? A. I’m saying that I would expect them to look at
17 the actual circumstances of the market at the time they take this decision. I would expect
18 them to look at what the conditions of entry might be -- Yes, what kinds of companies
19 might come in. They might even be aware of particular named entities that are considering
20 entry. So, I would expect them to look at the actual circumstances and say, “If we were to
21 take this decision, would it have an adverse effect on these potential entrants? Would it
22 encourage them?”

23 Q You go so far as saying that they should then actually consider specifically who they might
24 be. A. Well, if they are aware of potential entrants, then it would seem to me relevant to
25 ask themselves what would be the impact on these potential entrants, and how much weight
26 they put on that is another matter, but it seems to me a relevant consideration.

27 Q And identify them in the statement. A. We are not arguing -- Whether one identifies
28 them in the statement is another matter, but to look at what the situation is, and if they
29 consider it relevant to give some indication of what impact that has had on their thinking ---
30 -

31 Q Let us look at 3.128 at p.42 of the statement.

32 “Ofcom shares the concern of these respondents [O2, T-Mobile, H3G and Orange]
33 and fully intends that a consistent and non-discriminatory approach to regulation of
34 such new entrants should be applied.”

1 Those are the new entrants referred to above who might use a variety of technologies, new
2 services.

3 “Ofcom will continue to monitor the market and, in the light of developments, will
4 consider what, if any, steps to take, including whether it is appropriate to conduct a
5 further market review in order to define appropriately new markets for mobile
6 termination provided by other operators and to consider whether such providers
7 have SMP in those markets and, if so, what regulatory remedies are appropriate. In
8 judging what action to take, and the timing of that action, Ofcom will take all
9 relevant circumstances in account, including the prices charged by other operators
10 providing mobile termination, and the prima facie evidence that may as a result exist
11 of potential detriment to consumers”.

12 So, they are saying, as it were, that they reserve the position and they will look at it in the
13 light of developments as they happen. That is what they are saying, is it not? A. They
14 seem to be saying that, which I would take to be saying, “We didn’t look at it in the context
15 of this decision, but we will bear this in mind in the future”.

16 Q They are saying, “We have had arguments about this. We wish to be consistent. That is how
17 we will deal with it”. A. Whether this is saying that this is a factor they took into
18 account in the decision not to regulate H3G, I think is not clear from this. What they are
19 saying is “After we’ve made these decisions, we will continue to monitor the market”.

20 THE CHAIRMAN: This is a slightly different point. The regulation of new entrants is a different
21 point, is it not, from the signal that is sent to potential new entrants by regulating, or not
22 regulating, H3G.

23 MR. ROTH: That is the point I am canvassing, which I understood was the point that Dr.
24 Littlechild was criticising them for not taking into account. Not the regulation of H3G, but
25 the effect -- the signal to these potentially identifiable new entrants who have not come in
26 yet. That is what you are talking about, is it not?

27 MR. SCOTT: I think when one looks at this, this is in a passage on mobile virtual network
28 operators. There is a sense in which it seems to be making an assumption that the reader
29 actually knows who the mobile virtual network operators are. There were at the time, I
30 think, slightly over half a dozen of them. Is that not right?

31 MR. ROTH: It is dealing, as you see from 3.127, with not just -- I appreciate the heading is there,
32 but this is the answer to the responses to the March 2006 consultation with O2, T-Mobile,
33 H3G and Orange who should take steps now to develop its regulatory approach in relation

1 to the termination of services of new entrants (and this is potential new entrants) which, as
2 T-Mobile noted, may potentially utilise a variety of technologies’.

3 MR. SCOTT: It is looking to the fact that we are likely to have further opening up of the radio
4 spectrum, and so on, so that it is in that broader context.

5 MR. ROTH: Absolutely.

6 MR. SCOTT: Not circumscribed by the heading in the statement.

7 MR. ROTH: Absolutely. That is exactly right. I would suggest that that is an entirely
8 appropriate approach for the regulator to take to potential new entry. A. I’m not saying
9 that monitoring the market after you have made your decision is an inappropriate regulatory
10 approach. I was not suggesting that for one moment. What I am saying is that Ofcom does
11 not seem to have looked at the potential impact of its decision on entry decisions by other
12 operators at the time of deciding whether to regulate H3G.

13 Q If we go on to 9.129,

14 “Ofcom does not consider that H3G or T-Mobile’s arguments that common MCT
15 charges ... are unlikely to be suitable for future new entrants using alternative
16 technology are a strong reason for not aligning 2G/3G MNOs;’ charge controls. In
17 the current review, Ofcom is not setting charge controls for such new entrants.
18 However, without fettering its discretion, in the event that it were to be regulating
19 such charges, Ofcom is inclined to the view that it is likely to be desirable for new
20 entrants’ MCT charges to be aligned with those of incumbent suppliers. When
21 assessing such matters, Ofcom will take into account all relevant considerations at
22 the time, as it has done in the present market review”.

23 That is indicating -- sending the signal to potential new entrants that this is what it is likely
24 to do, but it will of course consider the matter further in the light of the specific
25 circumstances at the time, such as who they are and what they offer. That is what they are
26 saying, is it not? A. Yes. They are saying that.

27 Q The other negative effects. You have quoted in your second report from para. 29 of your
28 first report, but if one goes back to your first report at Tab 1 of Bundle K, and if you go to
29 para. 51 - imposing charge control on H3G for costs. When you say ‘the costs’ I think you
30 mean the detriments. A. Yes.

31 Q In para. 51 there is an other statement of what, as it were, has been left out of account.

32 “In an economic appraisal, against the calculated benefits of introducing a new
33 regulation must be set the economic costs. These might include any additional
34 administrative costs of compliance ----“

1 Then you talk again about incentives to inefficiency and investment. We have discussed
2 that. But, the first one you highlight there is administrative costs of compliance. You
3 develop that point of administrative costs of compliance in your third witness statement,
4 again in answer to Mr. Myers. So, it is only right to take you first to Mr. Myers. Again, it is
5 Bundle K, tab 7, Annexe 2 at A2.5(a) He refers in A2.4 to your point about administrative
6 costs of compliance. He picks it up in 2.5(a)

7 “Ofcom noted that ‘the administrative cost of implementing a charge control ... [is]
8 unlikely to be material’ [He gives the reference.] This is because the price control
9 has simple mechanics, requires no forecasting to ensure compliance and uses
10 information on volumes that is straightforward for H3G to collect”.

11 Then you comment on that in your third statement at Bundle K, Tab 3, p.14. Paragraph
12 35(a) - compliance costs. Perhaps, for convenience, we could insert a reference. That is
13 Myers 2, para. A2.5(a). This is the direct response to the paragraph I have just shown you.

14 “Mr. Myers points to Ofcom’s statement at 8.21. I accept that this acknowledges
15 and takes a view on administrative costs of compliance, although again it applies to
16 operators generally rather than to H3G specifically.”

17 Pausing there, if you go back to what Mr. Myers says - that price control has simple
18 mechanics; requires no forecasting to ensure compliance; and uses information that is
19 straightforward for H3G and like other MNOs to collect - are you saying that you know that
20 is wrong in any way, what he says? A. No, I’m not saying that I know that it’s wrong.
21 I’m saying I don’t know whether it’s right. H3G has not previously been subject to price
22 control. Therefore, it may not have in place the kind of mechanisms that would be necessary
23 to implement it, and therefore whether it is as straightforward for H3G as it is for other
24 companies is something that I am not able to give a view on.

25 Q If it were correct, then that part of the point falls away, does it not? A. That would be an
26 empirical matter, and I am not able to comment on that ----

27 Q If it were correct ---- A. If it were correct, if it were the case that it were not a problem --
28 You see, I am not able to judge whether that is in fact a problem. What I acknowledge is
29 that Ofcom has referred to it, has asserted this as the basis for its conclusion. I have no
30 reason -- no basis myself to challenge whether that is empirically correct.

31 Q You then go on to say,

32 “Whether it is still fair to say that the costs are unlikely to be material if the benefit
33 of regulating H3G is little over £7 million per year ----“

1 Pausing there. That £7 million is derived from the £29 million over four years as the
2 welfare gain using the share of volume method which is discussed in your second statement.
3 That is where it comes from. A. Yes, that's correct.

4 Q We, I think, are agreed, are we not, that the £7 million is the welfare benefit of regulation of
5 H3G using that methodology and treating 10.7 pence per minute as the unregulated price.

6 A. That's correct.

7 Q But, that relates, of course, only to one of the five possible benefits. If any of the other four
8 heads is also a benefit, then the comparison of administrative costs should not be confined
9 to this £7 million, assuming that is the right figure, but seen in the context of the totality of
10 the benefits, should it not? A. In principle, that's correct. My view is that the other four
11 are pretty negligible too. So, it's not a great difference. But, in principle, that is correct.

12 Q Thank you.

13 MR. SCOTT: Mr. Roth, just for a moment -- What Dr. Littlechild just said was that 'the other
14 four were pretty negligible too'. It is not clear to me, Dr. Littlechild, where you
15 particularise that negligibility. Mr. Roth may, or may not, want to take you to that, but it
16 seems to me that if that is what is being argued on the other side - Myers is suggesting to us
17 that those other four benefits are not negligible -- Now, it seems to me that what is going on
18 here is that there has been a very focused discussion where the quantification has been
19 focused on the welfare test and not on any quantification of the other four. So, I am
20 concerned about that negligibility being marked up without further attention. It is going to
21 be up to Mr. Roth whether he wants to ----

22 MR. ROTH: I will come back to it because I think, to be fair to Dr. Littlechild, he may not deal
23 with all of them, but he does at certain points address some of them elsewhere in his report,
24 and his view is that they are all negligible. All I was saying is, if one of them is not
25 negligible, one would have to assess administrative costs not just against this one, but
26 against all of them. I think Dr. Littlechild agreed with that if his premise were wrong that
27 the others were insignificant. (To the witness) You then go on to say:

28 "If the costs of compliance include any cost of challenging Ofcom's decision to
29 regulate."

30 I am trying to understand that. "The costs of challenging Ofcom's decision to regulate",
31 you mean the costs of this appeal? A. The cost of testing whether this is, in fact, an
32 appropriate decision, so that would, for example, be the cost of this appeal. It seems to me,
33 given that on a previous case evidence was given in the court that the cost of one party was

1 about £1 million, if we have got half a dozen parties here, plus Ofcom, plus the Tribunal, we
2 could easily be into a range of costs which is comparable to the £7 million.

3 Q I have no doubt. We talk about 10.7p per minute, 16p per minute, the number of thousands
4 of pounds per minute that these proceedings cost would dwarf anything. The point that I am
5 wanting to ask about is this. The costs of challenging the decision: if the decision is right,
6 why are the costs of bringing a challenge against it relevant to the administrative costs of
7 compliance. If there is a mistaken appeal why is that a relevant factor? A. That is
8 postulated on the assumption that the proposal is right and this is at issue. The question is
9 whether it is economically reasonable to propose something which has such a small benefit
10 relative to any uncertainty about whether it is the right decision or not.

11 Q I am not speaking generally. If the appeal is upheld then there is no price control. It goes
12 back to Ofcom to reconsider, subject to particular remedies. If the decision is flawed, it is
13 so decided. If the decision is upheld, why are the costs of an unsuccessful appeal relevant to
14 an assessment of the detriments of regulation? A. All that is postulated on the
15 assumption that the appeal is wrong, or will be wrong. It seems to me that there is a
16 possibility that it will be wrong, a possibility that it will be right, and that uncertainty means
17 that there are expected costs associated with testing whether that is the right decision or not,
18 and they ought to be taken into account in deciding whether to go ahead with this particular
19 decision, and to be weighed against the magnitude of the benefits that one would expect to
20 flow from it.

21 Q So you are saying that in deciding whether to regulate one looks at the benefits, but one of
22 the detriments is the likelihood of legal proceedings and what that might all cost to
23 everybody? A. That seems to me a relevant consideration, is the game worth the candle?
24 Is the benefit of this particular action sufficiently great that it offsets all the costs that might
25 be involved, which would include the possibility of legal challenge. How much weight is
26 attached to that, that is for Ofcom, but it seems to me a consideration.

27 Q I see. We will have to disagree about that. You then go efficiencies in investment in your
28 para.51 of your first report. Incentives to efficiency or investment. Is that of H3G or the
29 other MNOs? A. In principle, it is both.

30 Q Then unintended distortions in competition between existing players, does that mean
31 between H3G and the other MNOs? A. In principle, the answer is yes, it could be
32 between the existing MNOs. Whether that is a significant factor in practice, I do not know.
33 I do not assert that it is. It may be.

1 Q There is no reason to think, from what you have seen, that there is any distortion as between
2 – competition as between the MNOs other than H3G, is there? A. I would not be able to
3 give a view on that. It would depend on the kind of product offerings they had and the
4 extent to which any one of them was in competition specifically with H3G. I do not give a
5 view on that.

6 Q I do not think there is anything that you have read that suggests that is a possibility – is that
7 right? A. Well, one of the elements of testimony concerns a particular operator,
8 considering very carefully whether it can match H3G’s response. Now, whether that was
9 the only operator that did that, whether they all did, I do not know.

10 Q That is again between H3G and the other operators, is it not? A. Yes, but in so far as one
11 operator would be particularly vulnerable to competition from H3G, then it could be in a
12 different position vis-à-vis the other operators. These are possibilities I would have thought
13 worth looking at, I do not assert that is the case.

14 Q There is nothing beyond that that you have seen that suggests that as a possibility in all this
15 material that you have looked at? A. I have not looked at the material in detail with a
16 view to that particular question, so I would not wish to say that there is not anything. I do
17 not have an example to give you at the moment, other than the one I have given.

18 Q If we go to your third report, para.35(c), which is on p.14, tab 3, Bundle K, you seek to
19 explain the point. You are referring back to your para.51, if you look at para.35:
20 “In response to Littlechild 1 para.51 Mr. Myers says ...”
21 Then at (c) you pick up “Unintended distortions” – yes? A. Yes.

22 Q And that is the reference we were looking at:
23 “Mr. Myers says that ‘distortions to competition and efficiency are being gradually
24 unwound through glide path regulation of H3G’.”
25 You give a reference to Mr. Myers. I think it should actually be A2.5(c), rather than (b)(iii).
26 “This again looks at the alleged benefits of regulation but not at the costs. What I
27 had in mind was the common finding that regulation can distort the nature or
28 extent of a company’s investment or operating pattern.”
29 That is the point you were making? A. Yes.

30 Q Of course, there are always risks with regulation in general terms. The position is, is it not,
31 that termination charges in the UK have been subject to regulation since 1991, extended in
32 1998 – that is the position, is it not? A. Yes, that is correct.

33 Q And there has been major growth and increasing competition in the mobile retail market in
34 the past decade? A. I believe that is the case, yes.

1 Q And the regulation determination charges has not prevented that, has it? A. It certainly
2 has not prevented the growth you describe. Whether the growth would have different is
3 another matter. You referred earlier to the argument that I put separately to say that the
4 CPP system has a very significant effect on the way the market developed compared to the
5 RPP system. So it would not be true to say that Ofcom's regulation has not impacted, not
6 affected or distorted the investment or operating pattern in this country.

7 Q Yes, because you do not know, is what you are saying, what would have happened if there
8 had been different regulation or no regulation? A. Oh, I think in that case we know pretty
9 clearly the kind of thing that might otherwise have happened.

10 Q You have a view that if we had had RPP instead it would have been very different?
11 A. Yes.

12 Q I do not want to get into that now. I want to move to one of the major costs that you focus
13 on at some length and that is the net payment from H3G to the other MNOs, and you will
14 recall that is quite a major part of your report. That results from the traffic imbalance, I
15 think, in this sense: if there were no imbalance between H3G and the other MNOs there
16 would be no net out-payment? A. That is correct.

17 Q Can we look at your second report at Bundle K, tab 2, para.52, p.17.

18 "Mr. Myers says that, even under the price controls, H3G's termination charges
19 would be above forecast cost, hence 'the source of any lack of overall profitability
20 by H3G is not charge for MCT that is too low'. It as not my intention to suggest
21 that the proposed level of H3G's termination charge, given the charges imposed on
22 other operators, was wholly or mainly responsible for H3G's financial situation.
23 Mr. Myers also points out that Ofcom's Decision Statement considered the
24 financial impact of the price controls on H3G. I accept that this was the case.
25 However, I do suggest ..."

26 You are explaining your position:

27 "... H3G's financial situation is impacted by Ofcom's mobile termination charge
28 regime as a whole, which impacts differentially on different operators, and that
29 Ofcom did not consider the implications of its price control for H3G's competitive
30 position, as I shortly explain."

31 Then you go on to explain this. In para.54 you talk about the net out-payment with some
32 confidential figures. At para.56 you say:

33 "I accept that I did not explain myself sufficiently clearly on this issue. My
34 argument is the following."

1 That is the introduction to what your argument on this is – is that right? A. Yes, that is
2 correct.

3 Q At 57:

4 “Ofcom’s price control has endorsed the CPP regime. According to Ofcom’s
5 Decision Statement and Mr. Myers that regime gives market power to operators
6 with respect to termination on their networks (H3G, of course, disputes this).
7 Ofcom’s price control sets limits to the extent to which that market power can be
8 exerted. But the levels set by Ofcom, which are comparable to those by other CPP
9 regulators in Europe, are significantly in excess of the marginal costs of providing
10 termination. This means that an entrant with outgoing calls exceeding incoming
11 calls is vulnerable to the market power of the incumbent operators to the extent
12 allowed by the price control. Previously, H3G as an entrant was not subject to the
13 price control and to some extent was able to offset the market power of the
14 incumbents by charging a higher price for termination. The application of the new
15 price control to H3G limits H3G’s ability to do this. The effect of the new control
16 is to reduce H3G’s prospective termination charge income by more than its
17 prospective termination charge outgoings. The projected net effect [and you give
18 the figures] ...
19 The central point is that the termination charge price control impacts not only on
20 the relationship between operators and customers, but also incumbents and new
21 entrants.”

22 You conclude in para.58:

23 “Hence, the price control allows incumbents to exert market power over entrants,
24 and thereby to transfer income from entrants to themselves.”

25 That is the net transfer – correct? You nodded. A. Sorry, yes.

26 Q It does not get on to the microphone when one nods. You say (paragraph 59):

27 “This is not an implication of the price control that Ofcom’s Decision Statement
28 examined or even recognised. There was an opportunity to do so in response to a
29 suggestion put forward by H3G but this opportunity was not taken. Ofcom said:
30 ‘In H3G’s view, any charge controls should be set to ensure neutral revenue flows
31 between mobile operators for termination payments. Ofcom does not agree with
32 H3G’s argument’. There was no explanation of why Ofcom does not agree ... nor
33 any indication that Ofcom recognised the full extent of the competition involved.”

1 So if I understood this correctly, the point is that if the MNO's MCT charge was set at just
2 above marginal cost, but not significantly in excess, but the level of H3G charges was set to
3 take account of the traffic imbalance such that there was a neutral revenue flow, no net
4 payments, this would not be an issue. It is an issue because the level, you say, is
5 significantly in excess of marginal cost? A. I think in my first statement I was making
6 some general propositions that any restriction on a company limits its ability to compete,
7 and I was also saying in the particular circumstances of H3G, which was a new entrant,
8 relatively small market share, had high costs of termination charges, had a traffic imbalance,
9 in those circumstances restrictions are particularly onerous. What I have introduced here
10 are some remarks and arguments pertaining to the relationship between price and marginal
11 cost which I now understand may not be appropriate for the tribunal to take into account
12 because that was not part of an original appeal. Therefore, to that extent -and in retrospect I
13 might not advance those arguments in this particular forum even though I think they are
14 correct -- The argument that I still maintain is that because of the traffic imbalance and
15 because of the high price associated with traffic termination charges, that makes it
16 particularly difficult for an entrant such as H3G.

17 Q The point about the traffic imbalance is that it leads to a net payment from the new entrant
18 to the existing operator. That is your point. A. Yes.

19 Q The reason it leads to a net payment is the point you are making because the marginal cost,
20 if it were set for the incumbents close to marginal cost, but at a higher level for the new
21 entrant to take account of the traffic imbalance, you would have a net neutral payment. A.
22 I am explaining that even if we take no account at all of the difference between the price
23 and the marginal cost -- if we set that aside completely, if you have a traffic imbalance, then
24 you have a physical traffic imbalance, then you have a revenue imbalance as well.

25 Q That depends on the charge. If the charges are different for the existing player and the new
26 entrant, and if the new entrant is allowed a higher charge to take account of the traffic
27 imbalance, you would not, would you? A. It depends ----

28 Q It depends on the level. A. It depends on the level, yes.

29 Q Is that not the point that you were saying, as I understand your para. 59 - that it could be set
30 so as to ensure a neutral revenue flow? A. This was H3G's suggestion that it might be
31 possible to do that. I do not say that I endorse that. I say that -- That would be a situation
32 you would have if these prices were zero, or essentially zero.

33 Q That is one possibility. If there was stricter price control and they were all set at zero, then
34 you would take care of it. A. Yes.

1 Q That is one way. Another way would be to set it to take account of the traffic imbalance so
2 that the discrepancy would be greater than in the decision between H3G and the others, such
3 that the actual payments, taking account of the physical traffic, would cancel out. A. In
4 principle that is a possibility. Whether that would be factually possible, I do not know. But,
5 that is a possibility.

6 Q I agree the easier way of doing it is to set it at zero. That would also obviously avoid, self-
7 evidently, any net payments. A. Yes.

8 Q Indeed, I think you go on at para. 68 of this report to say,

9 "I agree with Mr. Myers about the general case for aligning prices more closely with
10 costs (although it should be noted that the definition and calculation of relevant costs
11 needs careful consideration). My concern as explained above is that the price
12 control generally does not go far enough in this direction."

13 That is a reference to the passages we were just looking at. A. Yes.

14 Q So, this whole concern goes to the level of the price controls - I think you have just
15 acknowledged that - not the fact that H3G is subject to any price control at all. A. I think,
16 with respect, I would make a distinction there. What I am saying is that there is an
17 argument associated with the level of the price control in relation to marginal cost and
18 whether that mark-up is at the appropriate level, or not. I am saying that I now understand
19 that may not be a relevant issue to raise here. But, there is another question as to what the
20 total costs of termination charges are. That is not addressing the question as to whether the
21 price control was set at the right level, or not. If this is a big element of a company's costs, it
22 is something you have to worry about. I would have said that that is not specifically
23 addressed to the level of the price control.

24 Q I am focusing on the traffic imbalance point. I see that there may be a separate point about
25 the level and that it imposes a cost on a company. Clearly, if you reduce its income it is less
26 well off. If you increase its income, it is better off. But, I am talking specifically about the
27 point about the traffic imbalance and the resulting net payment fro H3G to the other MNOs.
28 I am just focusing on that point, and them saying that your argument on that point is met,
29 and goes to the level of the price control. Indeed, H3G, as you may know, and perhaps with
30 your support, is advancing in its appeal on the price control issues that it should be set so as
31 to produce I think what is described as net payment zero. It would deal with that point,
32 would it not? A. It would deal with the net revenue issue, yes.

33 Q Which is resulting from the traffic imbalance. A. Insofar as the concern is that net
34 payment, as opposed to the total level of the charges, yes.

1 Q Thank you. In fact, the reasoning about the net payment from entrant to incumbent, that
2 applies only to mobile-to-mobile calls. It does not apply to fixed mobile calls - i.e. calls
3 from BT or, indeed, what are referred to as the other fixed operators - the Altnets. Of
4 course, BT's termination charge is in the other direction - it is much, much lower, is it not?
5 A. Certainly the argument that I was concerning myself with here was with mobile
6 operating termination charges - not with fixed operators.

7 Q No. Sorry. I did not express it clearly. It is concerned with mobile-to-mobile calls, i.e.
8 mobile termination charges for a call from another mobile as opposed to mobile termination
9 charges for a call originated on a fixed operator. A. The net revenue imbalance that H3G
10 would face would depend on all these factors, but I think what is at issue here is the
11 termination charges to other mobile operators.

12 Q Yes, because on the fixed to mobile, as we all know, the BT termination charge is very, very
13 much lower. You know that, I think. A. I believe that is the case, yes.

14 Q So, in looking at this, one would not be concerned about that proportion of the mobile
15 operator's incoming calls that are from a fixed originating network -- imbalance with that
16 fixed operator. A. I assume that in looking at this whole picture, that would be much less
17 significant than the mobile operators.

18 Q Yes. You say that the decision to regulate H3G operates as a barrier to entry. We see that
19 in this second report, if we are still in Bundle K, tab 2, at para. 22 - the bit about market
20 power.

21 "The same element of market power to which Mr. Myers refers in fact works against
22 the interest of new entrants rather than in their favour. It is not 'normal' that a new
23 entrant has to make payments to its incumbent competitors in order to conduct its
24 business. This appears to be a barrier to entry".

25 You see that? A. Yes.

26 Q Just to be clear, is this related to the same point that it is the result of a traffic imbalance, or
27 is it some other problem? A. I think there are two elements to my thinking here. One is
28 the concern about whether the level of the price control is appropriate, and whether it
29 reflects an element of market power. That comes back to the CPP -v- RPP point, which I
30 accept may not be appropriate for this tribunal. The other concern is a general concern that
31 imposing constraints on entrants restricts their ability to compete, and that is the case here.

32 Q So, it is not just because of the traffic imbalance and the net payment. It is a wider point
33 about barrier to entry. A. Yes. Restrictions in general restrict the ability of entrants to
34 compete effectively.

1 MR. SCOTT: Can I just look at this word 'normal' for a moment, which you put in inverted
2 commas? I have not been in telecommunications the whole of my life, but I have been in it
3 for much of my life. I cannot remember this normal situation carrying where people have
4 been prepared to deliver calls without regard to the cost of delivering calls. I realise that it
5 has been suggested in certain circumstances, but I am a bit confused as to why you
6 contemplate a normal position in which people do not pay for the delivery of calls. A. I
7 had in mind there the world as a whole -- the economy as a whole, and not specifically
8 telecommunications because I was engaging at that point with Mr. Myers on a general
9 proposition, I think about entry and market power, and so on. I do not take a view as to
10 whether, in the context of telecommunications, it is normal to pay -- I would assume that it
11 is normal to pay, or to make some arrangements for payment. Whether it is a small nominal
12 amount or a small amount covering actual marginal costs, or a large amount is another
13 matter. But, I can accept that in the context of telecommunications it might be normal to
14 make payments of some kind.

15 MR. ROTH: Picking that up, in a retail market, when your competitors are vertically integrated,
16 it is entirely usual that a new entrant has to buy inputs from the wholesaler -- from one of
17 the existing vertically integrated players, is it not? A. In the context of a
18 telecommunications market in particular, certain payments would be made. Now, one would
19 expect that in many case this is on a competitive market rather than a regulatory determined
20 price, but I accept ----

21 Q That may bend when they are buying, as many new entrants are, from BT - broadband, for
22 example -- For example, it may be a regulated price. My point is - and I think you agree
23 now - that being a network industry, it is entirely normal to buy inputs from vertically
24 integrated competitors. A. Yes.

25 Q Yes .What is unusual in this case is the fact that the existing players - the incumbents - also
26 have to buy inputs from the new entrant. A. Well, if they wish to interconnect or are
27 obliged to interconnect, then that is also true.

28 Q That is rather unusual. It is not a common feature. Certainly BT does not have to buy input
29 from Freeserve when Freeserve wants to set up a broadband operation. A. Well, I
30 wouldn't take a view on precisely what is normal in the context of the UK
31 telecommunications industry.

32 Q You do not accept that it is rather unusual that the existing players have to buy inputs from a
33 new entrant. That is the unusual feature. A. That may be an unusual feature.

1 Q The simple fact that existing players in a market is subject to charge control, and a new
2 entrant is also subject to charge control -- That in itself cannot be characterised as a barrier
3 to entry, can it? A. What I am saying is that it depends on how you define barriers to
4 entry. I went through a discussion with Dr. Walker on this, and the sources that he quoted
5 pointed out that there are different definitions. One definition which is commonly used is
6 ‘anything that makes it more difficult for a new entrant to compete’. On that basis, having
7 to restrict the kind of terms you can offer as a new entrant restricts your ability to compete
8 with the incumbents.

9 Q But if it is the same restriction the incumbents face that is not a barrier to entry. A. You
10 may say that you do not wish to call it a barrier to entry. You may say that it is inappropriate
11 to distinguish and to differentiate in this way. But, as to the question, “Does it restrict the
12 ability of a new entrant to compete with the incumbents?” the answer, I would suggest, is,
13 “Yes, it does”. In that sense it is a barrier to entry.

14 Q All the companies in the market have to pay tax. The new entrant, when it comes in, also
15 has to pay tax. It would be better off if it did not have to pay tax. Is the uniform tax regime
16 a barrier to entry? A. Well, on that basis you could say that it was. Now, whether you
17 take that as the basis for differentiating between an entrant and an incumbent is another
18 matter. No-one here is suggesting that they should not have to pay tax. The question is
19 whether a regulatory obligation on the existing companies should be extended down to an
20 entrant, and when that should happen.

21 Q Yes, that is indeed the question. I was just thinking about what is meant by ‘barrier to
22 entry’, which, in competition law, often has particular meaning. One can see that if the
23 mobile number portability regime puts obstacles in the way of switching of a subscriber’s
24 mobile to another operator in terms of delay of extra cost, and so on, one can see that might
25 be a barrier to entry in the traditional sense because it would make it harder for the new
26 operator to get established. You would agree with that. A. Yes.

27 Q But, if that MNP regime causes a traffic imbalance, the barrier to entry -- It is not the traffic
28 imbalance, is it - it is the MNP regime which is the underlying cause? That is the barrier.
29 A. Well, I’m saying there are two causes at least. Potentially one might be this regime, but
30 the other is if a new entrant finds that it has to take customers that make more calls than
31 they receive, in which case the physical traffic imbalance is something that is independent
32 of that particular regime.

33 Q We will come on to that. Just sticking to the MNP regime, if the imbalance is caused -- if it
34 is the cause, the MNP regime - and I am not asking you to express a view whether it is, or

1 not -- But, if it were the cause of a traffic imbalance, the barrier -- the difficulty for the new
2 entrant is the result of the MNP regime, is it not? The traffic imbalance is the symptom of
3 that. A. That may be the case. How one deals with that, I think, is another matter.

4 Q Indeed. You do not, of course, express any view - and this is not a criticism, but just for the
5 record - as to whether the MNP arrangements do lead to a traffic imbalance, or not. A.
6 That is correct. I see there are arguments on both sides.

7 Q In your third witness statement at Bundle K, tab 3, para. 17, p.6, you say,

8 "It is beyond the scope of my testimony to examine where entrants necessarily have
9 different calling patterns from incumbents, and specifically whether they are likely
10 to have adverse net traffic balances".

11 That is not something, you fairly say as an economist, that you can comment on. Ofcom did
12 examine this. Could you turn to the statements in the other bundle at para. 9.211 on p.180.
13 This is a confidential paragraph. I interpose for a moment -- Madam, I am at a complete loss
14 to understand why some of these sections that have been redacted at the request of I think
15 H3G are actually confidential. Mr. Scott may recall that the tribunal, on the last occasion,
16 had some things to say about this. But, I shall work within those restrictions for the
17 moment.

18 THE CHAIRMAN: Please do.

19 MR. ROTH: Absolutely. But, you may wish to consider that. 9.211. Could you just read it to
20 yourself, Dr. Littlechild, because I must not read it out. (Pause whilst read): A. Yes.

21 Q So, Ofcom did examine this very point that you referred to - namely, whether new entrants
22 need to have adverse net traffic balances. You can see that. A. I can see they looked at
23 that issue, yes.

24 Q They concluded - and I do not think that can possibly be confidential - that it is not an
25 inevitable and unavoidable result. I think you are not in a position to contradict that; is that
26 right? A. I wouldn't take a technical view here. I see that they say it has not been
27 inevitable in the past. Whether that is still the case now is something that they do not
28 discuss in detail here. More generally, what the options open to this entrant were is not
29 really discussed. So, it is one thing to say that they need not have done this, but whether
30 this was Hobson's choice, and whether they had much in the way of alternatives, or whether
31 they could have had, for example, a representative slice of the customers in the market for
32 the same price as the incumbents, that seems to me unlikely. But, that is not discussed.

33 Q I cannot question you in detail about what is there because I cannot read it out. But, I think
34 we have agreed you cannot controvert it. We can see what Ofcom found. If it were the case

1 that as of now, not in the past, a new entrant -- and as of now, I mean when the statement
2 was issued, and so not long ago ----

3 MISS ROSE: I am sorry to interrupt. We have got instructions that that paragraph does not need
4 to be confidential. There is no objection to Mr. Roth questioning on it.

5 MR. ROTH: I am very grateful. I was at a loss to see how it could possibly be confidential.

6 THE CHAIRMAN: Thank you.

7 MR. ROTH: That makes our life much easier. It has saved me reading it out, and we have all now
8 read it. In the middle they say, "Ofcom does not accept this is an inevitable and unavoidable
9 result of H3G being a more recent entrant and a smaller competitor". If they are right about
10 that - and they may be right, they may be wrong, and you do not know -- but, if they were
11 right, that would rather weaken the point about this being a barrier to entry, would it not?

12 A. I think that comes to the last point I made in answer to you. To say this is a deliberate
13 choice, and that that was not the only alternative open to them is different from saying that
14 they could have had whatever kind of customer base that they wanted. So, they did not
15 have to do this, but maybe they were restricted in other ways so that the traffic imbalance
16 would still have been a problem.

17 Q They could have avoided a traffic imbalance, as others have done, and Ofcom saying that
18 that was an option that they could have exercised. A. Ofcom is saying they did not need
19 to have a traffic imbalance. It does not spell out here how that was to be achieved,
20 therefore, hat kind of prices they would have achieved - for example, for those kind of
21 customers -- how many customers they could have achieved on that basis. So, off gives its
22 view, but what I do not see here is the exploration of the market and the alternatives
23 available and what the consequences would have been.

24 Q Dr. Littlechild, they are expressing the view not that it was physically inevitable, but that it
25 was not commercially necessary for them to have a traffic imbalance. Of course, you can
26 always adjust your prices in such a way that you control the number -- influence the number
27 of incoming and outgoing calls. They are saying that commercially it is not necessary for a
28 new entrant - that is their view - to have a traffic imbalance. That is a sensible reading of it,
29 is it not? A. I don't know whether it restricts itself to commercial and to revenue as
30 opposed to physical traffic imbalance. It says, in effect, as long as they charge a price which
31 covers the cost, all is okay. That, of course, begs the question as to whether they could have
32 charged such a price. So, I see this as saying, "This wasn't the only alternative available". It
33 asserts that there would have been alternatives available that did not have a traffic

1 imbalance. It does not spell out what they were, and nor does it establish that that was in
2 fact possible.

3 Q I will not take what that paragraph means any further with you. I am going to move on to
4 the one benefit of regulation of H3G which you are urging - an estimated quantification
5 conducted through experts. That one benefit is a more efficient structure of prices. There
6 has been a lot of progress on that. I think where we are now on the calculation is that the
7 methodology is agreed. You have accepted for the purposes of this case the share of
8 volume method proposed by Mr. Myers; is that right? A. That's correct.

9 Q You have accepted again, for the purposes of this case, that the benchmark for what H3G
10 was charging before price control should be taken as 10.7 pence per minute - not 10.5
11 pence. A. Yes.

12 Q The result of that we can see in the figures in Table A.3 to Mr. Myers' first witness
13 statement at Bundle K, Tab 5, p.32. Those figures are not confidential - at least not in my
14 copy. I hope I will be corrected if that is wrong. If you have Table A.3 you will see that
15 that is using, at the bottom left, the 10.7 pence for the price. That produces the £29 million
16 at the present value gain - a figure which you say is the relevant figure. If it were for the
17 sensitivity used in the statement, it would be £80 million. If it were 16.6 (which was H3G's
18 charge increase proposed) it would be £118 million. I think there is no dispute about the
19 arithmetic. That is agreed. A. That's correct.

20 Q You say that the £29 million is insignificant. If it were £118 million, would you regard that
21 as significant? A. Obviously, the bigger that it is, the more significant it becomes. I
22 haven't formed a view as to at what point it would become significant. It seemed to me that
23 the only relevant figure to look at here was the £29 million and that is what I formed the
24 view on.

25 Q You have not formed a view on the £118 million. A. I have not addressed myself to that.

26 Q Do you want to address yourself to it now? (After a pause): If you do not want to, just
27 say so. A. I won't then.

28 Q The rationale for making this calculation is to seek to measure this particular element of
29 gain - gain for a more efficient structure of price - from H3G being subject to price control
30 compared to, counter-factual, H3G not being subject to price control. A. Correct.

31 Q I think you were in court yesterday and also the previous hearing day (or part of it) and you
32 have heard much of the debate between the parties as to whether other regulation by Ofcom
33 should be taken into account, or not taken into account. Those are legal issues which the
34 tribunal is going to have to rule upon. Obviously, they are not matters for you. For present

1 purposes, can we assume, please, that the impact of regulation by Ofcom has to be left out
2 of account? A. I am sorry? Can you explain the significance of that question?

3 Q It is not a question. I was just asking you to assume for the purposes of the questions that
4 follow, that I am going to ask you, that the impact of regulation by Ofcom should be left out
5 of account. That is the assumption on which I want you to answer my questions.

6 Q Forgive me. I am not trying to resist this. I am not sure what this means - to say that the
7 implication of regulation by Ofcom should be left out of account. You mean the impacts of
8 that on the company -- on the industry -- on the sector?

9 Q On the level of price that can be charged. Regulation of the mobile call termination charge.
10 Ofcom's regulatory intervention leading to a ceiling on the level of mobile call termination
11 charge. Is that clear?

12 MISS ROSE: Madam, I do rise at this point. Not surprisingly, the witness is confused because
13 Mr. Roth, with respect, has been wholly unclear. When he says 'the impact of regulation is
14 to be left out of account' does he mean that the proper interpretation of the end-to-end
15 connectivity obligation on BT is to be left out of account, or does he just mean that the
16 potential resolution of a dispute by Ofcom of a dispute arising out of that is to be left out of
17 account, or both of those? And left out of account for what? What account?

18 MR. ROTH: For determining what the price would have been in the absence of ----

19 MR. ROTH: For determining what the price would have been in the absence of price control.

20 THE CHAIRMAN: So is this the point that Mr. Myers makes that you have to look not only at
21 the price that would prevail without actual regulation, but without the threat of regulation as
22 well?

23 MR. ROTH: Yes. It is regulation in all respects. As you know, the whole discussion we have
24 had over the past few days is the fact of control on H3G, but including dispute resolution,
25 yes, clearly. One is looking here at a comparison, as the witness has just agreed, between
26 what the price would be if H3G is subject to a charge control, and if it were not subject to
27 control. Asking what the price would be if it were not subject to charge control, that kind of
28 factual, does one bring dispute resolution into consideration for that price or not, and I am
29 saying, no, you do not.

30 THE CHAIRMAN: Perhaps it will be clearer as you move on.

31 MR. ROTH: I think so. (To the witness) If it is not clear, Dr. Littlechild, when I ask the
32 question, please say so. The issue really between you and Mr. Myers on this point is that
33 you say in the absence of charge control the price would have continued to be 10.47. That
34 should be the working assumption. Obviously, one is predicting. Mr. Myers says, no, a

1 more realistic assumption is 16.6. Is that a fair summary of the debate? A. With respect,
2 no, I do not think so, and this is a point that several of the witnesses have disagreed with me
3 on. I am not predicting what the price would have been, whereas they are. I am saying this
4 is what the price was, and that is a sensible benchmark to use for a comparison because I
5 believe that steps could be taken to ensure that the price charge by H3G did not exceed that.
6 So I am not making a prediction about what would have happened in the absence of
7 regulation.

8 Q That might simplify this line of questioning considerably. Mr. Myers, I think you will
9 accept, is making a prediction of what the price would have been in the absence of
10 regulation. He is saying that the realistic assumption to take is 16.6, but you are saying, “I
11 am not addressing that point” – have I understood you rightly – “I am using saying you
12 should as a benchmark what the price was”? A. Yes. I think, to be fair to Mr. Myers, he
13 is not coming out with a specific prediction, he is saying that this indicates that it could be
14 higher than the 10.7. I am saying that is an unreasonable basis, that the 16.6 figure is an
15 unreasonable basis on which to form a prediction, but I then go on to say that because we do
16 not get into the prediction business, let us start from something we know.

17 Q Something we know is the price that it had been in the period before the notice raising the
18 price to 16.6. A. Yes, I am assuming taking that as known.

19 Q Just trying to understand the reasons you give for rejecting the 16.6, it is in your second
20 witness statement, tab 2, paras.38-39, p.14. You refer to the 16.6, and, as you fairly pointed
21 out, Mr. Myers says it could be even higher. You say:

22 “... it was understood that it would be superseded by the price control on 1 April
23 2007.”

24 If no price control had come in on 1st April 2007, have you any basis for saying that H3G
25 would then have stopped charging at 16.6 if it were free to do so? A. I think it is fair to
26 say that this was my description of what I understood to be the situation at the time. It
27 seemed to me a somewhat complex situation. It was addressed at some length yesterday, I
28 believe, in the Tribunal hearing. I am not in a position to say whether, if the price control
29 had not been imposed on H3G, this would not have been relevant. What I was referring to
30 here is the new arrangements associated with a new price control. This was not specific to a
31 price control on H3G.

32 Q You say in para.40:

33 “It seems to me realistic to assume that, in the absence of a price control on its own
34 termination charges but with the proposed price control on the other operators,

1 H3G would be either willing or constrained to maintain its termination charges at a
2 level not exceeding the 10.7 ppm previously obtaining.”

3 You say you are not making a prediction there? A. Oh, I am making a prediction of H3G,
4 and I am saying that for one reason or another it would be willing to agree not to increase its
5 prices above the previous level. That is not making a prediction about what actions it would
6 take in the absence of any framework of regulation.

7 Q When you say “constrained”, do you mean constrained by the threat of regulation, or
8 constrained by what? A. Constrained by an action that Ofcom would take, whether it be
9 to invite them to give an undertaking or something more substantial than that, but short of a
10 price control.

11 Q So is this the point, so that I have understood it properly, that you make in your third
12 witness statement, Bundle K, tab 3, para.11, footnote 10:

13 “If the concern was or is that H3G might price above 10.7 ppm, Ofcom had and
14 would still have the options of a) inviting an undertaking from H3G not to increase
15 its average price beyond the previous level and/or b) indicating that if H3G did
16 increase its average price then Ofcom would reconsider its decision not to regulate
17 H3G’s prices at the level specified in the new charge control.”

18 A. Yes.

19 Q That is what you meant? A. Yes.

20 Q I see. Now I understand. Dr. Littlechild, you are not a lawyer, you are an economist. In
21 economic and commercial terms an undertaking binding H3G as to its prices is equivalent
22 to a form of price control, is it not? A. You may call it a form of price control. It would
23 not have the same effect as a formal price control. I have had experience of seeking and
24 getting such undertakings from companies in the electricity sector and there is a distinction
25 as regards enforceability, for example, or as regards the scope of what you might look for
26 that could be different here.

27 Q You could define it more narrowly or more broadly? A. You could define it differently,
28 yes.

29 Q But it would have the effect of preventing H3G from raising its price above 10.7 unless it
30 got released from the undertakings? A. Yes.

31 Q Similarly, indicating that if it did then it would reconsider its decision. That is, as it were, a
32 sort of threat of price control? A. Yes.

33 Q Which would constrain H3G’s conduct? A. Yes.

1 Q So that is the basis on which you are saying in your previous report, the paragraph we
2 looked at, that you do not think, if other things were done, the price would go above 10.7?

3 A. That is right. Whether Ofcom considered it necessary to take those steps is another
4 matter.

5 Q I have no doubt that if H3G gave an undertaking not to increase its price above 10.7 they
6 would not, they would honour their undertaking. There is no dispute between us about that.
7 The welfare gain analysis that Mr. Myers did on the basis of the methodology that is now
8 accepted was to consider what, in his view, H3G might charge in the absence of any such
9 undertaking or indication by Ofcom. That is what he was doing? A. That is what he was
10 doing, yes.

11 Q If that is the right question, would you agree then the 16.6 charge or 14.5 charge used in the
12 statement is not irrelevant? A. I think, with respect, I would say it is irrelevant. From
13 what I know of the circumstances surrounding that 16.6 price it has nothing to do with the
14 kind of price that an operator like H3G would charge on an ongoing basis.

15 MR. SCOTT: I do not know whether you were here yesterday when Miss Rose explained on
16 behalf of H3G why they had gone to 16.6p per minute, but if my recollection is right she
17 explained that it was a response to the 3G pricing by others. If what had happened had been
18 that Ofcom had seen all five 3G operators in a new entrant sense and decided that not one of
19 them should be subject to controls and their 3G prices as distinct from their 2G prices,
20 would you then have expected on a purely voluntary basis H3G to have taken its price down
21 to 10.7 from the 16.6 which would otherwise have carried on? A. I think I would have to
22 say that is a very hypothetical situation, and secondly it seems to be inconsistent with the
23 assumption that I was asked to work with in putting my statement forward, which is that the
24 price controls on the existing operators were as they were.

25 Q The distinction I am drawing is that the price controls on the existing operators of their
26 existing 2G operations go on as they have done for quite some time, but a situation in which
27 3G price controls were not introduced on any operator? A. I can see the distinction that
28 you are drawing, but I say that this seems to me inconsistent with the assumption I was
29 asked to make when I put forward my statement, so I have not addressed myself to that
30 particular possibility.

31 THE CHAIRMAN: Can I interject there, Mr. Roth, to ask how much longer you are likely to be
32 with Dr. Littlechild?

33 MR. ROTH: It is slightly difficult always to predict because of not knowing the length of the
34 answers and where they take one, but I would have thought about 20 minutes.

1 THE CHAIRMAN: Dr. Littlechild, you have been in the witness box a while now. Are you
2 comfortable to continue or would you like to have a break? A. That is fine, thank you.

3 MR. ROTH: If Ofcom's in its decision had said, "We will impose this price control on the other
4 four MNOs but we will not impose any price control on H3G", if that had been their
5 decision, in those circumstances would H3G not seek to charge the price that would give it
6 the most revenue? A. You are proposing a hypothetical situation which is not the one
7 that I think realistic. A regulator could decide to do that. What I am saying is that it is open
8 to this regulator to assure itself that rises in prices above the 10.7 did not happen, and
9 therefore it is not a relevant benchmark to look at the possibility of that eventuality.

10 Q You say that would not happen. Can you just enter the hypothetical world with me just for
11 a moment. If that were the actual decision and there were no other constraints of the kind
12 we looked at in your footnote which you suggest might be appropriate, in those
13 circumstances would you accept that there would be at least the incentive for a company, a
14 commercial operator, with 100 per cent market share of course, to charge the highest price
15 that it could? A. I think, with respect, I find this an implausible set of assumptions.
16 Either a regulator is concerned about this, in which the regulator takes steps, I say, very
17 straightforwardly to prevent it, or else the regulator does not consider that is either likely or,
18 if it did happen, a serious problem. So it seems to me that it is not a sensible basis on which
19 to make a comparison.

20 Q But if the regulator has concerns about that there are some steps he should take, albeit you
21 say these different ones would deal with it? A. Yes, I believe it is possible to do that in a
22 straightforward way and therefore the argument for a price control of the kind that actually
23 took place should be evaluated against that straightforward option.

24 Q Yes, I understand. I think, on that basis, we can leave it there. Can I come on to the one
25 point, picking up Mr. Scott's point of the benefit that Ofcom relies and you disagree with,
26 and that is asymmetric regulation, again a major part of these reports. I think you accept
27 that asymmetric regulation can have disadvantages for competition? A. Yes, perhaps I
28 could explain my position here a bit more. It seems to me that Ofcom is using a relatively
29 static model which is useful for many purposes, but not all purposes. It is sort of like
30 Newtonian physics, it is still valid for many cases, but if you are talking about distances
31 between galaxies or you are looking inside the atom it is not sufficiently general. So if we
32 are talking about an industry where you have a given number of existing players then it is
33 perfectly valid to be concerned about asymmetry between those existing players, and that is
34 the kind of point that I was making in an earlier article that I wrote. When we coming on to

1 looking at entrants that is a different matter, and I am suggesting that the model that they
2 have is not fully capable of looking at those considerations.

3 THE CHAIRMAN: Just to be clear, the model that you are talking about there, we have moved
4 on from the welfare analysis point to a more general model ---- A. Yes, I think that
5 Ofcom has a very specific mathematical model that Mr. Myers has talked about. What I am
6 talking about now is the way of looking at the world, if you like, the economic way of
7 looking at the world.

8 MR. ROTH: As opposed to the specific model? A. As opposed to the specific model.

9 Q Mr. Myers argued, and it is in his first witness statement, Bundle K, tab 4, para.37, p.11,
10 this is “Asymmetric regulation and competitive distortion”:

11 “In contrast, in my view there is a positive effect on efficient and sustainable
12 competition, because the imposition of a price control avoids the competitive
13 distortions that would arise from such extreme asymmetric regulation.”

14 He explains in 37 that it:

15 “... leaves H3G unregulated, whilst imposing cost-based price controls on the
16 MCT charges of the other MNOs ...”

17 and he explains why he considers that. In response, in your second witness statement at
18 Bundle K, tab 2, para.26 you cited a series of materials – Bundle K, tab 2, p.10 – the views
19 of Dr. Valletti and others and they are set out over a couple of pages leading to the
20 conclusion in para.32, picking it up half way down, what they show, and that is the
21 materials you have been discussing above:

22 “What they do show, however, is that the case against asymmetric regulation is not
23 as straightforward as it may once have seemed, particularly where new entrants
24 and the nature of competition are concerned.”

25 That is the point you have just made about thinking about new entrants.

26 “This correspondingly undermines Ofcom’s heavy reliance on the principle of
27 avoiding asymmetric regulation because of its distorting effect on competition.”

28 You see that? A. Yes.

29 Q In your third witness statement, which is at Bundle K, tab 3, at para.23, under the heading
30 “Representations” you say:

31 “Without expressing a view on whether the point raised regarding the scope of
32 H3G’s Notice of Appeal is correct, I confirm that I shall not rely upon paragraphs
33 24 -25 of Littlechild 2. I also confirm that I do not rely on the content of articles
34 referred to in the section of that statement entitled “View of Dr. Valletti and others’

1 in regard to establishing that H3G is disadvantaged by on-net/off-net pricing, in
2 particular that its traffic imbalance is caused by this to any material degree. My
3 point does not depend upon the aforesaid. For the avoidance of doubt, I therefore
4 withdraw the version of that section in Littlechild 2 and restate as follows.”

5 Then you restate it. You come to the same conclusion that we have in your sub-para.(c), the
6 second half of that paragraph:

7 “The case against asymmetric regulation is not as straightforward ...”

8 In fact, I think you use the same words? A. That is correct.

9 Q Just looking at the previous page, p.8, “Views of Dr. Valletti and others”, you refer to
10 Mr. Myers citing Dr. Valletti’s paper and then you go on:

11 “However, at least one economist questions whether asymmetric regulation is
12 inappropriate and whether symmetric regulation makes the situation better or
13 worse.”

14 Your footnote 18, the economist you are referring to is Martin Peitz, is it not? A. That is
15 correct.

16 Q And you cite the same two articles as you cited in your second report in that passage that
17 you withdraw? A. Yes.

18 Q Paragraph 27 of your second report – that is right, is it not? A. That is correct.

19 Q Those articles do not support leaving a new entrant in the mobile market free of regulation,
20 do they? A. They draw a distinction between the situation of an entrant and an incumbent
21 and they analyse what is the appropriate policy towards them. They make the argument that
22 in certain circumstances it may be better to regulate the entrant less heavily than the
23 incumbent.

24 Q Yes. It may be appropriate to regulate the entrant with a different level of price control than
25 the incumbent. That is the argument they make, is it not? A. I think that is a finer
26 distinction. Now, you may say that in the present context we are talking about whether
27 there should be a price control, as opposed to the level of that price control, but the general
28 point they make is that entrants are potentially different from incumbents and that needs to
29 be taken into account in deciding how to price control them.

30 Q More specifically, what they say to be taken into account in setting the level of price
31 control. They do not provide any support for the proposition that the entrant should be left
32 without price controls, do they? A. I think the ideas that they advance there, they are the
33 kind of ideas one would be looking at also in deciding whether to price control or not. They
34 may not have focused on that in their article, but the notion that there is a case for

1 differential treatment of entrants compared to incumbents, that is the fundamental point that
2 they are making. That would be applied to the question of whether there should be a price
3 control as well.

4 Q Let me make it quite clear, the case that there should be some difference in treatment for a
5 later entrant than for an incumbent is one where Ofcom does not disagree with you. They
6 indeed so in the decision. Whether they got it right will be a matter for the Competition
7 Commission. I think we had better look at these articles. Could you take bundle C1A.

8 THE CHAIRMAN: Just to be clear, Mr. Roth, in the question whether it relates to whether there
9 should be any price control or whether it relates to the level of price control is a question
10 that really arises because of this domestic legislation and how it is set up and the split
11 between price control matters and non-price control matters. Whether Peitz article is
12 directed at that legislation ----

13 MR. ROTH: They certainly were not directed at the legislation, but what they make clear is that
14 there should be a price control on all players, but you take account of different levels.
15 Mr. Myers was only saying in his report that the extreme form of asymmetric regulation
16 would produce distortions. That is what Mr. Myers is careful to address. That is what
17 Dr. Littlechild is rebutting. So could you please take bundle C1A. The point, just to
18 explain, madam, there were passages withdrawn from the second report but it comes back in
19 the third report. Can you go to C1A, tab 1. This is Martin Peitz 2002 article, is it not, the
20 one you rely on? A. That is tab 1.

21 Q Yes, that is the one you rely on in your footnote, is it not? A. There are two that I rely on.

22 Q That is the first of the two, the 2002 one? A. Yes.

23 Q Thank you. In fact, what Martin Peitz was considering specifically, first of all, was the
24 fixed market, was it not? Look at the introduction:

25 "Recent market liberalization in Europe has allowed new competitors in various
26 form into the market."

27 He goes on, if you read down, to talk about:

28 "Fixed operators with SMP required to charge to charge cost based access prices.
29 Fixed operators without SMP are not required to base their access prices on costs.
30 This means that interconnection charges do not have to be the same between two
31 operators even if operators have the same cost structure."

32 He gives an example. Then at the bottom of the page:

33 "In the present paper I formalize a telecommunications market in which, at the
34 moment competition takes place, entrants have built up their own access network

1 (local loop) or are engaged in unbundling agreements with the owner of the local
2 loop.”

3 That is the fixed market, is it not? A. Yes.

4 Q That is nothing to do with mobiles, has it? A. No, my argument here, I think, would be
5 that he is discussing the case for symmetric versus asymmetric regulation. He may have
6 used an example of fixed networks, but the ideas in principle could be applied to mobile
7 networks.

8 Q Yes, he is discussing it on the fixed market with a monopolist, but you say that what he
9 concludes could equally apply by the same reasoning to mobile? A. Well, I would have
10 thought the same analysis could be done. Whether you would come to exactly the same
11 conclusions is another matter.

12 Q There are two page numbers, a bit confusing. Let us stick within the article, the one in the
13 centre of the page, p.24, “Discussion and Conclusion”:

14 “This paper has explored the role of regulation in an asymmetric market. An
15 asymmetric market is the typical situation in the first periods after entry has taken
16 place. I have shown that asymmetric access price regulation that ties a positive
17 access markup to the entrant and is cost-based for incumbent is an effective
18 instrument to increase consumer surplus and the entrant’s profits.”

19 He proceeds to summarise at p.25 the results of his paper in the following, “Principle of
20 access price regulation in a market with entry:

21 “*the regulator should set asymmetric access prices such that only the entrant*
22 *enjoys an access markup.*”

23 He is talking about a regulator setting prices both for entrant and incumbents but with a
24 mark-up for the entrant. That is his conclusion, is it not? A. Yes, but you interpret me, I
25 think, as asserting that this – let me take it another way. What I have said in my article is
26 that he casts doubt on the argument against asymmetric regulation, and that he does. That is
27 not, I think, in dispute. You say Ofcom accepts this. I say that it does not accept the
28 thinking underlying this article.

29 Q The thinking underlying this article is that there should be different price levels for entrants
30 and incumbents set by regulation – that is the conclusion, is it not? A. That is the model
31 that he chooses to work with, because that is convenient to talk about setting a particular
32 price for an entrant. The basic underlying philosophy, the ideas, the economic ideas
33 underlying this article could be applied to the possibility of there being no control at all.

1 Q I do not want to spend a lot of time on this or we will be here rather longer, but he
2 concludes with his principle of access price regulation. That is his conclusion, that the
3 regulator should set asymmetric – that is view. You may disagree with it, but that is his
4 view, is it not? A. I think, and this may come back to the point that the Chairman made,
5 this is within a context where it is assumed that the regulator sets a price. In that context he
6 is saying that there is no longer an automatic basis to assume that the price is to be
7 symmetric. The reasoning underlying that would apply equally well to the question whether
8 or not you should have a price control at all on an entrant.

9 MISS ROSE: He does not give a conclusion on that point.

10 THE CHAIRMAN: He does not because that is not the question that he is addressing. But, it is
11 the question that we have to address. The question is whether the arguments that he relies
12 on for saying that on the assumption that the regulator sets prices for everyone -- should
13 they always set a symmetric price or an asymmetric price -- We have to consider whether
14 those arguments actually mean that in the context of the question we have to ask ourselves,
15 which is, "Should there be a price set at all?" whether those arguments can be transferred in
16 considering that question to support a conclusion that they do not -- that there is no
17 justification for a price control. That is not the question that Professor Peitz was addressing,
18 but that is the question we have to address.

19 MR. SCOTT: I find it interesting that in the second part of the paragraph from which we have
20 been reading that this type of wholesale price regulation is effected, and then there is the
21 balance, in protecting consumers, on the one side of the balance, and in encouraging entry at
22 the same time, on the other side of the balance. Then it goes on, "If losses in total surplus
23 occur, they are likely to be smaller". That takes you to the other side of the issue. But, he
24 is clearly getting a balance here between protecting consumers and encouraging entry.

25 MR. ROTH: Yes. I think if we go on to the other paper which you rely on, this becomes clearer.
26 This is at Tab 3. This is the second paper that I think you have relied on - the 2005 paper at
27 Tab 3. A. That is correct, yes.

28 Q You see the abstract just after the title.

29 "Suppose that a strong and a weak operator compete in a telecoms market. To
30 terminate a call operators need access to the competitor's network if the call is off-
31 net. Operators set two-part tariffs and price-discriminate according to termination of
32 a call. Suppose as a benchmark that access prices are regulated at costs. I show that
33 a weak operator's profit and consumer welfare increase if the regulator sets a higher

1 price to access the weak operator's network. However, total surplus decreases even
2 locally".

3 Over the page, in the introduction, and picking it up at the third paragraph, "In this paper I
4 address the question of how to regulate access prices in an asymmetric market". That is
5 what he is examining, is it not? A. Yes, but I think my same answer applies as to your
6 previous question on the previous paper. This is the specific context in which he is
7 exploring these principles of whether you should treat entrants differently from incumbents.
8 He happens to be looking at it here in the context of setting a price for an incumbent. Those
9 ideas, those principles could equally well be applied to analyse whether you should have a
10 price control at all for an entrant.

11 Q But in fact in even concluding that you set different price levels, he is balancing that as
12 against the detriment that comes from allowing a more generous price for the new entrant, is
13 he not? A. Certainly there are balances. As the point was made here, there are balances
14 to be drawn. Where you draw the balance is obviously something to be considered.

15 Q The balance, even if there is a differential -- a higher price for the new entrant -- that can
16 lead to disadvantages. A. Yes. That is not in dispute.

17 Q If you set no price for the new entrant, those disadvantages could be greater because there
18 will be no ceiling at all on the new entrant's price. A. Yes. This is not in dispute, I think.

19 Q He does not consider at all, in either of these papers, that it might be an appropriate response
20 to the problem to set no price control on the new entrant. He does not put forward any case
21 for that, does he? A. That's not something he looks at. I would guess that as an analytic
22 economist he would find it easier to deal with something tangible than something
23 intangible. In the real world we have to deal with both.

24 Q In the next sentence, going back to your report (Bundle K, Tab 3), you say at para. 23(b),
25 "Others argue that regulating termination charges to reduce one competitive
26 distortion may create another".

27 Do you see that? That is Footnote 19. The 'others' you are referring to are David Harbord
28 and Marco Pagnozzi in their article. A. That's right, and the papers they cite.

29 Q You refer in your footnote to p.3 of their paper. That is the same passage, I think, that we
30 find quoted in your second report, if we go back to Bundle K, Tab 2, para. 28. A. Yes.
31 From memory that is the case.

32 Q It is not fair to work from memory. If you go back to your second report at para. 28 you
33 quote from their paper.

1 “It now appears that Ofcom’s regulatory policy is founded on an incomplete
2 understanding of competitive interaction in the mobile market, which as led it to
3 focus on one potential distortion in relative prices at the expense of other
4 considerations. Its LRIC-based price regulation is consequently contributing to
5 another welfare-reducing distortion of prices ... which is particularly damaging to
6 new entrants and to competition from smaller networks. By focusing solely on the
7 absolute level of mobile termination rates, Ofcom’s regulatory policy may well be
8 damaging competition and reducing welfare in the mobile market”.

9 That, with the references given, is what you are relying on. A. Yes.

10 Q If we look at the original of that article which is in the other bundle where the Peitz papers
11 were, at Tab 8, Bundle C1A -- That is the article, is it not? A. I believe so.

12 Q It corresponds. If you go to p.3 in the article, “It now appears that Ofcom’s regulatory
13 policy is founded ----“ That is the passage you quoted. A. Yes.

14 Q Just reading that passage in the article,

15 “It now appears that Ofcom’s regulatory policy is founded on an incomplete
16 understanding of competitive interaction in the mobile markets, which has led it to
17 focus on one potential distortion in relative prices at the expense of others. Its
18 LRIC-based price regulation is consequently contributing to another welfare-
19 reducing distortion of prices - off-net versus on-net price discrimination - which is
20 particularly damaging to new entrants and to competition from smaller networks”.

21 They are talking about the problem of off-net versus on-net price discrimination, are they
22 not? A. That is the main purpose of their article, yes.

23 Q And of this passage. A. Yes.

24 Q Why did you leave those words out from your quotation? A. Because I didn’t wish to
25 draw attention to that passage and I was advised that highlighting that would be
26 inappropriate. I did not wish to rely on that particular argument. What I wished to indicate
27 was that there were different views about the nature of the competitive situation and the
28 impact of Ofcom’s regulatory policy.

29 Q But the view that they are putting forward in the passage that you quote in your second
30 report at para. 28 is because of off-net versus on-net pricing. A. Yes, that is the focus of
31 that passage, yes.

32 Q I am sorry. I did not understand you. Why did you leave those word out? A. I had been
33 advised that this was - off-net/on-net specifically - was an inappropriate area to raise before
34 the tribunal. It seemed to me that the general point was that there is a different approach --

1 Some different considerations have been raised which Ofcom had not taken account of. The
2 specific nature of those considerations wasn't particularly important.

3 Q But you are praying in aid the view of Harbord and Pagnozzi, and the passage you quoted,
4 as supporting the position. Do you not think, on reflection, that leaving out those words
5 gives a slightly unfortunate impression of what they are actually referring to? A.

6 (After a pause): Well, I think on reflection I would want to consider how much emphasis to
7 put on anything which might be related to allegations associated with the level of the price
8 control -- the difference between that and marginal cost -- the CPB issues. All those things
9 I responded to in this statement in the light of Mr. Myers' reference to CPB. In retrospect,
10 maybe I should have played down anything associated with that, and concentrated only, for
11 example, on some of the references in Harbord and Pagnozzi, which I believe would not
12 necessarily depend on this off-net/on-net issue.

13 Q We have not followed up all your references, but in your third statement where you
14 withdraw that part of your second statement and re-state the position, you continue to rely --
15 You withdraw it specifically because of objections being raised, you will recall, to off-
16 net/on-net being introduced. You continue to rely on that in your para. 23(b). A. I am
17 simply making the point that there are different views. They are, I believe, increasingly to
18 have some effect on commentators, economists, and so on. I do not wish to take up the
19 specific reason - namely, the off-net/on-net - but that is an example of a more general
20 orientation of economists which it seems to me the tribunal ought to be aware of. Whether
21 they place weight on that is another matter.

22 Q But it is right to say that the Harbord/Pagnozzi view is because of the concern about on-
23 net/off-net price discrimination. That is the main focus of their paper. I think the general
24 point they make probably goes wider than that.

25 Q Well, one can read their paper and see how they explain it. You then go on to say that,
26 "Two European telecommunications regulatory bodies have taken such
27 considerations into account in recent decisions for proving asymmetric rates when a
28 new entrant, or at least a smaller player is concerned".

29 You refer to the decision of the French regulator, and the decision of the Portuguese
30 regulator. Those are your Footnotes 20 and 21. A. Yes.

31 Q Those decisions approve asymmetric rates for new entrants compared to longer established
32 MNOs. But, they do not leave the new entrant without price control, do they? A. I
33 believe that's the case. So, again, I emphasise, it is the thinking underlying these papers and

1 these judgments that is important to take into account. That is potentially relevant to the
2 decision whether to regulate, and not simply the decision at what level to put the control.

3 Q The first decision - the French decision - We have Bouygues as the new entrant, and only
4 two longer established MNOs -SFR and Orange. You will remember that. Is that right?

5 A. Yes. Excuse me. Could you give me the page in -----

6 Q It is in your third statement at Footnote 20. I am taking you there because you say that is
7 the re-statement of your position. You set it out in more detail in your older one. What the
8 French regulator did is that they had a difference in termination charge of 2 eurocents per
9 minute higher for Bouygues for a temporary period - initially eighteen months, and then to
10 be reviewed. That is what they did, is it not? A. Yes.

11 Q The Portuguese decision that you rely on -- Can you remember how much the asymmetry
12 rate was there? A. No I am afraid I cannot tell you that.

13 Q Can you remember how long it was set to last for? A. No. My argument is not
14 concerning the details of these controls. It is purely the principle - the principle of
15 asymmetry has been accepted in these two decisions.

16 Q I thought you said it is the reasoning behind the principle of asymmetry because that
17 reasoning, you said, could be applied to the extreme form of asymmetry of no price control.
18 We are not interested in this hearing simply with the principle of asymmetry and level.

19 A. The principles, yes, could be applied to the question of whether to regulate.

20 Q So, the reasoning of those decision, you say, supports the principle of that extreme form of
21 asymmetry. A. What I say is that it is the kind of reasoning, the kind of principles that
22 would seem relevant in deciding whether to regulate or not. Now, whether one literally
23 follows them and says, "Yes, that's the answer for the UK" is another matter.

24 Q We have got in the bundle the full Portuguese decision, but I see from your report - the
25 previous one - that, in fact, I do not think you were working off the full one. You were
26 working off the summary. So, I do not think it is fair to ask you on the full one. I think
27 this is the summary that you worked off. Can we pass that up? (Handed) Can you tell me:
28 is that the document you were working off? It is the Cullen summary. You in fact footnote
29 it in your second report.

30 MISS ROSE: Madam, it is in the bundle already at C1A, Tab 9.

31 MR. ROTH: Thank you very much. Dr. Littlechild, you can discard that document and go back
32 to the bundle where the Peitz article was, and go to Tab 9. If you look at the summary, we
33 can see there in the second paragraph that the investigation was closed at the end of phase 1
34 with comments.

1 “The Commission commented on ANACOM re-introducing asymmetry of mobile
2 termination rates between Optimus and two other mobile network operators and on
3 the need for a coherent approach for regulating MTRs across the EU”.

4 A. Excuse me, sir, which paragraph are we reading?

5 Q The second paragraph on the first page.

6 “The Commission commented on ANACOM re-introducing asymmetry of mobile
7 termination rates between Optimus and two other mobile network operators and on
8 the need for a coherent approach for regulating MTRs across the EU”.

9 One sees below heading A, under NB that previously in its decision of February 2005,
10 ANACOM [the Portuguese regulator] set a quarterly glide path of reductions for all MNOs
11 reaching symmetry at the end of the glide path. Then, below that, we see price control
12 obligation. New MTRs. You read just above the table,

13 “As shown in the table below, the ANACOM decision would be valid for one year,
14 from January 1, 2008 until December 31, 2008. The proposed MTRs would apply
15 to termination of voice calls on both 2G and 3G networks”.

16 It is different -- starting out at 1.6 eurocents per minute, but falling over the nine months to
17 1.3 eurocents per minute. That is the asymmetry that they set. A. Yes.

18 Q They say that it is a transitory measure. Re-introduction of asymmetry. They say that a
19 new market analysis is foreseen by the end of 2008. They say why they are doing it. Just
20 pausing there, that is a very limited degree of asymmetry for a short period not very
21 different in degree in fact from the asymmetry Ofcom set in this case, is it? A. Well, it
22 may not be different in degree, but it seems to me that it acknowledges certain principles in
23 their reasoning, which were not explicitly acknowledged by Ofcom, or at least not given
24 significant weight. So, the significance to me - and I suggest to the tribunal - is not the
25 specific numbers or time periods, but the principles underlying this which deserve
26 consideration.

27 Q Are you saying that Ofcom did not reason in its ----

28 THE CHAIRMAN: Mr. Roth, I think we know the balance of the point.

29 MR. ROTH: Thank you. I can conclude this point with this matter: the European Commission in
30 fact did not even agree with what the Portuguese regulator had done, did they? A. Oh, I
31 think one can see a tension here between the European Commission and the individual
32 regulators, and, indeed, the European Regulators' Group. The European Regulators' Group,
33 in the paper that I cite here, is going rather further than the Commission itself is comfortable
34 with at the moment. So, whether the Commission supports this - is enthusiastic -- or is

1 worried I think is another matter. The question is: are these relevant considerations to take
2 into account?

3 Q Can I repeat the question? The Commission was not content with what the Portuguese
4 regulator did. A. I can quite believe the European Commission, I agree, was not as
5 enthusiastic about this decision as the Portuguese regulator was.

6 Q I am sorry. I put it rather stronger than that. The European Commission did not agree -- It is
7 not about enthusiasm. They did not agree. You quote the Commission's response in your
8 Footnote 16, do you not? A. Yes. The Commission is saying, "We'd rather not have
9 this, or if we do have it, it should be only for a short time". But, they are acknowledging the
10 possibility that a case can be made for asymmetric regulation.

11 Q That is what you quote in Footnote 16.

12 "MTRs should normally be symmetric and [that] asymmetry requires an adequate
13 justification. Although in exceptional cases, asymmetry might be justified by
14 objective cost differences (which are outside the control of the operators), the fact
15 that an MNO entered the market at a later stage and that it has a smaller market
16 share can only justify higher MTRs for a transitory period."

17 That is the bit you quote, is it not? A. Yes.

18 Q That quote comes from the second page of this document under 'Commission Comments' at
19 s.2, the second paragraph. A. Yes.

20 Q That is what you have quoted. But, in the paragraph just above that, the Commission say
21 that they welcome the overall reduction, and it asks ANACOM to reconsider the proposed
22 asymmetry in favour of Optimus. It notes a substantial change, and that it is made on the
23 same market analysis. So, they are actually positively asking ANACOM to reconsider, are
24 they not? A. Yes, they are.

25 Q You do not mention that in your Footnote 16, do you, where you quote the next paragraph?
26 A. Well, I don't mention that they ask them to reconsider. I say that they say they should
27 normally be symmetric and that it requires adequate justification to have asymmetry. That is
28 their position.

29 Q Yes. Then you go on to rely on the ANACOM decision in 23(b). Then you refer to the
30 ERG position. You have just referred to that. Can we then finally turn to that. That is not in
31 this bundle - the academic bundle, as it were. This is in a quite different place, in Bundle F4.

32 MR. SCOTT: Mr. Roth, we are grateful for the note explaining the status of this document.

1 MR. ROTH: This is the document - just to be clear and so that there is no misunderstanding - that
2 you are referring to in your Footnote 22 of the passage we have been looking at in your
3 para. 23(b); is that right? A. Yes that is the case.

4 Q In fact, you rely on it quite a lot. Just before we go into it, if you look at your third report,
5 in para. 3, responding to Dr. Walker, you actually quote from it, do you not, on the firsts
6 page? A. Yes.

7 Q Then, at para. 21 of this report - asymmetric regulation - the second sentence,
8 “As the draft ERG common position paper recognises, it would be quite possible to
9 conclude that the disadvantages of regulating a small company and/or a new entrant
10 (in terms of discouraging new entry and thereby reducing variety and innovation)
11 outweighed the advantages of regulating such companies (in terms of reducing
12 distortion of competition between existing players)”.

13 A. Yes.

14 Q So, that is also a reference to that document. If we look at the document which starts at 589,
15 but go to p.593 in the stamped pages, we see ‘General economic principles of termination
16 rates regulation. The current regulation of termination rate asymmetry/symmetry’. Going
17 down to the fourth paragraph,

18 “At this stage, it is worth to remind that symmetry can concern either remedies
19 (symmetry in remedies meaning the same remedy for fixed or mobile operators) or
20 termination rates (symmetry in rates meaning there exist a single termination rates
21 for all fixed or all mobile operators). The present document mainly focuses on the
22 second type of symmetry, i.e. termination rates symmetry and investigates the
23 conditions under which it could be advisable for NRAs to impose symmetric
24 termination rates to notified operators”.

25 That is what they are considering. Over the page at p.594, “Economic principles tend to
26 recommend the setting up of a unique and uniform termination rate for all network
27 operators ...” That is discussed. Going down three paragraphs to the penultimate paragraph
28 on that page, “Unlike a unique efficient termination rate level ----“

29 THE CHAIRMAN: Mr. Roth, what point do we get from this which is different from the point of
30 the previous articles? I am just very aware of the time that this seems to be taking. Perhaps
31 you could put the point to Dr. Littlechild that you want to draw from this report?

32 MR. ROTH: The point that I put is that the whole discussion of this paper is about the question of
33 whether or not one should allow asymmetric rates for a limited time period by regulation,
34 and not about leaving a new entrant unregulated. A. My answer would be the same as it

1 has been to all your other questions on this point - that the principle here is that you should
2 approach entrants differently from incumbents. They happen to analyse this in the context
3 of an assumption that everybody will be regulated. I do not see anything here that actually
4 rules out the question, the possibility of a company not being regulated.

5 Q Can I just take one remark there which I would suggest does - that is, on p.595. After
6 discussing when asymmetric might be justified, and just after the first new paragraph --

7 “In this case, regulators should keep in mind that asymmetric regulation is
8 sustainable only on a transitional period, because asymmetric is sustainable only on
9 a transitional period.”

10 Then the next sentence:

11 “Furthermore, when choosing this entry encouragement intervention, the regulator
12 must be able to commit itself on a sunset clause and to guarantee that differences in
13 prices effectively reflect differences in costs (unit cost versus global costs).”

14 Then they go on to discuss whether even that is a good idea or not. So in this entire lengthy
15 and detailed consultation, there is no suggestion that there is any benefit or merit in leaving
16 a new entrant without regulatory control? A. I think that is not the thing they address
17 themselves to. They seem to have taken for granted that there will be a control and their
18 focus is on the level at which that is set. It seems to me the underlying thinking – in terms
19 of ----

20 THE CHAIRMAN: I think we know the point.

21 MR. ROTH: We have got the point that you are seeking to make. I suggest to you – I think I
22 should put it to you – that after referring to all those documents in your third report, you
23 conclude and you repeat the conclusion from your second report at the end of para.23:

24 “This undermines Ofcom’s heavy reliance on the principle of avoiding asymmetric
25 regulation because of its distorting effect on competition.”

26 In fact, all those documents, maybe they do not address the question of leaving a new
27 entrant completely unregulated, but they do not give any support for the proposition that
28 there is merit in leaving a new entrant completely unregulated, do they? A. With respect,
29 I would disagree strongly with that. They argue that there is an actual disadvantage in
30 symmetric regulation and a positive advantage in asymmetric regulation, and that is the
31 point I am making here in my sentence, they undermine Ofcom’s reliance on that. The
32 same principles that are set out in all these references can be applied to the issue of whether
33 to regulate or not.

1 Q Ofcom's error, you say, is although they have regard to asymmetric regulation when they
2 look at levels, as they do in s.9, and indeed, as we know, they set a higher level, they should
3 have, unlike the French and the Portuguese and the ERG, gone so far as to consider whether
4 there should be that extreme form of asymmetry? A. Well, you refer to it as an extreme
5 form, but they should, in my view, have considered whether there should be regulation or
6 not, and in doing so they should have considered these arguments along with the other
7 arguments that they did consider.

8 Q It is just a curious omission by all the regulators and the ERG that, when looking how to
9 regulate MNOs and new entrants, they do not consider that leaving the new entrant
10 unregulated might be a sensible option? A. I cannot comment on what the situation in
11 other European countries with respect to the issue of whether to regulate or not. It seems to
12 me that the thinking here applies equally to that issue. I cannot comment on what the
13 situation is in those other countries.

14 Q This is a policy paper for discussion of what should be the right policy, is it not? A. Yes,
15 it is a discussion paper, and I would have thought that it would be a valid point to say, "And
16 not only should we consider the rate, if it is regulated, the argument applies to whether it
17 should be regulated or not". That would seem to me a valid point to make.

18 Q Just oddly they do not do so. A. Maybe Ofcom will have the opportunity to put this
19 point.

20 MR. ROTH: Thank you, Dr. Littlechild.

21 THE CHAIRMAN: Does anybody else wish to put any questions, bearing in mind the very
22 extensive cross-examination that there has already been of Dr. Littlechild this morning?
23 Mr. Turner?

24 MR. TURNER: Madam, I am extremely conscious of the time and I may be subject to what
25 lawyers call "submission squeeze". I did, on the other hand, prepare a cross-examination to
26 cover certain important points that have not been addressed by Mr. Roth, and Mr. Roth
27 knows which those are. I had, in fact, anticipated, had things gone to plan, that I would
28 have over an hour to deliver that cross-examination. I can cut that right back to something
29 in excess of half an hour, but I certainly will not be able to conclude by the short
30 adjournment if we begin now. I am conscious that Dr. Littlechild has been in the box for a
31 very long time as well. If the Tribunal felt it appropriate to break now to give
32 Dr. Littlechild a chance to refresh himself and me a chance to see if I can pare it down even
33 more, may I commend that as a possibly appropriate course?

1 THE CHAIRMAN: Yes, I think that is a good idea. I think we will then take the short
2 adjournment now and be back here at a quarter to two.

3 (Adjourned for a short time)
4

5 THE CHAIRMAN: Yes, Mr. Turner?

6 MR. TURNER: Madam, I am grateful. I have taken the opportunity over the short adjournment
7 to pare these questions down to what we consider to be the bare minimum in order to do
8 justice to the issues. I shall aim for 45 minutes. It may be more, it depends on the nature of
9 the responses given by Dr. Littlechild to the questions. The only other matter I should draw
10 your attention to is that Miss McKnight, who is Vodafone, has said that, subject to my
11 cross-examination which may cover issues that she is interested in, she may wish some time
12 after that depending on the Tribunal's views.

13 THE CHAIRMAN: This is taking a lot longer than it ought to take. I would hope that you do not
14 intend to cover any of the matters that were covered by Mr. Roth this morning.

15 MR. TURNER: We have scored out swathes of questions.

16 THE CHAIRMAN: Let us get started on the questions you have not scored out.

17 Cross-examined by Mr. TURNER

18 MR. TURNER: Dr. Littlechild, I am going to ask you a few questions on behalf of T-Mobile.

19 First, for the purposes of your three reports you have assumed that H3G has significant
20 market power in the provision of voice call termination on its network – I think that is right.
21 What do you understand by the finding that H3G has significant market power in call
22 termination? What is H3G thereby able to do? A. I did not address myself specifically to
23 that point, but with respect to operators generally I take it to mean the argument that they
24 are able to charge a higher price for termination on their system because only they can
25 connect another caller with a customer on their system.

26 Q A higher price than what? A. Than a price that would obtain in a more competitive
27 system. That of course raises the question of cost and higher price in relation to cost, but
28 that in general is what I would mean, a higher price than the cost.

29 Q You agree that the question of whether imposing any form of price control on H3G was
30 justifiable would depend on the application by Ofcom of economic theory and analysis to
31 the evidence that it had before it? A. As a general proposition that seems reasonable.

32 Q So far as the evidence is concerned, may I just establish what you have taken into account in
33 reaching your own opinion on what Ofcom has done. For the purposes of your main report,

1 if you would pick up bundle K and turn to tab 1, we see that at para.4 you say that you have
2 been shown a number of documents and you list those there. A. Yes.

3 Q In your report you refer to various paragraphs of Ofcom's MCT statement. Did you read
4 the whole of the statement, at least in its non-confidential form? A. I read such parts of it
5 as seemed to me relevant in the time available to answer the questions put to me.

6 Q But you have not read the totality of it, excluding for the moment the annexes? A. Well, I
7 have looked through that, but I would not wish to be held to be able to reproduce or answer
8 questions on all of it.

9 Q Since making your report you have also obviously read the reports of Dr. Walker and
10 Mr. Myers. What else have you read since making your first report? A. I have looked at
11 some of the other testimony that has been put in – for example, the report by Mr. Delacroix
12 – I have seen that.

13 Q Were you asked to read either of the witness statements of Mr. Kevin Russell, the chief
14 executive officer of H3G? A. I was not specifically asked to read those. I have seen at
15 least one of those, but I have not studied it in detail.

16 Q Have you seen the second report in particular, in which he covers, among other matters, the
17 nature of the traffic imbalance suffered by his company? A. I cannot remember whether I
18 have looked at that or not.

19 Q Have you read the witness statement of Mr. Amos of BT, who addresses the level of H3G's
20 termination rates compared with those of other operators? A. I am aware that there is
21 such a statement. I may have flicked through it. I would not be able to say precisely what
22 he said.

23 Q In the course of your second and third reports, you have on various occasions corrected
24 aspects of your first report, which you say could have been clearer. I am not going to take
25 up time with going to those references. For clarity, are there any further points in any of
26 your three reports that you now wish to withdraw at this stage? A. I think we have
27 covered a number of points in discussion with Mr. Roth. I do not, at the moment, recall
28 anything else that I wish to withdraw.

29 Q I am grateful. Could you please turn to para.36 of your main report, tab 1, and the internal
30 numbering is p.10. You refer there to the way in which an economic assessment, the
31 benefits of regulating H3G's termination charges could be approached? A. Yes.

32 Q In para.37, if you will just cast an eye over that, you refer to three particular factual issues
33 which should be taken into account in any such economic assessment, and those are H3G's
34 small retail market share, the fact that H3G has generally held its mobile termination

1 charges below the 3G rates of the incumbent operators during the previous period, and the
2 fact that H3G as a whole is not yet profitable. You refer to the notice of appeal. A. Yes.

3 Q May I begin with the issue of H3G's small market share which you refer to at various points
4 in each of your three reports, and here I will perhaps just pick up certain references. In your
5 second report at tab 2, para.3(a) you agree that asymmetric regulation can in principle
6 distort competition. You argue that this benefit – presumably there you mean the benefit of
7 symmetric regulation – is not significant in the particular circumstances of H3G as a new
8 and relatively small entrant and Ofcom's decision statement did not adequately analyse this
9 issue. A. Yes.

10 Q Then similarly at paras.45 and 46 in the same statement, you develop your points in relation
11 to H3G's market share.

12 "My statement noted that H3G was presently a small competitor with a retail
13 market share around 4%, that the assumption that it would grow (to 12.8% market
14 share) over the period of the control could be over-optimistic, and that Ofcom's
15 decision might itself hinder H3G's ability to grow."

16 If you cast your eye down what you said in the remainder of that paragraph and para.46, you
17 will see there in the second sentence of 46:

18 "I simply repeat that, at present, H3G has a small market share and that its ability
19 to compete with incumbent operators is hindered by Ofcom's chosen method of
20 regulating mobile termination charges, which effectively requires H3G to cross-
21 subsidise its larger incumbent rivals. This is therefore another factor that needs to
22 be taken into account ..."

23 Where did you source your figure of 4 per cent? A. That was, as stated in para.37, from
24 the notice of appeal.

25 Q What date does that correspond to? A. I would have to refer back to that document.

26 Q In any event, you are using market share as an indication of the relatively small size of
27 H3G, the new entrant? A. Yes.

28 Q To see one reason why such a relatively small size might matter, can we turn to your article
29 from April 2004, which is at tab 2, bundle C1A, the article entitled "Price Controls on
30 Mobile Termination Charges". This begins in that tab at p.47 where there is a picture of
31 you smiling at the top of the page. Extracts from this article have obviously already been
32 quoted in your own written exchanges with Mr. Myers. Could you please turn to p.50. You
33 will see there in the second, rather faint, there is a heading "Comments on European
34 Policies". Would you read to yourselves the top of the third column down to the end of the

1 second paragraph. I shall not take up time reading that aloud. That is column 3, the first
2 two paragraphs, beginning, “Non-regulation of new entrants is understandable”.

3 A. (After a pause) Yes, I see that.

4 Q We see, therefore, that when an operator such as H3G is still small, and within this article
5 you are looking at operators under a threshold of 6 per cent, the point you were making
6 there is that even high termination charges on their account are not significantly
7 burdensome on the operators and customers of other networks who have to pay those
8 charges – yes? A. Yes.

9 Q Please keep that article open and, would you go to your second report, para.19, tab 2, bundle
10 K. At para.18, what you are doing there is reproducing some text which we have already
11 read which Mr. Myers had omitted from his own report when he was quoting you. You say
12 in para.19:

13 “The sentences that Mr. Myers cited explain why I consider that asymmetric
14 regulation may be a problem both in principle and in practice.”

15 The third sentence:

16 “The sentences that Mr. Myers omitted [which are set out] explain why I do not
17 consider that asymmetric regulation is a significant problem in the particular
18 circumstances of H3G in the UK at the present time, or likely to be a significant
19 problem during the four years of the present mobile price control.”

20 So that is your opinion? A. Yes, that is correct.

21 Q You were in court on Thursday of last week when Miss Rose QC was making submissions
22 on behalf of H3G? A. Yes, I was. I would not claim to have understood everything that
23 was said in court.

24 Q I fall into that category as well! Did you hear her explain this, and now I am quoting from
25 the transcript:

26 “As H3G’s market share becomes greater BT becomes increasingly price sensitive
27 and therefore willing to act to protect the interests of its customers.”

28 Did you hear her say that? A. I am quite sure that she did since you read it from the
29 transcript. Whether I took it in is another matter.

30 Q She explained to the Tribunal that the point at which H3G’s actions were sufficiently
31 material to have mattered to others in the market, in particular BT for the purposes of the
32 argument we have heard, has been reached. Were you made aware of this alteration in
33 H3G’s situation since 2004? A. I have not discussed the details of what H3G’s market
34 share is, no. I am going on the basis of the appeal and the decision made by Ofcom.

1 Q The point I am putting to you is that on the evidence and the argument that the tribunal has
2 currently heard, we are at a stage where BT is now sensitive enough for H3G's termination
3 charges to be a matter of concern to it as it takes action to protect its customers, and I was
4 wondering whether that is a factor which you considered to be relevant, bearing in mind the
5 reasoning in your article? A. I certainly would not say it is not relevant. I would have
6 thought that Ofcom, in considering this issue, would want to take all such arguments and
7 evidence of that kind into account.

8 Q In your same article a market share of 12 per cent or more in the passage that we have read
9 is also described as, and I use your words, "far from negligible". Would you agree that on
10 the approach that was taken in your article, again which discusses placing a significant
11 burden on others, it is not the new entrant's share of subscribers alone that is important,
12 more particularly when you are considering the burden placed on others, it is its share of the
13 incoming minutes on which the payments have to be made? A. Yes, I think one could
14 make a case that a variety of different measures are relevant to be considered.

15 Q And that H3G's termination charges are more burdensome for other operators and for their
16 customers if H3G has, say, a million subscribers all receiving 100 minutes of calls a month
17 than if they have a million subscribers receiving ten minutes of calls a month. That must
18 follow? A. This is possible. I do not think I would want to dispute the details of that. If
19 I were called on to consider this as a member of Ofcom, I would want to consider how
20 significant this was.

21 Q I am simply putting to you a matter of principle that if you have more minutes on which
22 termination charges have to be paid the burden will be greater, as a matter of logic?
23 A. Yes.

24 Q Have you been shown the evidence comparing the incoming traffic levels of H3G on the
25 one hand and other MNOs on the other hand on an active subscriber basis? A. I may
26 have seen that evidence, I do not have it in my mind at this minute.

27 Q Would you have been shown it before you wrote your reports? A. I cannot remember
28 whether I was shown any information or not.

29 Q In any event, would you pick up bundle C2, and please turn in tab 1 to p.62. I am now
30 entering confidential territory.

31 THE CHAIRMAN: Do you want to then clear the court?

32 MR. TURNER: Madam, it should not be necessary to refer to the figures which are there on the
33 page, and I hope to do that without the bother of clearing the court, but simply for
34 Dr. Littlechild to be aware that we must not speak of these figures. Dr. Littlechild, please

1 look at the table at the top of the page. You see there a comparison in terms of both
2 incoming and outgoing traffic between H3G on the one hand and other MNOs on the other
3 hand. So taking the incoming traffic on which the charges are paid, you see the range for
4 the other MNOs. Do you see the figure for H3G? A. Yes, I do.

5 Q Similarly, for outgoing traffic you see the range for the other MNOs? A. Yes.

6 Q And do you see the corresponding figure for H3G? A. Yes, I do.

7 Q Based on this, and without going into the precise numbers, it is fair to say that share of
8 subscribers might be an imperfect proxy for share of incoming minutes in the case of H3G –
9 there is an imbalance here? A. That is possible.

10 Q Another relevant measure of market share for new entrants, when you are considering the
11 proportionality of any price regulation, would be its share of minutes that is relevant?
12 A. It is possible.

13 Q It is relevant because it affects the extent to which the operator can take advantage of any
14 economies of scale. By contrast a share of subscribers takes no account of whether the
15 subscribers are, on average, high volume or low volume. But for economies of scale
16 minutes are relevant? A. I am not sure whether that is the case. I can see that an
17 argument can be made. I believe an argument has been made. I would not claim that I am
18 sufficiently familiar with the economics of these telecommunications networks to take a
19 view as to whether that is the case or not.

20 Q Putting it very simply, the level of use of the network measured in terms of minutes will be
21 relevant to an assessment of whether scale economies are being used by the operators
22 concerned? A. I can see that may be possible. I do not think you are suggesting that is
23 the only or the main consideration.

24 Q No, absolutely not. In your third report at para.6, if you would turn it up, you actually say
25 there, looking at the top of p.3, a few lines down, that a significant issue in this case – do
26 you have that, about five lines up from the bottom of para.6? A. Yes.

27 Q You have been talking about lack of scale and you go on to say about four lines up from the
28 bottom:

29 “A significant issue is whether this second factor applies to H3G and, if so, how.”

30 A. Yes.

31 Q That second factor was the factor of encouraging a growth of a new entrant on the market
32 which suffers from a lack of scale – yes? A. Yes.

1 Q We can get a good indication of H3G's share of minutes from Dr. Walker's report, which
2 had digested the Merrill Lynch raw data. I do not know if you have read Dr. Walker's
3 report. A. Yes, I have read Dr. Walker's report.

4 Q I am not going to go into the raw data in the interests of time, but if we go to the text of his
5 report in tab 8, p.213, you have there para.3.11. I can take you through the calculation if
6 need be, but what he has done is he has calculated the share of minutes for H3G for the last
7 quarter of 2006 as 10.4 per cent – you have that? A. Yes.

8 Q As I say, I can go through the figures with you, but you have no reason to, and you have not
9 so far questioned that figure? A. I have no basis to question that figure.

10 Q That is a third relevant measure of market share, which I want to put to you before drawing
11 inferences from this, and that is share of market revenues. You would agree that share of
12 market revenues might also be important, or at least useful, as a measure when you are
13 assessing the relative size of an operator compared to others?

14 THE CHAIRMAN: What do you include in revenues?

15 MR. TURNER: Retail revenues.

16 THE CHAIRMAN: Just retail revenues, not MCT?

17 MR. TURNER: This is totality, this is retail and wholesale revenues also on the termination
18 payments. A. All these could be possibly relevant, yes.

19 Q You are aware that Dr. Walker also reported an estimate of H3G's market share based on
20 overall revenues. Do you recall what that was? A. This is in the same paragraph we are
21 talking about here?

22 Q Yes, it is. A. Is this a number that I am not supposed to mention?

23 Q No, this is a number that you can mention. The more you mention it the better! A. Are
24 you referring to the second sentence of 3.11?

25 Q I am referring to the figure of 9 per cent? A. Nine per cent, yes.

26 Q Standing back, Dr. Littlechild, both of those measures are higher than the 6 per cent
27 threshold for the small new entrants mentioned in the article that we looked at a moment
28 ago? A. With respect, I think there I said that they happened to be about 6 per cent. I do
29 not think that I referred to this as being specifically a threshold.

30 Q You certainly did not take that as a definitive level, but in that article the small new entrants
31 were ---- A. Were about 6 per cent.

32 Q -- below 6 per cent, but more particularly ---- A. About 6 per cent.

33 Q Not all of them. More particularly, from the point of view of giving any special regulatory
34 dispensation from price controls, 9 and 10.5 per cent is approaching the 12 per cent figure

1 which you described in the same article as “far from negligible”? A. As numbers, that is
2 certainly true.

3 Q Those figures were, moreover, reporting H3G’s market share prior to the beginning of the
4 four price control period – yes? A. The 4 per cent number, for example, was. I do not
5 know specifically about the others. If you say that is ----

6 Q The end of 2006. A. Okay.

7 Q The opinion that you have expressed, and which I shall not return to, is not merely that
8 asymmetric regulation of H3G is not a significant problem at the present time, your opinion
9 is that you consider that asymmetric regulation is not likely to be a significant problem, and
10 I quote your words, “during the four years of the present price control” – yes? A. That is
11 what it would seem to me on the pieces of evidence that I looked at, specifically the 4 per
12 cent. Now, my argument has always been that this is a matter for Ofcom to look at and to
13 consider.

14 Q You would agree that it is not unreasonable in principle – indeed you have agreed – to
15 assume that H3G’s share will grow from its current level, however you measure it, if it is
16 efficient? A. I agree with that in the sense that one would expect any efficient company
17 to grow. I think I make the point somewhere that in so far as one looks at its previous
18 growth it is difficult simply to extrapolate that because that was under the assumption that it
19 was not regulated on termination charges. If it is to be regulated on termination charges that
20 changes the conditions.

21 Q Let me deal with that. Ofcom, as you have said, did make an assumption concerning the
22 growth in the market share over the period of the price control and you responded to that in
23 your first report – I am going to go to the reference – your words were, “This is a
24 conjecture”? A. Yes.

25 Q Were you shown or made aware of H3G’s own market share predictions before you
26 prepared your reports and expressed the opinion about the conjecture on the part of Ofcom?
27 A. No, I do not think I was.

28 Q May we turn to H3G’s predictions. If you pick up bundle F2. You need to keep Bundle K.
29 Keep C1A to hand. Bundle B will need to be floating near you. Bundle F4 can be put away
30 completely. C2 you can put away for the moment. Now we are looking at F2, at H3G’s
31 market share predictions. We will go to p.313. I assume that this is not a document that you
32 have previously seen? A. This is the document from -- It is addressed ‘Dear Darren and
33 Chris’.

34 Q It is addressed, ‘Dear Darren and Chris’. A. No, I haven’t seen this.

1 Q It is dated 5th June, 2006. If you read the first few sentences on the first page you will see
2 the context referring to Ofcom's mobile LRIC model, and saying that we had said that H3G
3 would provide Ofcom with updated forecasts for subscribers and associated demand, and
4 that these are provided in the attached spreadsheet, and so on. Now, if you turn to p.316
5 you have here the annexe which describes the data which was provided by H3G. Things
6 that are marked in yellow are, again, confidential information. If you would be kind enough
7 to turn to p.319 you will have there Table 1. There you have forward-looking projections of
8 market share - this time based on active subscribers - by the company itself. You might just
9 want to cast your eye over the period of the first price review. Take the year 2010, which is
10 entirely within the price control period -- We are looking here at market shares, as I say,
11 based on subscriber numbers. The proposition I put to you is that even in terms of share of
12 subscribers, this share reported forecasts for 2010 is, to use your own words, and by
13 reference to the reasoning in your article, far from negligible. A. It is difficult to
14 comment on this, given that this is a yellow figure.

15 Q It is at the bottom of the range that you had indicated as being far from negligible. A.
16 Yes.

17 Q In fact, Dr. Littlechild, it is hardly, to use your expression, conjecture to assume that based
18 on a starting position of 9 to 10 percent -- 10.5 percent, H3G would attain the 12.8 percent
19 share assumed by Ofcom within the period of the coming price control if it was unregulated.
20 A. I'm afraid that I don't know the basis of the assumption on which H3G was making its
21 predictions. So, I can't comment upon whether they have taken that factor into account, or
22 not.

23 Q No. What we do know, however, is that H3G has itself made a forecast going forward about
24 the market share that it would be likely to achieve. A. Under that particular set of price
25 control assumptions.

26 Q Yes. On that basis, and following the logic of your article, it would be sufficiently large to
27 cause damage to others, potential competitive distortions, and to warrant some form of
28 regulation.

29 MISS ROSE: I am sorry to interrupt. I was not clear whether Mr. Turner was putting it that this
30 forecast was based on the price control that was imposed, or whether it was independent of
31 the price control. If he could possibly clarify that point?

32 THE CHAIRMAN: Yes. What assumptions are made in these forecasts for what price control is
33 going to operate over the period?

1 MR. TURNER: Madam, it is not wholly clear from the letter. I have to accept that. The letter is
2 reporting, as the words on p.313 say, that these are current internal forecasts consistent with
3 the LRIC model inputs.

4 THE CHAIRMAN: These are H3G's figures. So, presumably, they will be able to help us.

5 MR. TURNER: They will be able to help us out on that.

6 MISS ROSE: Madam, I can clarify. I do have instructions that this took no account of the price
7 control.

8 THE CHAIRMAN: What does that mean? That it was posited on the basis of no regulation?

9 MISS ROSE: No price control on H3G.

10 THE CHAIRMAN: No price control on H3G.

11 MR. TURNER: That is helpful, madam. So, taking that at face value, if this company is wholly
12 unregulated within the period of price control, the company itself forecasts growth to the
13 level that you see indicated in this table. A. By the end of that control period. I think I
14 covered that point in one of my statements, to say that if indeed the company was no longer
15 in the 'negligible', but in the 'far from negligible' category, then I would expect that to be
16 seriously considered for inclusion in the price control for the next period.

17 Q So, this is within the price control with which we are concerned? A. Yes, but ----

18 Q It is not at the end of price control A. You are talking about -- I thought you were talking
19 about a figure of 2010. You are talking about ----

20 Q The period ends the following year - 2011. A. Yes, but my suggestion was that Ofcom
21 should look at the period as a whole. By all means, if it got to the top of the range towards
22 the end of that period, that would indicate either that a price control should be imposed in
23 the next period, or, if Ofcom thought this was a serious enough problem, it would say ,
24 "Well, for the time being, we are not going to impose a price control -- or, for three years --
25 or for two years". So, those options would be open to Ofcom.

26 Q Dr. Littlechild, I will make two points. First, we have seen that this is based on active
27 subscribers and that in terms of a measure of market share, if one were to take a share of
28 minutes or a share of market revenues, it would be likely to be a higher figure, right at the
29 start. You accept that. A. It could be yes.

30 Q Secondly, looking at this table, the end position is in fact 2011 - not 2010. So, within the
31 period of the price control we are already on an active subscriber basis at the figure that you
32 indicate in your article to be far from negligible. A. By the end of the period on this
33 assumption here which, as we have established, is not assuming the existence of the price
34 control.

1 Q I will move on. I want to focus on your specific criticism of Ofcom for failing to follow
2 through on its logic for excluding for excluding H3G from price controls which it adopted
3 in the earlier market review period. If you turn to para. 63 of your first report, this is an
4 important paragraph. Picking it up at the second sentence, at the bottom of p.15 of the
5 internal numbering, you said,

6 “Ofcom concluded at the time of the last control that this was not a strong enough
7 argument to offset the disadvantages of imposing a charge control on H3G. It noted
8 that H3G had only about 1 percent of the market. It said that ‘any adverse effects on
9 consumers were likely to be small given H3G’s very small subscriber base relative
10 to the wider mobile sector”.

11 You quote the decision of the MCT statement at para. 2.39. You then say,

12 “H3G’s market share is now about 4 percent, but the logic of Ofcom’s previous
13 argument still applies”.

14 You have that? A. Yes, I do.

15 Q That remains your opinion? A. Yes.

16 Q Could you please turn to Bundle B, p.15, para. 2.39. You see there, as you pointed out,
17 half-way through the paragraph, that,

18 “H3G, which was using its 3G network to terminate voice calls, still had less than 1
19 percent of the mobile subscribers in the UK. Consequently, Ofcom determined
20 there was insufficient evidence to conclude that regulation of 3G termination
21 charges was a proportionate approach. Any adverse effects on consumers were
22 likely to be small given H3G’s very small subscriber base relative to the wider
23 mobile sector”.

24 So far, so good. The final sentence,

25 “As noted above, all 2G/3G MNOs now terminate some voice calls on their 3G
26 network, and H3G’s subscriber volumes have increased greatly”.

27 Now, before commenting on that, if you would turn to two further references on p.114 you
28 will find para. 7.28. This is a paragraph we have looked at before, but I want to concentrate
29 on a sentence which was not emphasised.

30 “Ofcom is not persuaded by H3G’s argument that, because it has relatively few
31 subscribers, regulation will be of limited net benefit [i.e. any regulation]. First H3G
32 will grow over the period of the control and off does not consider that the
33 consequent volume of terminated minutes will be insignificant”.

1 Finally, para. 7.56 at p.119 of the bundle. A similar point about Ofcom's judgment that the
2 competitive distortions will be material particularly as H3G grows.

3 Dr. Littlechild, it appears from this that Ofcom did address its mind to the point, and it did
4 reach a judgment that H3G was no longer too small to warrant a unique amnesty from any
5 form of price control. We see that at least. A. Where do you specifically say that it
6 reached that view?

7 Q In each of the paragraphs which I have just taken you to - and in particular if you take your
8 own para. 2.39 where you say that Ofcom failed to follow through on its own logic -- The
9 final sentence,

10 "H3G's subscriber volumes have increased greatly. Previously, the argument that
11 Ofcom had been influenced by was that it was so small to conclude that regulation
12 was a proportionate approach. But, now it has exercised its judgment in view of the
13 fact that the subscriber volumes have increased greatly".

14 The point I am putting to you, therefore, is that it did follow through on its logic, based on
15 the evidence that it sought. A. It's true to say that it did refer to the consequent volume of
16 terminated minutes being significant. So, it is forming a view that whereas it previously
17 was insignificant, these number of minutes are now significant. That is true. I would say
18 that it does not go into much more detail of its thinking as to what the adverse or, for that
19 matter, advantageous consequences of regulation are, but I take your point that it refers
20 there to looking at the change in the volume of minutes.

21 Q I will move on to another topic, which is H3G's behaviour in setting termination charges.
22 This is the second factor which you referred to in para. 37 of your main report as a matter
23 that should have been taken into account by Ofcom, but which was not taken into account.
24 You said there, to remind ourselves, that Ofcom needs to acknowledge in its economic
25 assessment this - that 'H3G has generally held its mobile termination charges below the
26 H3G rates of the incumbent operators during the previous control period'. Are those your
27 own words? A. I believe I took these from the notice of appeal, and I took that as being
28 accurate in the absence of any reason to think otherwise.

29 Q That is very helpful. Are you then suggesting as a matter of fact that H3G has, in
30 accordance with what you took from the notice of appeal, refrained from charging other
31 operators as much as it thought it profitably could? A. I took this to be an accurate
32 description of the situation. Clearly, if it is not an accurate description, then that would be
33 something for Ofcom to take a view on. But, that was the basis on which I was making that
34 assumption.

1 Q That is extremely helpful, and it enables me to go more quickly on this. In the first part of
2 the previous control period, which began in September 2004, or thereabouts, do you know
3 what were the 3G rates of the incumbent operators or ----

4 THE CHAIRMAN: Dr. Littlechild does not give evidence as to what the rates were, or whether
5 they were higher or lower. That evidence is given by other witnesses.

6 MR. TURNER: So, we can discount this factor.

7 THE CHAIRMAN: It is a matter for submission rather than something that needs to be put to Dr.
8 Littlechild, I would have thought.

9 MR. TURNER: Yes. In that case, I am grateful, madam. I will leave that line of questioning
10 alone, and go to the question of economic principle. On the level of pure economic
11 principle, when you are considering the likelihood of an operator such as H3G exercising
12 restraint in its pricing, you have yourself summarised the general position concerning the
13 effect of monopoly power under a CPP system in your article which is in Bundle C1A at
14 Tab 4 - Mobile Termination Charges - Calling Party Pays. Could we turn to that, please?
15 This is April 2004, revised in January 2006. If you go to p.81 at the top,

16 “Why is widespread and severe regulation needed in what otherwise seems to be a
17 flourishing and competitive industry? It is increasingly recognised that the high
18 termination charges reflect monopoly power created by the Calling Party Pays
19 (CPP) principle, which is used throughout Europe and most other countries.
20 Armstrong showed that the ‘bottleneck monopoly’ created by CPP, coupled with
21 regulation of fixed networks, provided the ability and incentive to increase
22 termination (or access) charges.

23 Do you have that? A. I do.

24 Q So, under the system of regulation which is in place in the UK, firms like H3G have both
25 the ability and incentive to increase termination charges. A. Yes. The extent of that, of
26 course, is another matter.

27 Q Could we turn to your April 2004 paper while we are in C1A, back at Tab 2, and go back to
28 p.50? In the second column of that page, again under the heading ‘Comments on European
29 Policies’ you say this in the last sentence on that page,

30 “There is also evidence that ‘asymmetric regulation of the larger operators will,
31 ceteris paribus, induce the smaller operators to increase their termination rates even
32 further’”.

33 A. Yes, I see that.

1 Q You hold by that view as well? A. I am just looking to see what this evidence is that I
2 quote there. I am afraid the numbers are so small it's a bit difficult to see. Is the cross-
3 reference there to Independent Regulators' Group?

4 Q This is your footnote ----

5 THE CHAIRMAN: It looks as if it is Footnote 13.

6 MR. TURNER: It is extremely small. That is the evidence that you refer to for that proposition.
7 The question was whether you hold to that proposition. A. The proposition is a quotation
8 from these other authors, and that is a statement of their view, rather than mine. What I am
9 saying is that this may be a relevant consideration to bear in mind - that these people have
10 this view.

11 Q To summarise, I put it to you that there is not, in fact, any basis for assuming that H3G if
12 wholly unregulated would not charge as much as it profitably could for call termination in a
13 situation where it was not regulated and the other operators were regulated. A. Are we
14 going back to the discussion I had before lunch where it seems to me that I am not trying to
15 predict what they would do in a hypothetical, completely unregulated situation. I am saying,
16 taking the situation as we have found it, is there reason to believe that they would abide by
17 an obligation or an understanding not to exceed the previous price?

18 Q No. My question proceeds only the basis of economic principle - whether an unregulated
19 firm in a monopoly position on a particular market would not choose to charge as much for
20 its service as it can profitably do - as a matter of pure economic principle. A. In general
21 firms seek to charge as much as they profitably can. That is constrained by a number of
22 factors in any particular concrete situation. But, would firms like to make more money
23 rather than less? Yes.

24 Q Could we please turn to para. 39 of your second statement? You have been questioned
25 about this before by Mr. Roth. I will seek to avoid duplication. But, we are familiar with
26 this. This is the 16.6 pence issue. You take issue here with Mr. Myers' view that it is
27 reasonable to assume that H3G, in the absence of regulation, would charge at least the price
28 it charged for November 2006, which was 16.6 pence per minute. Yes? A. I have said
29 that I find it very difficult to conceive of this hypothetical situation of no regulation. As I
30 understand it, the 16.6 pence was not a price that was chosen in the competitive market. It
31 was a price that was set as part of a bargaining regulatory discussion situation. It is not
32 representative of what a company in H3G's position would do on an ongoing basis.

33 Q Take the sentence two-thirds of the way down:

1 “It was not and is not the termination charge that H3G would set on a continuing
2 basis in the absence of a price control”.

3 A. Yes.

4 Q A very definite proposition. Is that your own words? A. They are word that I decided to
5 write. They weren't words that were suggested to me.

6 Q You hold to that proposition.

7 THE CHAIRMAN: I think, to be fair, is that sentence still governed by the, “I understand” at the
8 beginning of the paragraph? A. I am sorry, madam. You are correct.

9 Q Or is it your own view? A. No. I think it is governed by that, but it is words that I
10 deduced from that first -- second sentence rather than words that were given to me.

11 MR. TURNER: I am grateful. What is the basis for your understanding? A. These were
12 documents and discussions that I had with H3G. The documents, I think, are ones that may
13 have subsequently been put into evidence during the discussion of this a few days ago.

14 Q When you were a regulator yourself, did you take a company's word for granted about how
15 it would behave in the absence of regulation? A. Well, it would depend on the
16 circumstances. That is why I suggested, in both the statement I made and in the discussion
17 before lunch, the regulator would have to form a judgment as to how reliable any statement
18 or undertaking was from this company, and how important it was to get that in writing -- to
19 get it as a formal undertaking, or not. These are all things you would have to make
20 judgments on.

21 Q Finally on this issue, did you take any steps in this instance, other than the documents which
22 you have mentioned to us, to read any of H3G's business plans or internal documents
23 yourself before giving this as your opinion? A. I haven't looked in detail at those sort of
24 papers, no.

25 Q I will turn to the next topic, which is the third factor you had referred to as Ofcom having
26 left out of account in your para. 37 in your first statement) H3G not yet profitable. You say
27 that Ofcom should have looked at the benefits of regulating H3G when, as a whole, it is not
28 yet profitable, whereas its competitors are relatively established and in aggregate profitable.
29 That was your evidence. A. Yes. It was the benefits and the disadvantages, looking at
30 the whole picture. One would take into account what the financial situation of that company
31 was.

32 Q Just to be clear about exactly what you are saying -- We can look at two further references.
33 In para. 55 of your first report -- We can glance at that. What you say is that,

1 “H3G is a relatively new entrant and is at present loss-making. H3G’s ability to
2 compete with the profitable and established incumbents is undoubtedly hindered, not
3 facilitated, by being required to pay them an additional ... per year”.

4 A. Yes.

5 Q Turning to your second report at para. 54, p.18, you repeat -- re-emphasise the point. If you
6 look at the bottom of para. 54,

7 H3G’s ability to compete with the profitable and established incumbents is
8 undoubtedly hindered”.

9 Yes? A. That is the repetition of the previous point, yes.

10 Q Yes. So, as a preliminary observation, when you are considering H3G’s position you are,
11 Dr. Littlechild, of course aware that H3G is part of a major international group which itself
12 once had a 2G operation. A. Yes, I am.

13 Q You would readily agree that the Hutchison Group can in no way be thought of as a small or
14 inexperienced operation. A. I don’t know that I have said that. But, that would not be the
15 argument I was making here.

16 Q No. But is it a factor which, according to you, is at all relevant? A. Oh, I think it would
17 be relevant to look not only at the particular operation in one country, but the resources
18 could be drawn upon, yes.

19 Q Why did you not mention it? A. Well, I think I would say that I am drawing attention to
20 factors that would seem to be relevant here if Ofcom were to do an appraisal of the kind that
21 I suggested it should. Now, Mr. Myers has pointed out that it did, to some extent, that kind
22 of appraisal, and to the extent that it did, that is fine. But, I am saying, “Look! On the
23 surface -- on the face of it, here is a small entity in this country, having to make additional
24 net payments. That would seem to be a relevant consideration, and at the very least would
25 lead off to say, ‘Well, is that the only consideration or not?’”

26 Q I will move on. In your comparison with the overall position of the other operators, you are
27 not suggesting, I apprehend, that they are each individually profitable where H3G is not?

28 A. I am sure that there is a difference in position between the incumbent operators. I think
29 Ofcom, or someone, has pointed out that in fact at a certain period one of the operators - T-
30 Mobile - was indeed unprofitable in some sense at certain times.

31 Q Have you looked into that at all? A. I haven’t examined the background of that.

32 Q In fact, will you take it from me, as you mention T-Mobile, that T-Mobile was still making
33 operating losses in 2006 - losses of £166 million after deducing interest? We can produce
34 the figures, but if you will take it from me ----? A. Well, that’s fine. I don’t think that

1 changes the force of my statement. I'm not saying that all loss-making companies, however
2 they be defined, should be regulated differently. I am saying that is one factor which may be
3 relevant to take into account in assessing the impact of a price control on a company.

4 Q Dr. Littlechild, we are concerned here with the question of whether a particular company -
5 H3G - should be given a unique regulatory dispensation from price control -- from any form
6 of price control. Now, is it a factor that would be relevant to an economic assessment to
7 note that one of the other incumbent operators, as you put them, is also unprofitable, given
8 the comparison that you have drawn in your report? A. It could be. I think one would
9 need to look at the particular basis of calculating profitability, and I think one would need to
10 bear in mind that depending on the time at which this unprofitability occurred, it could have
11 a different impact. All these things could be relevant.

12 Q May I pick up on what you have just said, however, about the measure or profitability? You
13 commented in your main report that the other operators have made an aggregate return on
14 capital employed which exceeds Ofcom's current estimates for the cost of capital. Do you
15 recall that? A. That was Ofcom's statement, as I recall.

16 Q And which you have reflected in your report as a point that should have been taken into
17 account. A. That would be something that I think, amongst other things ought to be taken
18 into account, yes.

19 Q You continue to think it is a significant point. A. I think Ofcom would need to look at all
20 these points. It might come to the view that certain of them are not as significant as they
21 might appear at first. That is for Ofcom to decide.

22 THE CHAIRMAN: Mr. Turner, I am sorry to stop you, but you are now over the hour that you
23 said that you were going to be before you pared down your questions to the absolute
24 minimum.

25 MR. TURNER: Madam, I appreciate this is a counsel's estimate, if you will give me the
26 indulgence of five minutes.

27 THE CHAIRMAN: All right. You can have an extra five minutes, and then we really must move
28 along.

29 MR. TURNER: Yes. Dr. Littlechild, if you would turn to Bundle B and go to para. 2.26 of the
30 MCT statement? This is a short point. You referred in your report - and I think you gave a
31 mistaken reference for the record of 2.27 - at the end of that paragraph to the point that you
32 picked up for your report, which is that in recent years the four 2G/3G MNOs, excluding
33 H3G which has made losses today, have made an aggregate ROCE of around 16 percent

1 which slightly exceeds Ofcom's current estimate of the pre-tax nominal weighted average
2 cost of capital for the industry of 14.6 percent. A. Yes.

3 Q Would you first agree that ROCE figures should be treated with caution? A. Yes.

4 Q Ofcom in fact said that the aggregate ROCE slightly exceeds Ofcom's current estimate for
5 the industry - an adjective that was omitted from your report? A. Yes.

6 Q And Ofcom point out also there that they omit in that ratio 3G spectrum costs from the
7 calculation of ROCE. A. Yes.

8 Q Dr. Littlechild, given the time I will ask you questions on only one further topic. I want to
9 turn back to the issue of new entrants and traffic imbalances. It may be possible to take this
10 quite quickly. Your evidence was summarised, as it boiled down, in paras. 15 and 17 of
11 your third report. I am going to summarise it for you - and I hope I do this fairly: you are
12 not saying that new entrants necessarily have traffic imbalances. That is para. 17. A. Uh-
13 huh.

14 Q Therefore, you also do not say that new entrants necessarily suffer from disadvantages
15 caused by traffic imbalances. Yes? A. Where do I see that?

16 Q No. This my implication from that last proposition which you make in your report. If they
17 do not necessarily have traffic imbalances, they do not necessarily suffer from
18 disadvantages caused by traffic imbalances. A. If they don't have traffic imbalances
19 they would not suffer from that disadvantage. If they did have a traffic imbalance, then they
20 would suffer.

21 Q Yes. You have also accepted that the cause of traffic imbalances might lie with the
22 commercial strategies for a particular operator. A. Yes. I have made the point in
23 discussion that this was -- You have to look at the alternatives available to a company if you
24 are looking at commercial strategies, yes.

25 Q The final document I want to take you to is H3G's own evidence of its commercial
26 strategy which was quoted in Dr. Walker's report. If you would turn to Tab 8 in
27 Bundle K, and go to p.340. This is Hutchison's annual report for 2006. Turn to
28 p.342, the second column. Under the heading 'UK and Ireland' you will see a
29 description there of the strategy adopted by H3G. Picking it up from the fifth line
30 down,

31 "The moderate growth in the overall combined customer base [UK and Ireland] is
32 attributable to the strategy of focusing more on higher value contract customers
33 which grew by 22 percent during the year, and limiting activity in the pre-pay
34 customer market. The benefit of this strategy can be seen in the improved ARPU

1 which increased 35 percent from £34.51 in 2005 to £46.57, reflecting improving
2 quality of a customer base”.

3 Now, it seems that these higher value customers make a disproportionate amount of
4 outgoing calls. I am not going to take you back to the evidence we have already
5 seen. Do you, Dr. Littlechild, have any reason to doubt that H3G is not making
6 profits on these outgoing calls and covering the costs of termination charges to other
7 operators in the process? A. I haven't looked at those calculations of costs -
8 incremental costs and incremental revenues. I couldn't give a view as to whether
9 that is the case or not, I am afraid.

10 Q Madam, I have one more questions. I do not know whether you will allow me to put
11 it. Miss McKnight has indicated that she may not require any time.

12 THE CHAIRMAN: Put your final question then.

13 MR. TURNER: This relates to the topic that Mr. Roth very kindly said that he would leave for T-
14 Mobile to deal with. In your third report, at para. 5, this is the point about the
15 possibility that the increased competitive pressure exerted by H3G, as a result of not
16 being constrained by the price control, could stimulate other operators to increase
17 their own productive efficiency. A. This is which paragraph, sir?

18 Q It is para. 5, p.2 of your report. I was reading from your words half-way through
19 that paragraph where you said, “To illustrate, consider the possibility that the
20 increased competitive pressure ----“ You see your point? A. Yes.

21 Q I put it to you that you have got no basis on which to disagree with Mr. Myers'
22 assessment that the retail market was effectively competitive without H3G's entry.
23 A. I think if you are saying, “Has Ofcom come to a formal view that it is what they
24 define as ‘effectively competitive?’” I cannot challenge that if that is a factual
25 statement. What I would be saying is that there are always degrees of competition,
26 and the view that this market is competitive enough is an agreeable view for the
27 incumbents. It may be an acceptable view for the regulator to take. But, whether that
28 means that there is no further scope for efficiency improvements is a different
29 matter.

30 Q Please take it as an assumption that you have a competitive market place. In those
31 circumstances there is no reason to suppose that giving a unique cost advantage to
32 one operator in the form of freedom from any price control will result in overall
33 market efficiencies. A. No, I wouldn't accept that, with respect. If we look at
34 the account that is given of the proposal which is mentioned by Dr. Walker and also

1 the other witness for T-Mobile -- basically, that says, "We were very worried about
2 this, and we asked ourselves how could H3G do this? Can we match it? We
3 concluded we cannot". So, it seems to me that we have evidence there of an actual
4 response. Now, in the event, T-Mobile decided they would not do anything about it,
5 but they were prompted to consider the situation, and I would be very surprised if
6 actions of that kind by H3G did not encourage the companies to say, "Well, if we
7 can't meet them on this ground, is there some other way in which we could meet
8 their competitive threat?"

9 Q May I simply follow your point through? If you go to Tab 8, Bundle K, p.209, you
10 see references to what you have just been referring to. That is the Walker report. In
11 paras. 2.22 to 2.25 you have Dr. Walker's evidence on this topic. But, you are
12 absolutely right in that he refers at para. 2.24 to this We Pay service introduced in
13 January 2006. To refresh our memories,
14 "Under We Pay customers receive 5 pence per minute for calls received and 2 pence
15 per minute for text messages received. With the termination charges of the other
16 operators set closely in line with their termination costs, they would not be able
17 profitably to offer similar cash credits".
18 Then, please, read what Dr. Walker says about that in para. 2.25.
19 "It is important to remember why this is inefficient. H3G's pricing advantage on the
20 retail side of the market as a result of its higher termination margins is not the result
21 of superior efficiency."

22 You can read to the end yourself. But, he concludes,

23 "Competition should be on the merits, not on the basis of an artificial advantage
24 resulting from asymmetric regulation".

25 What Dr. Walker says there is right, is it not, Dr. Littlechild? A. If we were
26 talking about competition between the incumbents in an industry all about the same
27 size, I would agree precisely. My point is that we are not talking about that
28 situation. We are talking about a new entrant here, and the question is: Should a new
29 entrant be allowed to do that kind of thing to offset the difficulties of entry or not? I
30 say there is a case for considering that.

31 Q Madam, in view of the time and the constraints urged on me by the tribunal, I will
32 conclude my questions there.

33 THE CHAIRMAN: Thank you. Miss McKnight, you now do not wish to cross-examine; is that
34 right?

1 MISS McKNIGHT: That is correct. I am also conscious of the time pressures. Thank you. In
2 view of the amount of ground that Mr. Turner covered ----

3 THE CHAIRMAN: Thank you. Do the members of the tribunal have any points they wish to put?

4 MR. SCOTT: I have two short points. The first takes us to Bundle B, to the statement, and to
5 para. 7.56 to which we have already referred. The point is simply this: much of the
6 debate today, and the debate between the experts, has focused on the relationship
7 between the mobile operators. In 7.56 we read, "Neither does Ofcom accept H3G's
8 view that the objections to this approach may be set aside in the case of an MNO
9 with a relatively small market share as the distortions between fixed and mobile
10 sectors remain material - particularly as H3G grows".

11 The question in my mind is: if you had - and you were not - been cross-examined by
12 the fixed network operators, would you have thought that distortions between the
13 fixed and mobile sectors would have caused any of your answers to be different?

14 A. It seems to me that this was one of the benefits of regulation that Ofcom
15 mentioned. It was one of its five. Insofar as we are talking about the mobile sector
16 as a whole versus the fixed sector, and the possibility that no regulation would
17 distort that relationship, I accept that as a valid consideration. My question is:
18 Given that 95 percent by volume (so I take it that the 5 percent is a disputable
19 number) -- given that a very high proportion of that market is regulated, does not
20 regulating the remaining small part make a significant difference? I simply pose the
21 question.

22 Q In that case, can we go to the article in C1A at Tab 2? It is a page to which we have
23 already referred, p.50. The second column, headed 'Comments on European
24 Policies'. In this paragraph you say,

25 "Economists have argued that customers will base their demand for calls on the
26 average price of mobile calls if they are unaware which mobile network they are
27 calling [and most of us do not know which 07XXX number belongs to which
28 network]. Operators will take account of the effect of increasing their termination
29 charges only insofar as this impacts on the weighted average price, and smaller
30 operators will have a smaller impact on that average".

31 Yes, I understand what you are saying. But, the reality in this country is that there is
32 a differential operated at least by BT - I do not know about the other fixed network
33 operators - between the rate that they charge for calls to a number in the H3G series
34 and calls to numbers in other series. My question is simply this: As a matter of

1 inequity, or equitable distribution, would you expect weight to be put upon a
2 significant difference between the amount that a customer is being asked to pay for a
3 call to an H3G number and the amount that a customer is being asked to pay for a
4 call to a non-H3G number, bearing in mind that in either case now that call may be
5 being carried either on a 2G network or on a 3G network, and the same functionality
6 is being provided? A. I think this also relates perhaps to one of the benefits that
7 Ofcom identified. It seemed to me there that if we are talking about regulation or not
8 regulation of mobile operators as a whole compared to fixed operators it might well
9 be possible to identify certain significant social groups between which one could
10 say, "This is equitable", or, "This is not equitable". But, if the four major mobile
11 group operators are regulated, then we just have H3G. Is there really a significant
12 social group, or socially significant group of customers, or other parties where it
13 make sense to say, "Yes, this is inequitable"? It seems to me that we are rather
14 scrabbling to define that set of customers. So, by all means, Ofcom should look at
15 that, but it does not seem to me that it is possible to put a very high weight on that.

16 MR. SCOTT: Thank you.

17 THE CHAIRMAN: Thank you, Dr. Littlechild. Is there any re-examination, Miss Rose?

18
19 Re-examined by MISS ROSE

20 Q If you could take up Bundle B? It was put to you by Mr. Turner that Ofcom's view
21 was that the retail market was competitive without the input of H3G. A. Yes. I
22 think words to that effect.

23 Q If you could turn to p.122, para. 7.70,
24 "Furthermore, Ofcom remains of the view that the waterbed effect is unlikely to be
25 complete. Thus, some excessive profits generated by MCT charges may be retained
26 by MNOs at the expense of consumers paying excessive prices since the mobile
27 retail market may not be sufficiently competitive for all excess profits to be
28 competed away".

29 Do you have any comment on that? A. Yes. I understand that point. It seems to
30 me Ofcom is saying that for certain purposes it is effectively competitive, but they
31 say here, not just in that paragraph, but elsewhere, "But we're not sure we can rely
32 on that". So, I think there is a doubt about Ofcom's view on that.

33 Q I have no further questions. Thank you very much, Dr. Littlechild.

34 (The witness withdrew)

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MISS ROSE: We have to decide whether the next witness is going to be Dr. Walker, who I understand cannot come tomorrow, or Mr. Myers.

THE CHAIRMAN: Are there still questions that you wish to put to Dr. Walker?

MISS ROSE: Yes, there are, madam, certainly. Can I just explore with the tribunal what your current intention is in relation to the timetable? You will appreciate that Dr. Littlechild has been cross-examined for about four hours. It is now ten past three. Your proposal this morning was that we should deal with all three of the experts and that I should commence my submissions. I confess to feeling slightly daunted by that prospect as being the agenda from ten past three this afternoon onwards. But I would just like an indication from the tribunal of how late you envisage sitting; how far you envisage getting, because I do have significant cross-examination for both of these witnesses.

THE CHAIRMAN: I will just confer with my colleagues. (After a pause): Miss Rose, how long, being as quick as you can, do you think you need to cross-examine the two witnesses?

MISS ROSE: Madam, I would anticipate that I would need at least as long as was spent cross-examining Dr. Littlechild. At least four hours.

THE CHAIRMAN: To cover them both?

MISS ROSE: Yes, madam.

THE CHAIRMAN: It is very difficult to produce timetables that then the parties do not adhere to. We will sit today until five-thirty, and try to get through one of the witnesses, or certainly get through one of the witnesses. Then we will have to sit early tomorrow to do the second witness.

MISS ROSE: In that case, madam, we probably ought to take Dr. Walker first.

DR. MIKE WALKER, Sworn
Examined by MR. TURNER

- Q. Dr. Walker, do you have in the witness box a bundle marked 'K'? (Handed) A.
Yes.
- Q Can you turn in it to Tab 8? Is that a copy of your report? A. Yes.
- Q Can you turn to p.228? Is that your signature? A. Yes.

1 Q Is there anything in this report which you would wish to withdraw or correct? A.
2 No.

3 Q Madam, Dr. Walker is available for cross-examination.

4 THE CHAIRMAN: Can I just remind everybody that the issue before the tribunal is the question
5 of whether there should be any price control and not the question of what the level
6 of price control will be?

7

8 Cross-examined by MISS ROSE

9 Q Dr. Walker, if we just take up your statement, you identify yourself in that statement
10 in the first paragraph as an expert on the economics of competition law and policy.

11 A. Yes.

12 Q You are here to give expert opinion evidence about the economic issues in this case.
13 That is right, is it not? A. Yes, I am.

14 Q If we look at para. 1.4 of your statement there seems to have been a little truncation
15 there, because you appear to set out there what the issues are that you are going to
16 comment on with a colon, and then the issues themselves appear to have not found
17 their way into the statement. Do you see that? A. I do see that. The issues that I
18 cover are set out at 1.8. I'm sorry. That's obviously a typo glitch.

19 Q You do not purport, do you, to have any underlying knowledge of the facts of this
20 case? A. I'm not quite sure what that means. Of course I have knowledge of the
21 facts of this case.

22 Q You are not a witness of fact. A. No. I am not a witness of fact.

23 Q Neither are you an expert in the conduct of H3G's commercial affairs, are you?

24 A. I am not an expert in H3G's commercial affairs.

25 Q You indicate at the end of your statement in the standard declaration of an expert
26 that you understand your duty to the court and that it overrides your obligation to T-
27 Mobile who have retained you. You see that? A. I do see that.

28 Q And that you have complied with that duty. A. I have complied with that duty.

29 Q You understand, do you not, that it would be inconsistent with that duty for your
30 statement to stray beyond the matters of expert opinion into assertions of fact
31 designed to bolster T-Mobile's case. That is correct, is it not? A. I guess that's
32 correct, although obviously there will be assertions of fact that are accepted fact that
33 I will base my evidence on. Essentially I'm an empirical economist and so of course
34 I base my evidence on facts.

1 Q You of course make factual assumptions, but you are not in a position to indicate
2 which facts, where they are in dispute, should be accepted, are you? A. Not if
3 they are in dispute.

4 Q Can we just turn now to s.6 of your statement at p.220? This deals with the welfare
5 analysis. At para. 6.2 you say that you have previously criticised certain
6 assumptions of Ofcom's welfare analysis as applied to the five MNOs and that you
7 stand by those criticisms. Can you briefly tell us what those criticisms were? A.
8 Yes. I mean, I suppose, formally of course it was actually in the context of the CC
9 inquiry. So, it was only four MNOs then that were being looked at. There were a
10 number of issues with Ofcom's cost benefit analysis with which I disagreed. I think
11 the most important ones would be (1) that the cost benefit omitted CARs costs -
12 costs of acquisition and retention - as being a common cost. That seems to me to be
13 a mistake. Also, it did not base itself on ... prices. Again, that seemed to me to be a
14 mistake. In the CC inquiry, both of those issues were significant issues.

15 Q Was the effect of those criticisms that Ofcom's welfare analysis tended to over-state
16 the welfare gains of price control? A. In the 2002 inquiry, yes, certainly.

17 Q Would that still be so? A. Well, yes, I still think that if you omit CARS costs then
18 you will end up with the wrong pricing structure. Again, ditto, with reality prices -
19 although to be fair to Ofcom, they have moved away from equal proportional mark-
20 ups towards assigning common costs on the basis of routing factors, which it turns
21 out is closer to reality pricing than proportional mark-ups were.

22 Q If we go to para. 6.3 of your statement, you say that it is reasonable to argue that
23 regulators should consider the costs and benefits of regulating a specific operator.
24 Why do you say that? A. Because I think it's a reasonable thing to do.

25 Q Yes. Why? A. It seems to me that if you are looking at regulating an industry, it
26 is a perfectly reasonable thing to do, to look at regulating individual companies, or
27 not regulating individual companies. Of course, this is something that has been done
28 in the past. Back in 1998 we had Vodafone and Cellnet networks explicitly
29 regulated, and Orange and One2One as they then were were regulated in a different
30 way. It wasn't formally regulated. I don't think that's unreasonable.

31 Q Will you agree that it is particularly important to consider the costs and benefits of
32 regulating a specific company if the company in question is one out of five operators
33 which is much smaller, which is a new entrant, and which is the company upon
34 which the proposed regulation will have by far the most serious adverse effect? A.

1 No. I don't think that's reasonable, no. I think you should look at that question in
2 the same way as you would look at the question for any other operator.

3 Q I am not sure that you followed my question. You are not suggesting that in that situation it
4 would be reasonable not to consider the costs and benefits of regulating that individual
5 company, are you? A. No, you seem to be affording it a special status amongst the five.

6 Q So you are saying that each of them should be considered as an individual? A. No, I said
7 that is not unreasonable.

8 Q Let me ask you the question this way: do you think it is reasonable not to consider the
9 particular circumstances of the one company in that situation? A. No, I think it is – this
10 may not be an answer to the question because I am confused by the number of negatives. I
11 think, if you are looking at H3G, clearly you look at the factors that are relevant to H3G, but
12 that would go for any operator.

13 Q Of course, it is right to say, is it not, that Ofcom did not do that in this case? A. No, I do
14 not think it is right to say that Ofcom did not look at the specific factors relevant to H3G. I
15 think that has been discussed at some length this morning and in the expert evidence and I
16 do not think that is right.

17 Q If we consider specifically the welfare analysis, will you accept that Ofcom did not consider
18 the specific welfare gain of regulating H3G? A. It did not look at the specific welfare
19 gain reflected just in the pricing structure as part of its March 2007 consultation. That is
20 very different from saying they did not look at the benefits or disbenefits of regulating or
21 not regulating H3G.

22 Q In relation to the welfare analysis you would accept that they did not? A. The distinction
23 I am making – when you say “welfare analysis” – is the welfare analysis, as it is so called,
24 merely talks about the structure of prices. So I do not want to give the impression that I am
25 suggesting that Ofcom did not look at the welfare effects of not regulating Hutchison,
26 because I think they did. It is just in terms of the structure of prices, which is all their
27 welfare model does.

28 Q You then come on to consider the welfare analysis done after the event by Mr. Myers in his
29 reports, and the commentary upon that by Dr. Littlechild. You identify at para.6.5 an issue
30 which is now common ground, I believe, between all three of you. Then at 6.6, you identify
31 the second important question, the question of what price of H3G would set in the absence
32 of regulation? A. Yes.

33 Q As it turns out, given that everybody agrees about the methodology for this welfare analysis
34 in every respect, this is the critical question, is it not, for the welfare analysis? A. Well,

1 this question, and the issues surrounding it, yes, they are what drive the difference in the
2 estimates between Professor Littlechild and Mr. Myers.

3 Q The answer to this question, what price would H3G set in the absence of regulation,
4 depends on a number of factors. Can I just suggest to you what they are: firstly, the extent
5 of the end-to-end obligation on BT – do you accept that? A. I am not sure what the initial
6 premise is. We are talking about what price would be set in the absence of regulation – is
7 that right?

8 Q Yes. A. And you are telling to disregard or to not disregard end-to-end?

9 Q I am asking you to consider end-to-end. Is it your position that that should be disregarded?

10 A. No, my position – I do not understand the question, I am sorry for being slow.

11 Q You do not understand the question? A. No.

12 Q So you do not know whether end-to-end should be taken into account or not? A. No, that
13 was not my comment. My comment was – ask your question again and then I will give you
14 a response. Sorry, could you clarify what your question is?

15 MR. SCOTT: Can I ask this question: you have before you in the witness box somebody who is
16 an expert in economics. Are you asking this question as a matter of economics or as a
17 matter of law?

18 MISS ROSE: Sir, if you would let me finish this line, I think you will understand very shortly
19 why I am asking this question. When considering the question of what price H3G would
20 charge in the absence of regulation of H3G, is it your position that the extent of the end-to-
21 end obligation on BT should be taken into account? A. Yes. The end-to-end obligation
22 imposed an obligation on BT to interconnect, that seems to me that it is relevant to what
23 price we would expect to see set in that market between BT and the MNO.

24 Q Because it is relevant to the way that those parties would negotiate, as we have seen?

25 A. It is relevant to BT's outside options, and therefore the way those negotiations would go.

26 Q Therefore, would you also accept that the question of what is properly to be regarded as a
27 reasonable price for the purpose of the end-to-end obligation is relevant to the question of
28 what price could be charged by H3G? A. Well, it seems to me that if the constraint on
29 the price that would be set between BT and the MNO is contingent on what Ofcom would
30 decide was a reasonable price, then the answer is, it depends on what Ofcom would decide
31 was a reasonable price. That does not seem to me really a matter of economics. I think that
32 is just a matter of common sense, as I understand the question.

1 Q We are not bringing Ofcom into this situation. You understand, do you not, that the end-to-
2 end obligation is only an obligation to connect at a reasonable price? A. Yes, you talked
3 about that yesterday.

4 Q Therefore, the question of what is or what is not a reasonable price is relevant to the price
5 which could be charged by H3G? A. That is obviously true, but what is a reasonable
6 price within this context? It is surely dependent on what the regulator thinks is a reasonable
7 price. That seems to me the same as if we are in a competition setting where it is all very
8 deceptive pricing. It is not defined. It is not 10 per cent or 20 per cent. It is dependent on
9 what the relevant competition authority decides to assess it in that case.

10 Q The question of what price H3G would charge would also depend on H3G's own policy in
11 relation to prices, would it not? A. Well, it would certainly depend on H3G's own
12 particular circumstances, yes.

13 Q And its commercial strategy? A. Yes, it would depend on what it thought was ultimately
14 the profit maximising thing to do.

15 Q Neither of these are issues of economics, are they, they are questions of fact? A. Well, I
16 think the idea that a company will set the profit maximising price, which is what I just said I
17 would expect Hutchison to do, strikes me as – I would think of it as common sense, but it is
18 certainly a piece of economics as well.

19 Q Yes, but you have to go on from that proposition, do you not, and say in the market
20 circumstances in which it finds itself? A. Well, yes, you can only try and set the profit
21 maximising price ----

22 Q Which increase the factors I have identified? A. Which I think is contingent in this case
23 on what Ofcom would think a reasonable price was, yes, because that is my understanding
24 of the relevance of the end-to-end obligations.

25 Q If we go back to para.6.6, you take issue with the question of what the price would be that
26 H3G would be able to charge or would be likely to charge. You refer to the fact that
27 Mr. Myers argues that we are likely to be substantially higher than a 10.5 price and refer to
28 the fact that H3G raised its prices for the period 17th January to 31st March to more than 16
29 ppm.

30 “This shows H3G had the ability to raise prices to this level and so it seems more
31 reasonable to assume that in the absence of regulation H3G would raise its prices
32 to at least this level rather than try to sit around 10.5ppm.”

33 Will you accept that you are not really in a position to make that judgment? A. No, I do
34 not accept that at all. The 16.6ppm was a price that was set – it is part of the TRD disputes,

1 it was set within that context, it is the price that Ofcom essentially said was a reasonable
2 price. There was an issue because BT would not be able to backdate some of it, so it is
3 15.9ppm, but that was a price that, in my understanding, Ofcom had decided was a
4 reasonable price. I would expect Hutchison, if it was not regulated, to want to charge a
5 price at that level or more, if it thought actually that Ofcom would allow a higher price to be
6 a reasonable price.

7 Q We will leave aside the question of whether it is a reasonable price, because that, of course,
8 is one of the very issues that is for decision on this appeal? A. No, I do not think that is a
9 fair thing to leave aside because the context of the 16.6ppm was an actual dispute in which
10 Ofcom said that this was a reasonable price.

11 Q Yes, but that is under appeal, is it not, Dr. Walker? A. It is under appeal, but that is the
12 basis for my analysis.

13 Q You refer to the 16ppm and say that this shows that that is what H3G would do, but you are
14 not aware, are you, of the detailed factual circumstances in which H3G came to set that
15 price? A. I do not say that is a price that Hutchison would set. The price that Hutchison
16 actually set might be higher, it might be lower. It seems to me it is a reasonable estimate
17 based on the evidence that we have. I do not have access to Hutchison's internal strategy
18 documents.

19 Q Can I suggest to you that it is not for you in this case to assess the evidence, it is for you to
20 express opinions on matters of economics? A. I am an empirical economist, I am afraid I
21 express opinions on the basis of evidence. I think the idea that I should come to this
22 Tribunal and express opinions in the absence of any evidential basis is frankly ludicrous.

23 Q It was for Ofcom, was it not, to assess this question? A. Of whether 16.6 was reasonable
24 and, yes, they did.

25 Q No, not that question. It was for Ofcom to assess the question, what is the price that H3G
26 would be able and incentivised to charge in the absence of price control? A. It seems to
27 me that is a question that Ofcom should look at and of course does look at that in that part
28 of its welfare analysis. It has two counter-actuals.

29 Q Can you show me anywhere in the MCT statement where Ofcom addresses or answers the
30 question, what price H3G would be capable or incentivised to charge in the absence of price
31 control? A. Yes, I think in the welfare analysis Ofcom assumes what they float as a
32 monopoly price of 23 point something pence per minute. My interpretation of that would
33 be that that is the price that they would expect operators to set in the absence of charge

1 control, and they also do this sensitivity analysis with 14.5ppm being a mid-point between
2 the actual regulator charge and the monopoly charge.

3 Q They nowhere consider that question in relation to H3G, do they? A. They nowhere
4 separately consider that question in relation to H3G – well, I think it is not unreasonable in
5 the welfare analysis to assume that the monopoly price, given the logic of SMP. In the
6 market definition the SMP issue is that the monopoly price for the operators would be
7 similar. In fact, as we have heard, there is some evidence that small operators might have
8 an incentive to charge a slightly higher price. So I do not think that is unreasonable. If you
9 are asking me whether there is somewhere in the MCT a statement where it says, “We
10 looked at the monopoly prices individually for the five operators”, no, there is not.

11 Q Of course, the use of that price necessarily implies that the monopoly price would be a
12 reasonable price for the end-to-end obligations, does it not? A. No, I am afraid I am not
13 sure that is something that I understand or, if I do understand it, think it is for me to answer.
14 Ofcom decided that the monopoly price would be around 23ppm and they carried out their
15 welfare analysis on that basis, plus on the 14.5ppm.

16 MR. TURNER: I hesitate to interrupt, but in order to avoid confusing the witness, it would be
17 very helpful if Miss Rose could distinguish questions designed to elicit answers that he can
18 answer on the basis of his expertise from legal questions. Instead of mixing them up, if
19 there is a point which we are coming to, perhaps we could put that point now.

20 MISS ROSE: Madam, we have already come to the point, and it has been dealt with. If we go to
21 para.6.9 now, you make some comments about market share. You refer to alternative
22 measures of market share, such as total market revenue and share of minutes – do you see
23 that? A. Yes, I see that.

24 Q These are not measures that were relied on by Ofcom, were they? A. In what sense?

25 Q In its decision. A. Well, Ofcom looked at the size of Hutchison as being a relevant factor.
26 One of the important things that it looked at was it decided that it was unreasonable to
27 assume that H3G could avail itself of the same economies of scale as the other operators,
28 because it would have a smaller market share during the charge control. So it allowed for
29 the market share to be 12.8 per cent at the end of the period. Given that we are talking
30 about economies of scale, the logic is that it is a traffic market share that matters.

31 Q Just trying to focus, the measure that Ofcom used for market share was active subscribers,
32 was it not? A. That is the number that is in their model, but their model assumes that one
33 would think about economies of scale. Subscribers, traffic, will be equivalent. It is not a
34 particular issue that they deal with.

1 Q Do you suggest that Ofcom was wrong to use that measure of market share, active
2 subscribers? A. I do not think it is an unreasonable market share to use. When we are
3 talking about economies of scale, which is why it matters here, it seems to me traffic is a
4 better measure, because it more accurately reflects to the actual economies of scale that
5 operators can take account of. I do not think subscribers is unreasonable.

6 Q If we look at the fourth bullet point under para.6.9 ----

7 MR. SCOTT: Miss Rose, just while we are on para.6.9, do we take it that you accept the figures
8 as reasonably accurate?

9 MISS ROSE: Yes, sir, we do. The fourth bullet at 6.9, you say that:

10 "H3G has at least until very recently had a publicly avowed policy of aiming to
11 attract high value customers and limiting activity in the prepaid customer market.
12 This will tend to depress H3G's subscriber share compared with its revenue and
13 traffic shares. This is a commercial decision by H3G and cannot be used to avoid
14 regulation."

15 You are not in a position to comment, are you, on whether the commercial strategy adopted
16 by H3G was one in relation to which it had a choice? A. I am not sure that is entirely
17 correct. I can express an opinion, and maybe the tribunal will think I do not have a basis for
18 it, but I do not think that is entirely correct.

19 Q Do you have the detailed knowledge about the commercial calculations performed by H3G
20 and the options that were open to it in trying to enter this market? A. No, but that is, of
21 course, a different question.

22 Q Why is it a different question, Dr. Walker? A. Well, because you do not have to have a
23 detailed knowledge of every company's strategy and internal thinking to be able to make
24 observations like, for instance, a significant number of MVNOs have come in and been very
25 successful, and to note that it is not clear why a new entrant, even a network operator, could
26 not also choose to come in as an MVNO. That seems to me just an observation based on
27 the facts in the market and a reasonable conclusion for me to draw.

28 Q But will you accept that you are not in a position to express a view to this tribunal as to
29 whether or not H3G was constrained in its commercial strategy in entering this market?

30 A. Again, that is another different question. Of course they are constrained in their
31 commercial strategy. Every firm is constrained in their commercial strategy by the exact
32 circumstances of the market when they enter.

33 Q To the extent that H3G was constrained to adopt this strategy by particular competitive
34 conditions in the market which might include distortions in the market, will you accept that

1 that is something that should be taken into account in regulatory decision making? A. In
2 the context that we are talking about, I am not sure I agree with that, because Hutchison
3 entered the market knowing how the market was, knowing what the stated development of
4 3G technology was, and it seems to me that they have to take that account in their entry
5 decision. It is not clear to me that it is incumbent on a regulator to take account of that for
6 them. So I am afraid I do not think that what Miss Rose has suggested is actually right.

7 Q If the regulator is aware that a new entrant is suffering a disadvantage in entering the market
8 because of distortions in the market, do you not think that is something the regulator should
9 take into account before imposing onerous regulation on that entrant? A. There it clearly
10 depends what we mean by “distortions”. Certainly there are distortions that might be
11 relevant to that question, so, in that sense, yes, I agree. But you have to specify what those
12 distortions are.

13 Q At para.6.10, you comment that the figure for market share referred to by Dr. Littlechild
14 does not seem to be a robust basis on which to hang a decision of whether or not to impose
15 regulation, but you do not suggest, do you, that if that figure is in the right ballpark that it is
16 unreasonable to suggest that it is too low for regulation? A. You are right that I do not
17 suggest that if 4 per cent was a correct that therefore Hutchison should not be regulated.

18 THE CHAIRMAN: Now I am rather lost. A. I may have got that wrong myself.

19 Q It is not suggested that the 4 per cent figure of active subscribers is inaccurate.

20 MISS ROSE: No.

21 THE CHAIRMAN: What is suggested is that there may be other market share figures which are
22 more relevant?

23 MISS ROSE: Also relevant, although not considered by Ofcom.

24 THE CHAIRMAN: Not considered by Ofcom, but considered by Dr. Walker.

25 MISS ROSE: But he does not suggest that if 4 per cent is the right figure that it means that that
26 figure is so high that H3G should be regulated. A. I misunderstood your question. I
27 thought your question was exactly the opposite. I made no comment at all about 4 per cent,
28 whether 4 per cent is high enough or not high enough.

29 Q Will you agree that if 4 per cent is the right figure for market share the impact on
30 competitors or consumers of H3G having an unregulated price is likely to be pretty small?
31 A. No, I do not agree with that, because if the 4 per cent subscriber share figure is correct
32 that does not move us away from the other market shares which I think are more relevant to
33 the question of harm. If we are thinking about, for instance, harm to other operators from
34 paying a higher termination charge to Hutchison than they, themselves, received, then

1 clearly it is outgoing traffic of Hutchison that is important. Clearly it is their market share
2 of that figure which is important, and we know that that is higher than 4 per cent. That is
3 one of the aspects of Hutchison, that it had a lot of outgoing minutes. So I do not think that
4 you are right, Miss Rose.

5 Q Your suggestion is that there are other more relevant measures of market share which
6 should have been taken into account by Ofcom, but which do not feature anywhere in the
7 MCT statement. On that basis, that would suggest that Ofcom should look at this again,
8 would it not? A. Well, my understanding of the way the welfare limit modelling works,
9 which is where these economies of scale issues come in, is that effectively the 12.8 per cent
10 subscriber share is treated as equivalent to a traffic share. So the relevant measure is in their
11 model, because they are looking at economies of scale. That is my understanding.

12 Q You are not suggesting that they actually looked at these figures, are you? A. They
13 actually looked at?

14 Q The figures that you give? A. No, these figures that they give are not in the MCT
15 statement.

16 Q You also complain, if we go back to your statement, that Dr. Littlechild – para.6.11 –
17 suggests 4 per cent is too low, but does not say what figure would not be too low. Do you
18 see that? A. Yes.

19 Q That is not a matter for him to assess, that is a matter for Ofcom to assess, is it not? A. It
20 depends what we think that Professor Littlechild is doing. If we think he is merely saying,
21 “I do not think Ofcom has done enough”, then that is right. If we think he is saying
22 something more, and certainly after I had read his statement I thought he was saying
23 something substantially more than that, then I think it is a reasonable point that I make.

24 Q My point is a slightly different one, which is that it was a matter for Ofcom to answer that
25 question. If 4 per cent is too low for regulations, what is the right point at which regulations
26 should bite? That was a question Ofcom needed to address. A. Of course. If you are
27 going to say something is too high or too low you must have a benchmark.

28 Q Do you accept that Ofcom did not address that question in the MCT statement? A. No, I
29 do not accept that Ofcom did not address the question of the issue as to whether Hutchison
30 was too small or whether it was large enough. They may not have done it specifically
31 overtly in terms of market shares, but I think it is quite clear that they did address their
32 minds to the question of, is Hutchison now large enough that it could cause a distortion on
33 the market.

34 Q Paragraph 6.12, you say towards the end of that paragraph that the market share of an MNO

1 ---- A. Sorry, may I just read the paragraph – sorry to interrupt you. Thank you.

2 Q You say the market share of an MNO is irrelevant to whether net termination payments for
3 an operator are positive, negative or zero, instead it is dependent upon whether the MNO’s
4 customers make more calls than they receive and on the relative termination rates that the
5 MNOs can charge. In other words, the impact of the termination payments regulation
6 depends, firstly, on the balance of traffic of that operator, and secondly, the relative
7 termination rates that they can charge – correct? A. No, that is correct. This comment is
8 nothing at all to do with impact and I make a later point, or maybe an earlier point, about
9 how traffic imbalance is irrelevant compared to impact. This is just a statement about when
10 net payments – and I am not saying they are important, I explicitly say they are not
11 important – as to whether net payments will be positive or negative and under what
12 conditions. The point I am making is that it is not reasonable to say, it seems to me, it is not
13 right that a new entrant will necessarily have a traffic imbalance in one direction or the
14 other.

15 Q But if in this particular market the new entrant does have a traffic imbalance because of
16 competitive distortions in the market, will you accept that then does become a relevant
17 consideration for the regulator? A. The relevant consideration there will be the
18 distortions in the market, not the traffic imbalance. The way the question is asked, the
19 traffic imbalance is put as a symptom of distortion – it is not said what they are – clearly it
20 is the distortions which is the relevant issue there.

21 Q Clearly the regulator should sort out the distortions in the market, and would then be in a
22 position to regulate price controls in a fair manner – correct? A. It seems to me that the
23 regulator’s job is to deal with the distortions, or one of their jobs, yes.

24 Q But if the regulator does not deal with the distortions in the market and then imposes a price
25 control on the party that is disadvantaged by those distortions in the market, that may have a
26 very inequitable effect on that party, might it not? A. As a matter of logic, it might. It
27 might equally have very little effect. You can imagine that a distortion that has a small
28 impact on a particular competitor, and therefore you still want to price control them because
29 there is a significant detriment to not price controlling them. So to that extent it is a very,
30 very contingent question. It is a “might” question. Yes, it might.

31 Q So this does depend very much then on the regulator’s assessment of the extent to which
32 there is a competitive distortion in the market that is causing a traffic imbalance and the
33 extent to which the price control is going to have an adverse affect on that party as a result?
34 A. But the traffic imbalance is completely irrelevant here. If there is a distortion that leads

1 to traffic imbalance that has, therefore, an adverse on the market, you need to identify that
2 distortion and deal with that distortion. That does not mean you do not price regulate. It
3 means you deal with that distortion.

4 Q But if you do not deal with that distortion and do not even analyse what the causes of the
5 distortion are then your price regulation is likely to be unfair in its effect? A. No, that is
6 not true. It is quite possible to have a distortion that has a small impact on a market, of
7 course it is. It would be very helpful if we could phrase this discussion within an actual
8 distortion that I can talk about rather than a hypothetical, because all hypotheticals are true,
9 “Of course, it could”, but I cannot provide expert evidence without something to hang it on.

10 Q What you are saying is that it really depends on the extent of the adverse effects on the
11 particular party of the distortion in the market concerned and that you have to weigh that
12 against the benefits of symmetric price regulations? A. I am not saying that at all. They
13 are two distinct issues. Really it would be much easier if we had something concrete to talk
14 about.

15 MR. SCOTT: Sorry, just to interrupt you, I think that what you have just said about symmetric
16 price regulation, Ofcom have already given away that point. We are not arguing symmetric
17 price regulation, we are arguing asymmetric price regulation.

18 MISS ROSE: Yes, I accept that, sir. A. The point I was making, it seems to me if you have
19 two distortions in the market or two regulatory issues, one of which SMP in termination
20 markets and another which is another distortion, then the regulator should look at dealing
21 with both those distortions. They may be linked, they may not be linked. As a matter of
22 logic, I am not sure I can say anything more.

23 Q Assuming that the impact of the distortion is significant, if you do not deal with it and you
24 only deal with the issue of MCT payments you are going to have an inequitable effect on
25 that party, are you not? A. I am sorry, this is far too hypothetical for me to give an
26 answer to the question. It depends on the interaction between the distortion and the market
27 power within a termination market.

28 Q All right, let me try to be more specific. Let us assume for the sake of argument, and I
29 know you do not accept this, that problems in the portability of mobile numbers make it
30 more difficult to grow market share and they also result in a traffic imbalance for H3G –
31 okay? As a result, the imposition of the charge controls on H3G and the other operators
32 means that H3G makes a very large out-payment to its competitors. That means not only
33 that H3G is paying out, but it is subsidising its competitors to compete with it. Do you
34 accept that that raises a problem of fairness and equity if the distortion in the market caused

1 by MNP problems is not resolved? A. No, this is a conglomeration of a number of
2 separate issues.

3 THE CHAIRMAN: You are not asked whether non-portability does, you are not being asked
4 whether the characterisation of the payments of subsidising the competitors is correct or not,
5 all you are being asked is, do you or do you not accept that if there is a distortion in the
6 market which disadvantages one operator and which for some reason is not being dealt with
7 by the regulator, either because the regulator cannot do it or for any reasons, that that is
8 something that the regulator should take into account when deciding whether to impose a
9 price control on the operator disadvantaged? A. If they thought there was a distortion
10 then they should consider whether they think it is something that is relevant to another
11 distortion they are dealing with of SMP determination, but there is no logical link. This is
12 going to what we were just talking about, distortions, as opposed to us talking about a
13 particular issue like MNP or something. I can answer Miss Rose's question, or do you think
14 it has been dealt with?

15 MISS ROSE: Madam, I am satisfied that we have taken it as far as we can. Can we go in your
16 statement now to para.2.19, under the heading, "Implications of H3G's striking of mobile
17 termination". You say:

18 "In this section I provide evidence that H3G has been able to earn higher margins
19 on termination in the absence of regulation and that this has had an effect on the
20 retail side of the market."

21 If we go over the page you make a comparison of the operators' termination charges. This
22 is at table 2. What you are doing here is comparing the blended rate of the 2G/3G MNOs
23 with the 3G rate of H3G, are you not? A. Yes.

24 Q Do you accept that that is not a comparison of like with like? A. No, I do not accept that
25 is not a comparison of like with like. It is a comparison of the prices charged by the five
26 operators for terminating calls on their networks.

27 MR. SCOTT: In the sense that these are all charges of voice termination, they are charges for
28 voice termination. How that voice termination is provided is differentiated, but in terms of
29 homogeneity of service these are homogeneous.

30 MISS ROSE: The point is a simple one, that Ofcom has found that the costs of terminating on
31 H3G's network are higher than the efficient costs for terminating ----

32 MR. SCOTT: Absolutely, but ----

1 MISS ROSE: That is why I say it is not a comparison like with like. If you are looking at the
2 question of competitive pricing you are not comparing two equal services because you are
3 comparing a more expensive commodity with a cheaper commodity.

4 MR. SCOTT: No, I am sorry, if you are looking at a competitive market and the service that you
5 are getting is precisely the same – there is no coffee served on route – you are looking at a
6 single voice termination service, and in that sense it is homogeneous.

7 THE CHAIRMAN: That is one of the price control matters which will be referred to the
8 Competition Commission, whether there should be an additional charge for terminating
9 voice calls on 3G network, but that is not an issue that we can go into here. I think we
10 understand the point that you are making and we understand Dr. Walker's response to it.

11 MISS ROSE: You referred at para.2.24 to the We Pay offer. That was a very attractive offer for
12 consumers, was it not? A. It seems so, yes, that every time you got a call you are given a
13 5p bonus on your bill.

14 Q That has had to be withdrawn as a result of the imposition of price controls on H3G?

15 A. Well, I understand it has been withdrawn. I hesitate to go into H3G's internal strategic
16 reasons for doing so.

17 Q That is not necessarily the best possible result. A. I am very sorry, when you say it has
18 been withdrawn, my understanding is that it has been withdrawn to new subscribers. My
19 understanding is that it is not that those who were already on it have been taken off it.

20 Q That is not necessarily the best result for end users, is it? A. That the We Pay has been ---
21 -

22 Q Yes, the withdrawal of an attractive retail offer? A. Well, as I say later in my report, or
23 maybe it is earlier, and as was highlighted by Mr. Turner, attractive offerings that are based
24 on effectively entry assistance and are not based on the underlying merits of competition
25 between firms is not something that is good for social welfare. Even if it might be in an
26 individual case a nice deal for particular consumers, it is not good for social welfare.

27 Q Does that not, in fact, hit on the very crux of the issue in this case, that what Ofcom has to
28 balance is what might be the most efficient pricing structure against pricing structures that
29 might carry stronger competitive impetus, be better for innovation and investment with a
30 new entrant? A. I am not sure that is right actually. I note that Professor Littlechild
31 makes a point that there can be a tension between static efficiency and dynamic efficiency,
32 and he talks about patents and IP rights. It is absolutely right when we are dealing with IP
33 rights. However, I do not think it is right as a general proposition, and I do not think it is
34 the case that in general, having a static inefficiency, is the way to get dynamic efficiency. I

1 think the way to get dynamic efficiency is also to actually have static efficiency and to have
2 companies competing against each other to provide the best products. If we want an
3 example of how static efficiency does not lead to dynamic efficiency, I think we just have to
4 look at the history of planned economies, which has a huge focus on static efficiency that
5 was dynamically disastrous.

6 Q You refer to the history of planned economies and one of the features of planned economies
7 is a lot of regulation – right? A. Well, yes, and the point I was making is a focus on static
8 efficiency.

9 Q I want to make a slightly different point to you, which is that what we have here is a
10 situation where a regulator is setting an ex anti price control to last for a period of four
11 years. Would you consider that that in itself, setting that price control for that length of time
12 with so little room for manoeuvre could have an adverse effect on dynamic efficiency?

13 A. I think it depends on the exact market, and in this market, no, I do not accept that. I
14 think we have been through these issues in several inquiries. They have already been aired
15 in this hearing as well. There were good reasons to believe that operators of 100 per cent of
16 the market with SMP, you might want to regulate those and that would be economically
17 efficient. That was certainly the belief with the MNC in 1998 and the CC in 2002, and of
18 course Ofcom.

19 Q Let me give you an example of what I mean. Underpinning Ofcom's rationale is its
20 assumption that H3G will grow market share at a particular rate – correct? I am not saying
21 it is the sole factor, but it is one of the things they took into account? A. Again, I am
22 really sorry to be picky, but actually that is not quite right. They have put in their belief
23 about what an efficient operator ought to be able to reach, which is different to the question
24 you just put to me.

25 Q I think we are going to differ on that, but I do not necessarily think it is a matter to take up
26 with you, it is a matter for the proper interpretation of the decision. When Ofcom are
27 considering the gross achievable by H3G they do not take into account, do they, the effect
28 on H3G's ability to grow market share of this regulation on it? A. I do not think that is
29 right. I think Ofcom do take account of that factor.

30 Q Do you accept that, if they do not, that would be an error on their part? A. Well,
31 certainly, if they introduce some regulations that were based on the regulation down to
32 LRIC figures that were based on internally inconsistent figures, but for instance were based
33 on market share figures that made no sense within the context of the LRIC regulations, then,
34 yes, that would be internally inconsistent and that would be a mistake.

1 Q If their projections of market share growth turn out to be wrong then the point control
2 assumptions three or four years down the line are going to be also out of line, are they not?

3 A. Well, no, because there I think you are mixing up two issues. Undoubtedly, it is very
4 unlikely Hutchison will have a market share of 12.8 percent in on 31st March, 2011. They
5 might have, but it's very unlikely. They will probably have one that is higher or lower than
6 that. That fact that does not mean that the price control was wrong. The price control is set
7 on the basis of what is the correct figure for a 3G operator in this case that is efficient.

8 Q Can we go to s.3 of your statement where you address the relevance of H3G's recent entry
9 and lower market share? At para. 3.2 you make the point that what matters for the decision
10 is not how long a firm has been in a market, but the competitive circumstances for that
11 market. Then, a little further down the paragraph you say,

12 "So whilst there might in theory be competitive factors which imply that H3G
13 should be differentially regulated, and these might be related to the amount of time it
14 has been in the market, it is not H3G's recent entry itself that implies that it should
15 be differently regulated".

16 What are the competitive factors that you had in mind there? A. It's logic. There is no
17 particularly competitive practice that I need have in mind there. The point I am making is
18 that small market share or large market share **per se** is not relevant, it seems to me, to the
19 question of -- Entry. Sorry. Recent entry or being in the market for a long time is not
20 relevant to the question of whether you should be regulated. That goes down to the question
21 of SMP and issues to do with benefits and detriments of regulation.

22 Q What are the sort of competitive factors that you mean? What sort of thing are you talking
23 about? A. It's a fair question because actually it's not clear to me in this market why we
24 would want to differentially regulate H3G - on the assumption that we are talking about net
25 of costs. Of course, if we are not talking about net of costs, then that's one reason why we
26 would have different price controls and different glide paths. But, my point is just that, you
27 know, how long you have been in the market is just not relevant to the question of
28 regulation.

29 Q Different costs are not a competitive factor, are they? A. Yes, I think they are a
30 competitive factor. They are a factor that impacts on competition.

31 Q They are certainly a factor which impacts on what is the right price control. So, does that
32 mean that you do accept that your table at p.208 is not comparing like with like? A. No.
33 In fact I am not quite sure where we are going. Table 2 just compares the prices that the
34 five MNOs are charging. That is all it does. Operator termination charges pence per minute.

1 Okay? Your other proposition - which I think was that costs are not a relevant competitive
2 factor - is wrong. Costs are a very important competitive factor, and costs are a prime driver
3 of prices in competitive markets.

4 Q Can you identify any other competitive factors which might imply that H3G should be
5 differently regulated? A. Well, I can identify a number of other factors about which there
6 is a debate going on. Obviously, number portability and the imbalance issue. But, as you
7 know from my statement, I think both of those are not actually relevant factors. So, it
8 seems to me that if there is asymmetric regulation, as there is in this case, it is on the basis
9 of costs.

10 Q Paragraph 3.4. You make the point that Ofcom has allowed H3G to earn higher margins
11 above cost than the four 2G/3G MNOs. Now, it is also the case, is it not, that the 2G/3G
12 MNOs are being allowed a margin above cost until the year 2010? A. Yes.

13 Q That is talking about LRIC costs, is it not? A. Well, LRIC costs plus network externality,
14 and so on.

15 Q The marginal costs of terminating calls on your network are much, much smaller than those
16 costs, are they not? A. No. No. This is another thing that Dr. Littlechild talked about.
17 You cannot just say that marginal costs are low or marginal costs are high. You have to say
18 which marginal costs. Do you mean short run marginal costs? Do you mean the long run
19 marginal costs? If you are talking about allowing operators to recover their efficiently-
20 incurred costs, you must be talking about long-run marginal costs. We know from the last
21 inquiry, from the 2002 CC inquiry, and the evidence from that, that actually long-run
22 marginal costs and LRIC costs are very close to each other, as you would expect, because
23 LRIC is a form of long-run marginal cost pricing.

24 Q Just putting it in a very simple term, if somebody sends one call to my network, or ten calls
25 to my network today, it is not going to make any difference in practical terms to my costs.
26 A. Well, it will make some difference, but it will make a relatively small difference, yes.
27 But, that is not a cost that it seems to me is relevant to this matter. It is not a cost that we
28 would see prices aligned to, it seems to me in a competitive market. In a competitive
29 market you need to be able to recover your long-run costs.

30 Q We can disagree about marginal costs, but I think we do agree that the 2G/3G MNOs are
31 being permitted to charge a margin above cost, even on your own assessment.

32 THE CHAIRMAN: Margin above which cost?

33 MISS ROSE: Above LRIC costs, madam. A. All five operators have a glide path of differing
34 levels of generosity, so to speak.

1 Q Given the imbalance of traffic, that margin has a disproportionately severe impact on H3G,
2 does it not? A. You can't say that because it depends on -- I mean, H3G has a
3 significantly higher margin over LRIC than do the 2G/3G MNOs ----

4 Q Just pause for a second. A. -- and so ----

5 Q Just pause for a second. We are not talking about H3G's margin for a moment. I want to
6 focus on the margin of the other MNOs. We agree that the other MNOs are being permitted
7 to charge efficiently-incurred costs. H3G is terminating far more calls to their networks
8 than they are terminating on H3G's. Every time H3G terminates a call on their network
9 H3G is paying them profit. Yes? A. Pay them revenue, yes. Carry on.

10 Q But, we have agreed that there is a margin above cost. So, it is paying them an excess for
11 every call. Do you see that? A. Paying them at a margin above cost. Yes.

12 Q So, the effect of the traffic imbalance is that the margin above costs has a disproportionate
13 adverse effect on H3G. A. No. That is a question I was trying to answer, but you
14 stopped me. That is not true. When you say 'disproportionate adverse impact' I presume
15 you mean relative to something -- relative to the other MNOs. It is not clear what else it can
16 be relative to. The other MNOs also -- They terminate traffic on Hutchison -- on H3G, and
17 they pay a significantly higher margin over LRIC to Hutchison than Hutchison does to
18 them. However, my answer should all be understood within the context of, "I don't think
19 the traffic imbalance is a relevant factor" and I have explained why in my report.

20 MR. SCOTT: Just one question there. Miss Rose is concentrating on the mobile network
21 operators. Presumably you are taking into account the fact that the fixed network operators
22 - both the incumbent, BT, and other network operators, some of whom may be in their
23 infancy - are also having to pay for these termination costs. A. Well, they will also pay a
24 small margin over LRIC, depending on which network they're terminating on.

25 Q That margin, at the moment, will be larger in relation to H3G than it would in relation to
26 other MNOs. A. Yes. I mean, just to give the figures, in 2007/8 Ofcom thinks the
27 efficient LRIC for Hutchison is about 6.8 pence per minute and the charge control is 8.5
28 pence per minute. So, that's a margin of 2.7 pence per minute. For the other four MNOs
29 Ofcom thinks that the efficient LRIC is 5.1 pence per minute, and the other operators are
30 being allowed to charge either a margin of either 0.4 pence per minute above that, if it's the
31 Vodafone and O2, or a margin of 0.9 pence per minute above that if it's Orange or T-
32 Mobile.

1 Q So, one of the distortions that is present at the moment is that distortion. A. Yes. I'm not
2 sure I'm particularly happy with calling that a distortion. You're right the prices aren't
3 exactly aligned with costs, but then that, I think, is common in lots of competitive markets.

4 Q Thank you.

5 MISS ROSE: If we come on in your statement to para. 3.6, talking about market share, you say
6 that Ofcom's approach is in line with the Commission's framework.

7 "In particular it provides for termination charges to be set such that operators can
8 recover their efficiently incurred costs. The framework also provides for late entry
9 to be taken into account where an efficient entrant's market share is expected to be
10 below average for an initial period of time with the consequence that its ability to
11 realise scale economies is limited. Importantly for efficiency, it is not a regulated
12 firm's actual market share that is relevant, but the market share that could be
13 expected to be obtained by a reasonably efficient new entrant".

14 You see that. A. Yes.

15 Q Now, in order to assess the market share that could be expected to be attained by a
16 reasonably efficient new entrant, you would have to assess barriers to entry in the market
17 correctly, would you not? A. Well, actually you'd have to assess barriers to expansion in
18 the market because Hutchison is within the market.

19 Q Barriers to expansion. Yes. So, if, for example, the MNP system was a barrier to expanding
20 market share, that is something that should be taken into account in that analysis. A. If
21 MNP was about expansion, then you should take that into account.

22 Q Paragraph 3.11. You discuss H3G's market share and you make your points about the
23 alternative measure that you derive from the Merrill Lynch analysis. Then you say,

24 "Given that H3G has obtained this share of traffic in less than four years from
25 launch, Ofcom's assumption that a reasonably efficient entrant would obtain a 20
26 percent market share by 2016-17 does not appear unreasonable ----"

27 Now, I want to suggest to you that that question of the assessment of the expansion of
28 H3G's market share is not a question of economics - it is a question of the assessment of the
29 commercial opportunities open to it. A. I'm not quite sure what distinction you're
30 drawing there. It's a perfectly reasonable thing to comment on that, but what's relevant is
31 that what will actually affect market share is, of course, commercial strategy - whether it
32 turns out to be right or wrong - and those sorts of issues.

- 1 Q But, you are looking there at the past - the way that it has grown market share before this
2 price control was imposed - and extrapolating from that that Ofcom's analysis is not
3 unreasonable, are you not? A. Yes. Yes, that's right.
- 4 Q So, you are leaving out of account there the impact of this price regulation on H3G's ability
5 to grow market share, are you not? A. Yes. Yes.
- 6 THE CHAIRMAN: When you say you leave it out of account, is that because you think that it
7 does not have any impact on their ability to grow market share, or because from an
8 economist's point of view it is appropriate to leave it out of account, or ---- A. If I have
9 interpreted the question right, it is just a question that these are historic market shares up to
10 the last quarter of 2006, which is before price controls came in. So, these are market shares
11 in the absence of price control. So, it is reasonable to say that simply extrapolating them
12 does not take account of any effect of price control on the ability to win market share. That
13 wasn't a question that I was asked.
- 14 MISS ROSE: Still in para. 3.11, immediately after the passage we have just been looking at, you
15 say that,
16 "Ofcom's assessment of a 20 percent market share by 2016 does not appear
17 unreasonable and is potentially somewhat conservative in that such a share could
18 potentially be achievable more quickly. If so, Ofcom would have in fact set the
19 price control for H3G at too generous a level".
20 You see that? A. Yes.
- 21 Q Conversely, of course, if Ofcom have been over-optimistic in that projection the price
22 control would have been set at too harsh a level. A. Yes. I mean, the word 'generous' is
23 perhaps not a very happy word -- or, equally harsh. The point I am making is that they
24 would have set the price control at a LRIC that was actually slightly higher than the LRIC
25 of an efficient operator who had the market share they actually ended up getting. So,
26 generosity and harshness may not be the right things to say.
- 27 Q Of course, the uncertainty in terms of market share increases the longer the period that you
28 are looking at, does it not? It is easier to project a growth in market share over one year
29 than it is over four years. A. (After a pause): Yes. That certainly is a reasonable
30 proposition. (After a pause): Sorry. I am just going to come back here. Ofcom is not
31 predicting anything here. Ofcom is just saying what a reasonably efficient operator should
32 be able to get to. It is not saying that 12.8 is what Hutchison's market share will be on 31st
33 March, 2011.
- 34 Q Still in para. 3.11, you refer to the Dutch regulator, OPTA, and say that,

1 “OPTA concluded on the basis of both Dutch and international experience that it
2 was reasonable to expect that a new entrant should be able to reach an average
3 market share with eight years of operation - i.e. in H3G’s case by around 2010”.

4 If we can just pick up the paper that you refer to, behind your statement, at p.321 ----

5 MR. SCOTT: For the record, I think this is a report to, rather than a report from OPTA.

6 MISS ROSE: Yes. It is prepared by Analysys - an independent economic consultant. A. Yes,
7 it’s a report for them -- on their behalf, rather than a report by an independent party. I think
8 we know what it is. In the same way that Ofcom uses Analysys -- You know, it’s not a
9 piece of advocacy by a party. It’s a piece of independent research for a regulator.

10 MR. SCOTT: It is just getting on the record what it is.

11 MISS ROSE: If you go to p.326, under the heading ‘Analysys’s Response’, when it considering
12 options for rate of acquisition of market share, the second to last paragraph on that page,
13 “The rate of acquisition of 3G entrants such as H3G in other European markets is
14 not relevant to the consideration of Dutch GSM players’ regulated mobile
15 termination rates, since the regulation of Dutch mobile termination is based on a
16 hypothetical new (2G) entrant, rather than a real (3G) entrant”.

17 Do you see that? A. Yes.

18 Q Do you accept that you were wrong, therefore, to rely upon this? A. I would want to re-
19 read the whole report before I agree to that statement, but, certainly, yes, the point you make
20 seems like a good one, and suggests that I may have been wrong to rely on that.

21 Q Paragraph 3.12. You say,

22 “Further, H3G has followed a deliberate policy of focusing on higher value contract
23 customers with the result that it has a relatively high percentage of contract
24 customers”.

25 THE CHAIRMAN: We have been round this loop, I think, Miss Rose.

26 MISS ROSE: Madam, if I could just put the question: You are not in a position to say whether
27 H3G had any choice about that strategy, are you? A. Well, I think I’ve already answered
28 that question and my view is that I am in a position to make a general comment based on
29 observations of the market that lots of successful MVNOs -- people have come in as
30 MVNOs and generated market share.

31 THE CHAIRMAN: Yes, but you cannot say whether there was some particular reason why they
32 did it that you do not know about. A. No, of course. Of course.

33 MISS ROSE: I would like to just look in this context at some evidence that was put in on behalf
34 of Vodafone.

1 THE CHAIRMAN: What do you mean by 'in this context', Miss Rose? What is the point that
2 you are making?

3 MISS ROSE: Whether or not H3G had the option of pursuing a different ----

4 THE CHAIRMAN: I think we have ascertained that that is not something that this witness can
5 give evidence about. In fact, you have asked him several times to confirm that he cannot
6 give evidence about it. So, I do not think it is really fair to ask him to refute evidence that
7 other people have put in about it.

8 MISS ROSE: Madam, I was not going to ask him to refute anything, but, simply to draw to his
9 attention the evidence of Mr. Tillotson at para. 60 which supports H3G's position.

10 THE CHAIRMAN: I think that is a matter of submission rather than for the witness.

11 MISS ROSE: If we go to para. 4.1 ---- A. I'm sorry. Just before we move off this -- I just
12 want to make sure that I've not missed it. You haven't actually asked me whether I think
13 the regulation of H3G is going to stop it being able to win market share. I just want to be
14 clear that you don't think you've asked me that question and I've not answered it. I've been
15 waiting for it, and ----

16 THE CHAIRMAN: Dr. Walker, of course it is a matter for your counsel what questions he wants
17 to ask, but ---- A. That's fine. I was just clarifying.

18 Q All right. What is your view? (Laughter) Shortly, Dr. Walker. A. It just seems to me
19 that underlying that whole line of questioning is that these are historic market shares based
20 on not being regulated. Therefore, what does it tell us about the future? There is the
21 underlying implicit suggestion that, in future, Hutchison will not be able to win market
22 share. The point that I make is that because it's going to be regulated -- It's going to LRIC
23 regulation. So, it will be earning similar margins on termination as the other operators.
24 There is no reason why they can't compete on a level playing field. The essence of my s.2
25 evidence is that regulation is about allowing competition to happen on a level playing field
26 rather than a distorted one.

27 Q Dr. Walker, are you aware of the uncontested evidence of Mr. Russell and Mr. Dyson on
28 this issue?

29 Q I have read the witness statements of Mr. Russell and the witness statement of Mr. Dyson.

30 Q If we go to s.4, dealing with mobile number portability. You seek to address the question
31 whether problems relating to MNP have harmed H3G's ability to grow market share, and
32 whether those problems have contributed to traffic imbalance. In that respect you deal with
33 the question of churn. At para. 4.4 you say that,

1 “H3G’s argument that the MNP process significantly reduces the amount of
2 switching in the market and this accounts for H3G’s low subscriber market share is
3 at odds with the available evidence. The actual level of monthly churn in the UK
4 mobile market in the fourth quarter of 2006 was 2.5 percent, which was much higher
5 than in most developed ----“

6 I would like you to take up, please. Volume J, Tab 5. This is an Ofcom research document
7 called ‘The Consumer Experience’. Do you see that? A. Yes.

8 Q If you turn the page to p.638 you will see the heading ‘Switching Mobile Operator’. A.
9 Yes.

10 Q Switching in the mobile market in the past twelve months. Do you see that? A. Yes.

11 Q At the top of p.639,

12 “Over one in ten mobile Ofcom consumers have switched their mobile network
13 operator. However, since 2006 the percentage of consumers who have switched in
14 the last twelve months has decreased from 16 percent to 12 percent”.

15 Do you see that? A. Yes.

16 Q Do you accept that your estimate at para. 4.5 of a 30 percent churn rate per year is
17 incorrect A. No. No, I don’t accept that. I think this evidence, which I saw last night, is
18 interesting, but it is quite clearly, it seems to me, an out-lier from the other available
19 evidence. I would, of course, note that it is based on a survey of more than 1,000
20 consumers. So, it is a reasonably large survey, but it is nonetheless a survey with all the
21 issues that that gives rise to. The evidence that I was referring to from Merrill Lynch is
22 based on actual reported disconnections from the operators. So, we would expect those to be
23 accurate numbers. We know from Vodafone’s annual report that it thinks its churn rate is
24 more than 30 percent. Presumably it should know. It has got the connections. We know that
25 Hutchison’s annual report for 2006 had a monthly churn rate in it of 4.9 percent. So, that’s
26 about 60 percent per year. Their most recent interim report for the first six months of 2007
27 suggests that their churn rate has come down to 3.6 percent. That is still more than 40
28 percent per year. There is other survey evidence which I think Mr. Turner is -- Can I refer to
29 it?

30 MR. TURNER: If the tribunal wish to hear Dr. Walker on this ----

31 THE CHAIRMAN: If it is not in evidence, then we cannot really refer to this. But, what you are
32 saying is that you stick to your estimate in 4.4 because you think that the data on which it is
33 based is more representative and backed up by other figures than this ---- A. Importantly,
34 it is based on actual disconnections that companies are aware of as opposed to based on a

1 survey. So, I think my comment about the level of switching is a reasonable comment. Of
2 course, none of this goes to my comment about relative switching which is also a comment I
3 made about the Merrill Lynch data, showing there is relatively more switching in the UK
4 than elsewhere.

5 MISS ROSE: You are talking about numbers of disconnections. That would include churn and
6 return, would it not A. It would include churn and return, yes.

7 Q So, that means customers who terminate one particular tariff remain on the same network
8 with a new tariff because they get a better deal. A. Yes. That is right, but those are
9 people who have been -- In a sense, there are opportunities for another operator to win
10 them. These are all people who have switched from their package. It is absolutely right. It
11 will include churn and return.

12 Q So, might that explain the difference between the 30 percent and the 12 percent? A. I
13 would be surprised if, on the basis of the Tillotson evidence -- He refers to churn and return,
14 but I don't think he suggested that churn and return accounts for two-thirds of the
15 disconnections. So, I would be surprised if it accounts for all of that amount.

16 Q You cannot seriously suggest that somebody who is a loyal Vodafone customer, who simply
17 switches to a more attractive new deal that is being offered is a realistic prospect for H3G to
18 win as a customer? A. Well, if we go back to what Tillotson said, these are all people
19 who have been willing to actually, you know, churn and return -- actually change their
20 number. It seems to me that they are people for whom there is a competitive opportunity
21 for another operator to win them.

22 Q Apart from anything else, one of the significant problems about the MNP system which
23 Ofcom have identified is that it is donor-led. A. Yes, it's donor-led.

24 Q So, that means that if you want to win a new customer off another network it is the old
25 network that has to port the number. A. Yes.

26 Q That means that the customer has to go back to the old network and tell them they want to
27 leave, and the old network has the opportunity to win them back. A. Yes.

28 Q That problem does not arise if you are talking about churn and return, does it? A. I am
29 sorry? What problem doesn't arise?

30 Q The problem in relation to mobile number portability - that when you are trying to switch
31 network, the old network has the opportunity to win the customer back.

32 THE CHAIRMAN: Do you port your number when you do churn and return? I thought you did
33 not?

1 MISS ROSE: Madam, the point I am making is that the difficulty in porting your number is much
2 less of a barrier to churn and return than it is to moving outside the network, because you do
3 not have the situation of the original network operator saying, "I will give you a better deal
4 if you stay with me". A. I'm not quite sure that I understand exactly what the point is.
5 But, it seems to me that one of the things about churn and return customers, as Mr. Tillotson
6 makes the point, is that these are clearly not people who are that bothered about keeping
7 their number. So, they're not people who would be discouraged from switching network by
8 an inability to keep their number. So, it seems to me that you can't blame them on the
9 number portability system. You can't blame the fact that they don't switch to another
10 operator on the number portability system.

11 Q We are talking, I think, at cross-purposes. A. I'm sorry.

12 Q One of the problems in the MNP system is that if somebody wants to switch to a new
13 network and they want to take their number with them, they have to go back to the original
14 network and ask them to sort it out. Okay? A. Yes.

15 Q When they do that, the original network has an opportunity to incentivise that customer to
16 stay. A. Yes.

17 Q That makes it more difficult for the new network to gain the customer with the ported
18 number. A. Okay. That's your claim, and that seems to be a reasonable claim. My point
19 is that actually what is interesting in the UK is that there is more churn in the UK than there
20 is elsewhere, even though elsewhere there are number portability systems are not donor led,
21 and, indeed, Australia and Ireland are both systems that Hutchison have said are particularly
22 good.

23 Q Of course, we do not know to what extent those are people changing network or staying
24 with the same network. We have already made this point. A. We are back to the churn
25 and return, yes. I have made the point that if churn and return is a large part of the market,
26 then that suggests there is a large part of the market to which portability is not important.

27 Q At p.639, still in the same survey, we have the 'number of times ever switched mobile
28 network supplier'. Only 40 percent of people have ever switched their supplier. Do you see
29 that? A. Yes.

30 Q 60 percent have never switched. So, essentially, what you are talking about is a majority of
31 consumers who stay with the same supplier, year in/year out, and a minority, who perhaps
32 are more price-sensitive, more pro-active, and who are more likely to churn. Yes? A.
33 Subject to issues about survey evidence and the extent to which it is consistent with the
34 other evidence, just on the basis of these numbers, that is a reasonable proposition.

- 1 Q So, if you are the late entrant to the market, where the majority of people already had a
2 mobile 'phone by the time you came in, you are essentially competing for those who are
3 willing to churn. Correct? A. Well, if you were a late entrant who came in when most
4 people already had 'phones and so there are very few new customers, then that is true. That
5 is, of course, not the position Hutchison was in. We know that connections have gone up
6 from 49 million to 70 million. That is again in the Tillotson evidence.
- 7 Q 49 million is greater than the adult population of the United Kingdom, is it not? A. I
8 couldn't tell you. However, the number of connections has gone up by 40 percent. That is a
9 significant opportunity for a new entrant.
- 10 Q We know that lots of people get second-hand sets and Blackberries, and so on. But, that is
11 not the same, is it, as entering a market where most people have no mobile 'phone? Would
12 you agree with that? A. Well, it is different entering a market where most people do not
13 have a mobile 'phone. I am still not quite sure why 21 million new connections is not an
14 opportunity for an entrant.
- 15 Q If we look back at your statement at para. 4.5 you estimate what market share H3G would
16 have obtained on the assumption that it wins an average share of customers that do churn.
17 Do you see that? A. Yes.
- 18 Q That conclusion is invalidated, is it not, by the failure to take into account churn and return?
19 A. Well, no.
- 20 Q Well, H3G does not have an equal opportunity to gain a Vodafone customer who is simply
21 saying to Vodafone, "I'd like to go on to a better tariff", does it? A. Well, I mean, this
22 goes back to the point about -- Church and return are people who change their number.
23 They are a competitive opportunity, it seems to me. So, whether or not what I say in 4.5 is
24 reasonable depends on whether or not the tribunal thinks that argument is a reasonable
25 argument.
- 26 Q Of course, if the figures in Ofcom's research paper are correct then these figures are correct.
27 A. If it's the case that Ofcom's figures are correct and that all the other available evidence
28 is incorrect, then, yes, we have lower churn figures. However, as I have said, it is the Ofcom
29 figures which are the out-lier.
- 30 Q You have also assumed that the new entrant gets average churn from the outset -- from the
31 start of it entering the market, have you not, when you are looking at your market share
32 growth? A. Yes. Yes. That's right. I have assumed that each month they win as many
33 customers as any other operator.
- 34 Q From the very day that they enter the market. A. Yes.

1 Q Will you accept that that is a rather unrealistic proposition? A. Well, I hesitate to say that
2 it was actually proposition put by H3G in another matter - although it is --

3 THE CHAIRMAN: You do not hesitate very much! (Laughter) A. I do not think that's right
4 because we're not in the position of having a firm who entered the market -- It's a network
5 operator, but it's not in a position of entering with a small network that means that it can't
6 actually compete for the customers. It's not in the position of, for instance, Orange or
7 Mercury (as it then was) back in the early '90s where they had to build their own network
8 from scratch, and they couldn't connect customers unless they were on their network.
9 Hutchison, for very good reasons, were given a national roaming agreement and so right
10 from Day One it had full coverage. It is a large, competent firm. It seems to me that there is
11 no reason why it should not be able to compete in the same way that the other firms could.

12 MISS ROSE: We know, for example, that it was operating a new technology, new handsets,
13 more expensive handsets, and teething problems with the technology. A. Well, the point
14 that's made about coverage is not related to new technology. There was a 2G network there
15 that it was allowed to roam on. We have already discussed the MVNO issue.

16 Q Yes. But, that is not the only issue, is it? It was a 3G-only operator pioneering in the 3G
17 market, was it not? A. It was the first 3G operator. Absolutely right. However, it was a
18 3G operator that had a roaming agreement on a 2G network. It seems to me that it had an
19 opportunity therefore to compete for customers in the way that other MNOs did.

20 Q Will you accept that the handsets that H3G were giving to their customers were more
21 expensive than those which other operators were handing out because they were 3G
22 handsets. A. Yes, but that comes back to the point I've made following Tillotson about
23 the opportunity to enter as an MVNO, obviously while simultaneously building your 3G
24 network.

25 MR. SCOTT: This seems to be an historic argument. Are you saying that these factors apply to
26 the period now under consideration?

27 MISS ROSE: I am making a general point of principle - that it is not reasonable to assume that a
28 new 3G entrant will obtain average churn competing against all the established networks
29 from Day One of its operation.

30 MR. SCOTT: But we are now in a situation where the new 3G entrants are actually your
31 competitors. You are an established 3G entrant. In terms of the period at which we are
32 looking - we are now looking 2007 forward - are you suggesting that these factors are still
33 relevant to our consideration?

1 MISS ROSE: Sir, I am addressing the specific point made by Dr. Walker at para. 4.5 where he
2 does make a historical point. He says that,

3 “Figure 2 shows the expected growth of H3G’s market share based on this
4 assumption in comparison to the market share they actually achieved. We can see
5 that by the fourth quarter of 2006 they would have been expected to achieve a
6 market share of about 15 percent. In contrast, they only achieved a share of
7 subscribers of 5.5 percent”.

8 The point that I am making is that that conclusion is based on two unreasonable
9 assumptions - firstly, that 30 percent of customers per year churn; and, secondly, that the
10 new entrant would have achieved an average percentage of those churning every year from
11 the first date that they entered the market.

12 MR. SCOTT: I understand.

13 THE CHAIRMAN: Miss Rose, how much longer do you think you are going to be?

14 MISS ROSE: I would have thought perhaps another forty-five minutes? Of course, we do have
15 to finish this witness today.

16 THE CHAIRMAN: Yes, we do.

17 MISS ROSE: Paragraph 4.6. We do not accept that what you say in this paragraph is correct, but
18 I simply flag that up because this goes to the issue that the tribunal indicated that it did not
19 have sufficient evidence to determine.

20 I would like to come on now to consider traffic imbalance - para. 4.8. You make the point
21 at para. 4.9 that,

22 “Ofcom found that H3G’s incoming traffic level per subscriber is broadly similar to
23 that of the other MNOs. Moreover, Ofcom’s research suggest that H3G customers
24 are not more likely to retain an alternative subscription than the customers of other
25 MNOs”.

26 Just looking at the first of those propositions -- The point that you make is that the traffic
27 imbalance cannot be caused by difficulties in the MNP system because if that were so, they
28 should have lower incoming minutes, but in fact they have got more or less typical
29 incoming minutes and higher outgoing minutes. Is that the point A. That is the point.
30 The one thing I would say is that I wrote this before I had actually received the Ofcom
31 actual numbers as opposed to their description of their numbers. It seems to me that ----

32 THE CHAIRMAN: Those numbers are confidential. A. I understand that. Am I allowed to
33 make a relative point about them?

1 Q Yes. A. Well, the relative point I make about them is that actually H3G's incoming
2 minutes are significantly above those of the other operators.

3 MISS ROSE: In fact, if you are talking about a much smaller network of subscribers by
4 comparison with four larger networks with many more subscribers, you would expect the
5 smaller network -- each subscriber to receive far more incoming minutes, and to send far
6 more outgoing minutes. A. Why is that?

7 Q Because there are fewer on-net calls available. (After a pause): More of your calls have
8 to be off-net, whether they are coming in or going out. A. I see your point. Okay. It is
9 an on-net/off-net point.

10 Q Yes. If you belong to an enormous network, 90 percent of your calls may be made on-net,
11 and 90 percent of the calls made to you may be on-net. So, only 10 percent of your actual
12 minutes on the 'phone may be off-net, incoming or outgoing. A. Okay. As a point of
13 logic, that's right. Obviously, the particular numbers you have used are not ----

14 Q I know. A. Fine.

15 Q So, if you are a much smaller network you ought to have, per subscriber, significantly
16 higher levels of both incoming and outgoing minutes, should you not, on and off your net?
17 A. I am only taking issue with the 'significant' point. You know, if you have got, suppose,
18 a market share of 10 percent, then, okay, that 90 percent of calls will be off-net. For the
19 other operators that figure is going to be between 70 and 80 percent. So, there is a
20 difference, but it is actually not a huge difference. I am just coming back to the 90:10
21 percent issue you were using. I was just making the point that actually it is a 75 percent
22 versus 90 percent issue.

23 Q Why do you say that? A. Well, because if you take the other operators, they have
24 between 20 percent and 30 percent market share. So, for each of them, on your logic,
25 between 70 and 80 percent of their calls will be off-net.

26 Q We have 5 percent market share, and so 95 percent will be off-net. A. Okay. I am just
27 trying to think what the correct market share figure should be -- as to whether it should now
28 be the traffic market share or the subscriber market share. I'm not convinced it should be the
29 subscriber market share. I'm not convinced it should be, but -- Okay. It's 90 percent or 95
30 percent.

31 Q The point is that it is the number of people that you call on, that call you, who are on the
32 same network. So, really it is subscriber market share. A. I'm not sure because it comes
33 down to usage. But, I don't think it's significant given that, you know, 90 percent - 95
34 percent -- 70 percent to 80 percent -- those are the ballpark figures.

1 Q You do not think a difference between 75 percent and 95 percent is significant? A. No. I
2 didn't say that. I'm saying the distance between 90 and 95 percent was not a huge
3 difference.

4 Q The point is, is it not, that what this suggests is that in fact, all other things being equal, and
5 leaving out of the picture entirely H3G's commercial strategy, it ought to have higher
6 subscriber incoming and outgoing minutes. A. Yes. My understanding of the Ofcom
7 figures is that that is precisely true - by more than a factor that your analysis suggests it
8 should be. But, now we get into difficulty by not being able to talk about the exact
9 numbers.

10 Q That is true of the outgoing minutes. A. It's true of incoming minutes too.

11 Q What? You suggest that the incoming minutes are higher than would be expected given the
12 difference in the size of the network? A. Well, on the basis of your analysis, then I think
13 you would think that the H3G number should be -- Let us say the subscriber market share --
14 95 percent over 75 percent times the figures for the other networks, and the Ofcom figures I
15 saw -- The difference between the other operators and Hutchison was actually a bit larger
16 than that. As I say, it's difficult to talk about it in numbers, but, I mean, the simple
17 arithmetic -- The tribunal has the numbers.

18 Q Are you aware of the evidence that H3G put to Ofcom, demonstrating that those who ported
19 their numbers received more incoming calls than those who did not? A. I'm not sure
20 whether I've just seen an Ofcom reference to it, or whether -- I don't know if I've seen the
21 evidence. I think I've seen an Ofcom reference to it.

22 Q Let us take a look at it in Bundle F3 at p.265. This is a confidential document.

23 MR. SCOTT: Just in passing, Miss Rose, I am right in thinking that in terms of the overall
24 mobile operators, your client comes somewhere in the middle in that it has four operators
25 that are larger than it in terms of subscriber base (possibly five) and six or seven that are
26 smaller than it.

27 MISS ROSE: Sir, I would need to take instructions on that. You are referring to the MVNOs.

28 MR. SCOTT: Yes. My recollection is that one MVNO is larger than your client and the others
29 are all smaller.

30 MISS ROSE: I am not in a position to confirm that.

31 MR. SCOTT: But in terms of this argument you are somewhere around the middle.

32 MISS ROSE: We are looking at our incoming and outgoing minutes by comparison with those of
33 the other four MNOs. The point that was being made by Ofcom was that there was no
34 evidence that the MNP issue was affecting our traffic imbalance because our number of

1 incoming minutes was comparable to that of the other larger networks. I was making the
2 point that that did not imply that there was not a problem.

3 MR. SCOTT: Thank you.

4 MISS ROSE: This a confidential document and so we will have to be somewhat circumspect.

5 But, if you look at p.265 in the external numbering, you see there a comparison of the
6 number of inbound minutes by customers who ported their numbers and those who did not.

7 Do you see that? A. Yes.

8 Q Suggesting a consistent and significant discrepancy, does it not? A. Yes.

9 Q Will you agree that this is strong evidence that not porting the number does reduce the
10 number of incoming minutes? A. No. Not porting the number.

11 Q That those who do not port their number receive significantly fewer incoming minutes. A.

12 Right. Okay. No, because there is a selection bias there. No. That's mis-use of these figures.

13 What these figures show is that there are two groups of consumers - one whom ports, and
14 one group which does not port. They receive different numbers of calls. Your argument, I
15 think, is that actually these two groups of consumers would receive the same number of
16 calls if we did not have a donor-led number portability system. It seems to me that there is
17 actually no reason to believe that at all. We would, of course, believe that people who port
18 their numbers care about their number more than people who do not. One reason for that
19 might well be that they receive more calls than other people. So, a significant selection bias.
20 So, no, you cannot deduce that from these figures at all.

21 Q If you do not port your number your friends do not know what your new number is until
22 you call them, do they? A. Yes. Absolutely.

23 Q Inevitably, when somebody does not port their number, there is going to be a period of time
24 over which they will have to make more outgoing calls than they receive incoming calls. It
25 is inevitable. A. Okay.

26 THE CHAIRMAN: You are talking about the period of time during which they tell all their
27 friends what their new number is?

28 MISS ROSE: Yes. But, of course, madam, they may not do that in a systematic way. There may
29 be some who do brilliantly send a group text, but there may be others who are more
30 haphazard, who simply muddle along for a period, making calls when they need to.

31 THE CHAIRMAN: With their old mobile 'phone?

32 MISS ROSE: No, madam. I am not talking about two handsets. I am simply saying that for
33 people who do not port their numbers, their contact base -- At the moment that they port,
34 their contact base -- that they do not port, rather -- that they switch, their contact base does

1 not know what their new number is. So, they have to initiate contact with people. Now,
2 people will have different strategies for doing that. But, the inevitable result of it is that
3 there will be a degree of imbalance in their traffic.

4 THE CHAIRMAN: If they choose to tell people by 'phone that their number has changed.

5 MISS ROSE: Or if they simply choose to 'phone people rather than wait for them to call them.

6 They may not be 'phoning them to tell them that their number has changed. They may just
7 be initiating contact. A. My only comment is that as an empirical question -- I can't

8 imagine why you wouldn't do a group text since it's not very challenging, but ----

9 (Laughter) You are absolutely right. There may be some people who systematically make,
10 for each of their contacts, one extra call. I cannot believe that is going to lead to a
11 significant number of call minutes in and out on an ongoing basis.

12 Q If we go back to your statement at para. 5.2, you say, "-- any traffic imbalance arises

13 because H3G's customers currently make significantly more outbound calls than they
14 receive. The cause of the 'imbalance' is not a consequence of H3G being a smaller player
15 in the mobile market, or a function of the rate of migration on to the H3G network ----"

16 But, if, in fact - and I know you do not accept this - it were the case that the late entrant into
17 this market had no practical alternative other than to adopt a commercial strategy of
18 targeting customers who make high levels of outgoing calls, then there would be a
19 connection between the traffic imbalance and the status of H3G as a late entrant, would

20 there not? A. Okay. If it is the case that all late entrants can only target people who make
21 relatively high outgoing calls, then, yes, there will be a traffic imbalance. It still is not of
22 any competitive importance, it seems to me, for the reasons I have explained in my report.

23 Q You say it is not relevant for reasons that you explain in the following paragraphs, but, in
24 fact, if H3G are correct in the point that they make about the cost of terminating calls - the

25 marginal cost of doing that being very small - then the traffic imbalance will be very
26 significant to their competitive position, will it not? A. (1) No. (2) I think we have dealt
27 with this point, it is simply not the correct way to think about marginal cost is in terms of
28 short-term marginal costs.

29 THE CHAIRMAN: I think we have dealt with that.

30 MISS ROSE: We have dealt with that, yes, madam. (After a pause):

31 MR. TURNER: Again, I hesitate to interrupt, but if this is going to go on for much longer I do
32 not know whether the witness would appreciate a break. I simply ought to ask the tribunal
33 because he has been cross-examined for almost two hours.

1 THE CHAIRMAN: Dr. Walker? A. I am in the tribunal's hands. I know that time is short.

2 A. I am fine for now.

3 Q Can we rely on you to let us know if you become 'not fine'? A. I am sure I can send an
4 excellent signal.

5 MISS ROSE: You say at para. 5.7 that, "Ofcom's new charge controls provide H3G with an
6 advantage in competing for subscribers through being allowed to earn a higher margin on
7 termination than the other operators for the initial years of the charge controls. This
8 advantage means that individual customers will be more valuable for H3G to acquire as
9 they will bring a larger contribution margin to H3G than they would bring to the other
10 operators".

11 The problem with that analysis is that it assumes that H3G is able to raise its retail costs to
12 cover the much larger costs relatively that it has of terminating on the other networks, does
13 it not? A. (After a pause): I am not sure I understand. The only point I make here is
14 that from H3G's point of view, if it earns a higher margin on terminations than other
15 operators, that makes customers relatively more valuable -- makes a particular subscriber
16 relatively more valuable to H3G because it gets a greater termination margin, and therefore
17 that allows it to compete more strongly for that customer on the retail side of the market.

18 Q Let us just pause. We start from the position that there is a traffic imbalance. Now, we
19 disagree about the causes, but we start from the position that there is a traffic imbalance. So,
20 a new customer acquired by H3G is likely to be making more outbound calls than they
21 receive incoming calls. Right? Yes? In that situation, each customer is going to cost H3G
22 more in terms of what it has to pay to its competitors than it will bring in in terms of the
23 revenue received from the competitors. Do you see that? A. That is absolutely not the
24 right way to think about this. We have two different sets of charges. The termination
25 charge that H3G pays is covered by the charge H3G charges to its retail customers. The
26 termination charge is a charge on the other networks. Okay? There is absolutely no reason
27 why being able to compete in the market means those two things should be in balance. As
28 long as your termination rate is above your costs and as long as your retail prices cover the
29 termination rates of the other operators plus your retail costs, you can compete - even if you
30 have a huge imbalance.

31 THE CHAIRMAN: That second point is the difficult point though, is it not? It is whether it is
32 possible for H3G, in the position that it is in, to be able to grow its market share whilst still
33 charging retail prices which cover the MCT charge which is imposed on it by the other
34 MNOs. That is the good point. A. But with any particular customer, it is in the same

1 position. If you have a particular customer who makes a number of calls and receives a
2 number of calls, and H3G, for that particular customer, relative to the other networks is
3 going to earn more termination margin on that. So, it is not clear to me why it is therefore
4 unable to compete on the retail side of the market.

5 MISS ROSE: Madam, you have seen the evidence of Mr. Russell and Mr. Dyson on this. I am
6 not sure we can take it further with this witness.

7 THE CHAIRMAN: I think that is right. A. Okay. But, there is a slightly different ----

8 Q Thank you, Dr. Walker.

9 MISS ROSE: Can we now go, please, to para. 2.10 of your statement?

10 THE CHAIRMAN: We are going backwards, Miss Rose, rather than forwards!

11 MISS ROSE: We go in so many ways, madam. This is the question of asymmetric regulation.

12 You deal with this at paras. 2.10 to 2.18, where you deal with the implications for economic
13 efficiency of asymmetric regulation. Correct? A. Yes. I should say that this is
14 asymmetric regulation relative to costs. So, it is slightly different from most of what the
15 discussion was this morning when asymmetric regulation was used also to refer to
16 regulation where the levels are different, but they are still cost-effective.

17 Q Yes. You refer to the types of effects that will be caused to other competitors in principle,
18 but you do not address the degree of seriousness of those effects here, do you? A. No.

19 Q Because the degree of seriousness of those effects will depend on the market share of the
20 asymmetrically regulated operator, will it not? A. (After a pause): In a short-run
21 sense, that is right. We can certainly do a back-of-the-envelope calculation on that. In a
22 longer run sense, I do not think that's right. In the longer run sense, what we want is to see
23 competition developing in the market place on the merits - not based on artificial entry
24 assistance. It seems to me that in the longer run that is actually what we should be most
25 concerned about.

26 Q We may or may not disagree in the longer run. I am sure though we will disagree about the
27 at which the MCT rates should be set. But, what we are looking at is not the longer run. We
28 are looking at the regulation being imposed now, are we not? Let us take an example of
29 your argument. If you go to para. 2.16, you make the point that there is an impact on
30 competition.

31 "Operators need to set their retail prices for alls to other operators at a sufficiently
32 high level to over those other operators' termination charges as well as their own
33 cots in providing those calls. Where one operator is allowed to charge termination

1 rates that are higher than the other operators, it effectively increases the costs of
2 other operators (in terms of the termination charges to be paid)”.

3 Now, the effect of that is going to be very small if you are an operator and only 4 percent or
4 5 percent of your calls are being terminated on H3G’s network. Is that not right? (After a
5 pause): It is not actually going to have a significant effect on your retail pricing. A.

6 (After a pause): Again, we are back to a world of traffic share, it seems to me, and not of
7 subscriber share. Obviously, there will be a smaller effect of that where the operator has 4
8 percent -- 10 percent, or whatever, than if it has 20 percent. It is not the same as
9 insignificant.

10 Q You quote the European Commission at para. 2.17, and the point that the Commission
11 makes that MTRs should normally be symmetric, and that asymmetry requires justification.
12 Towards the end,

13 “-- the fact that an MNO entered the market later and that it therefore has a smaller
14 market share can only justify higher termination rates for a limited transitory period.

15 The persistence of a higher termination rate would not be justified after a period
16 long enough for the operator to adapt to market conditions and become efficient”.

17 What do you think the Commission means about ‘adapting to market conditions’? A.

18 (After a pause): Okay. Well, it seems to me that I don’t know exactly what the Commission
19 means when they say the operator is to adapt to market conditions, but if we take ‘the
20 operator to adapt to market conditions and become efficient’ then I think what we are
21 talking about is exactly what Ofcom does, which is that you would allow asymmetric rates -
22 - It is cost based but asymmetric until such point as your new entrant could reasonably be
23 expected to have a market share that allows it to take account of the same economies of
24 scale as the other operators.

25 Q If it does not have that, then asymmetric regulation is justifiable. A. If it has a smaller
26 market share, and so higher per unit costs, then, yes. I think the Commission is quite clear
27 about that. That, of course, is what Ofcom has done.

28 Q But the Commission does not limit it here, does it, to simply the question of higher costs? It
29 is a broader term - ‘adapting to market conditions’. A. It uses a broader term. I am afraid
30 I cannot shed any light on what that means. If you look at the Commission’s comments on
31 the piece of asymmetric regulation, it is not clear to me that there is actually anything there
32 beyond talking about costs.

33 Q In fact, other European regulators have used asymmetric regulation to deal with matters
34 other than differences in unit costs, have they not? A. Yes, some of them have, yes.

1 Q The Portuguese regulator has used it to deal with traffic imbalance. A. Yes.

2 Q Are you familiar with the ERG consultation paper at Bundle F4?

3 THE CHAIRMAN: Are we sure that this is relevant to the existence of price control? I think we
4 went through the ERG paper this morning, and it was put to Dr. Littlechild, and I think his
5 answer was clear that actually it is the principles that arise from it rather than the actual
6 decisions themselves, which do seem to be in the context of actually imposing asymmetric
7 regulation ----

8 MISS ROSE: I agree, madam. It is the principles underlying this document which are the subject
9 of my questioning. I hope I will be able to deal with this very quickly.

10 THE CHAIRMAN: Let us hope so.

11 MISS ROSE: Dr. Walker, are you familiar with this paper? A. Yes.

12 Q It starts at p.589. A. Am I familiar with this paper? Yes, I have read this paper. Well, I
13 have read the mobile call termination part of this paper plus the introduction. I have not
14 read the fixed call termination part of it.

15 Q Do you accept that the ERG here puts forward circumstances in which it is appropriate and
16 beneficial to use asymmetric regulation in relation to new entrants? A. You mean
17 asymmetric regulation that goes beyond just cost differences?

18 Q I am not talking about the sort of asymmetric regulation, but simply the point that is made in
19 this paper is that there are circumstances in which asymmetric regulation for new entrants is
20 positively beneficial and justified. A. Yes. Yes. It does make that point.

21 Q And that the circumstances in which this paper puts forward that position are not limited to
22 differences in costs. A. No. They also talk about traffic imbalance, and they also deal
23 with some on-net/off-net type issues.

24 Q On-net/off-net price discrimination and traffic imbalance. A. Yes, I think those are the
25 two other reasons they use.

26 Q If we just go to the end of this paper at p.675, it is said, "NRAs should also carefully
27 consider the source of any traffic imbalance". Do you see that? A. No, I do not. Which
28 page?

29 Q Page 675. The second to last paragraph. "NRAs should also carefully consider the source
30 of any traffic imbalance". A. Yes.

31 Q In the context of whether or not it is appropriate to impose asymmetric regulation for
32 MTRs? A. Yes.

33 Q Do you accept that that is an appropriate position? A. Firstly, it is not clear exactly what
34 the position of this paper is. I could, for instance, take you to the penultimate paragraph at

1 p.78 where it says that “NRAs should avoid allowing differences in MTRs that do not only
2 cover higher per unit costs faced by the newcomer for termination”. I think the paper is a
3 discussion document-type thing and has a number of different positions in it. It seems to me
4 that if we go right back to the beginning, if there is a traffic imbalance then we might want
5 to think what is causing that. If you think there is distortion that is leading to traffic
6 imbalance, then, that’s fine - you go back and you worry about the distortion. The actual
7 fact of traffic imbalance seems to me to be neither here, nor there.

8 Q I am afraid we are going to have to take it in a little bit more depth on that basis. If we go to
9 p.661, the first paragraph under ‘Advantages of asymmetry on a transitory basis’ -- The case
10 is there put, is it not, for the ways in which asymmetric regulation of a new entrant may be
11 beneficial in encouraging entry, contributing to dynamic efficiency, and favouring
12 infrastructure-based competition. Whether it is appropriate to make such a trade-off depends
13 on a range of factors which differ between countries - for example, the benefits of
14 promoting long-run competition may be greater where retail markets are relatively
15 concentrated. A. Okay. If I can take you to the beginning of that paragraph,

16 “-- as stated in the economic introduction, under some circumstances asymmetric
17 mobile termination rates may be justified, for example to take into account
18 differentiated conditions of spectrum allocation [cost] or to encourage the growth of
19 a new entrant on the market, which suffers from a lack of scale due to late market
20 entry [cost] where such promotion of competition is needed and justified”.

21 So, it seems to me that the two examples that you see, at least at the beginning of the
22 paragraph, are both cost-based ones, which I have no dispute with you, and then it also says
23 “where such promotion of competition is needed and justified”. So, again, it is not a general,
24 “We should do this in any market at all”.

25 Q Well, you refer to costs. We see costs as specifically dealt with over the page at p.662 -
26 ‘Exception to symmetry justified by objective exogenous cost differences’. Do you see
27 that? A. Yes.

28 Q Then we go at p.664 - ‘Exception to symmetry for a significantly late entrant on a transitory
29 basis’. A. Yes.

30 Q ‘Relation between entry delays (and market shares) and MTR asymmetries.’ First of all,
31 there is a survey indicating that the more recent entrants tend to have higher MTRs. Then,
32 over the page at p.66 - ‘Asymmetry for a significantly late entrant’.

33 “In this part we do not deal with MTR asymmetries justified by different
34 technologies and frequencies, as they are covered in the previous section. This paper

1 does not cover the valuation of MTRs, and figures and reasoning provided may
2 depend on a specific choice of depreciation”.

3 I think we can leave that paragraph. Then,

4 “Putting aside the fixed costs incurred by any given operator, a recent MNO cannot
5 from the start have a comparable customer base to his existing counterparts.

6 Assuming that using the same technology and the same spectrum over the same
7 geographical area, fixed costs of all operators should be (or, for the reason of
8 efficiency or similar regulatory coverage requirements, must be) equal or very close
9 to equal. However, in the short run the new coming MNO does not benefit from
10 comparable economies of scale and efficiency since it has fewer customers. As a
11 result, NRAs may observe that the late entrant incurs a higher per unit cost for all
12 services (including termination) than its competitors.

13 In order to acquire a significant market share after a certain period of time, MNOs
14 must benefit from the economies of scales, increase their market share, and their
15 traffic volume. This seems to be the key factor for an MNO in order to enhance
16 efficiency. When recent entrants have higher unit costs, it can be appropriate to
17 allow them to benefit from asymmetric MTRs ----“

18 Then there is your point that you should not over-compensate, which you have drawn
19 attention to. Then we go over the page again, where they consider: How long is this to
20 continue for? Then at p.672 - ‘Exception to symmetry during the transitory period before
21 MTRs are at costs’ ---- A. So, all that you have read out so far is just about cost based
22 differences. Right. Okay.

23 Q Yes. Then we have a section dealing with a situation,

24 “Where the MTRS are incumbents/entrants are not yet regulated to cost, where
25 competitive distortions may appear some potentially at the expense of the smaller
26 operator”. A. Where are you, please?

27 Q Page 672. A. Which paragraph, please?

28 Q Top paragraph. “Where MTRs of incumbents/entrants are not regulated to cost, where
29 competitive distortions may appear, some potentially at the expense of the smaller
30 operator”.

31 Now, you and I differ about what are the right cost measures, but we agree, I think, that
32 nobody’s costs are currently regulated. Nobody’s charges are currently regulated to cost
33 because of the glide path. A. That’s true, but quite clearly - and it is a relevant factor -
34 H3G’s margin is significantly larger than the margin of the other four MNOs.

1 Q They say,
2 “The following exception to symmetry is not an assistance to take into account an
3 entry delay, rather this is a compensation to take into account the delay to implement
4 the cost orientation, and particularly the consequent competitive adverse effect of
5 above-cost MTRs on small operators. In particular, in the transitional period before
6 MTRs are regulated at cost, this may create a situation whereby smaller operators
7 are unduly competitively disadvantaged.”

8 Then they refer to on-net/off-net price differentials. Do you accept that that is something
9 which ought to be investigated by a regulator? A. I’m probably missing something, but it
10 seems to me that we are still talking about costs.

11 THE CHAIRMAN: Can you just answer the question that you are asked. A. I was asked to
12 agree with this. This seems to me - unless I have missed something - to still be talking about
13 costs -- asymmetries related to costs. I certainly agree with that. (After a pause): I’m
14 sorry. Which is the bit that I’ve missed that you want me to agree to?

15 MISS ROSE: This is talking about an asymmetry to compensate the new entrant for competitive
16 distortions caused by ----

17 THE CHAIRMAN: You have put the question to him whether he accepts -- Perhaps you have not
18 put the question to him. Do you accept that if there are competitive disadvantages which are
19 not cost based for a new entrant -- Do you accept that nonetheless they should be taken into
20 account when deciding whether to impose regulation - regardless of what the ERG think?
21 What is your view on that? A. Well, consistent with the European Commission, if there
22 are exogenous factors then you would take them into account. If they are factors outside the
23 control of the new entrant then you would take them into account.

24 Q Even if they are not cost related? A. Yes, I think that’s right. Yes, you would.

25 Q I think that is probably as far as we can go with that point.

26 MISS ROSE: It is, madam. A. The important thing is that they have the outside control of the
27 operator. It is exogenous.

28 Q You will be delighted to hear, madam, that that concludes my cross-examination.

29 THE CHAIRMAN: Excellent news. Is there anybody else who wants to ask any questions for
30 Dr. Walker? No, no one is leaping up. Mr. Turner, is there any re-examination?

31 MR. TURNER: Only two questions, madam.

32 Re-examined by Mr. TURNER

33 Q Mr. Walker, it was put to you more than once that a comparison of the termination charges
34 that you draw in your report between H3G on the one hand, and the other MNOs on the

1 other hand, p. 208 in the bundle, is not comparing like with like, because H3G has a 3G rate,
2 whereas the others are blended rates. I just wanted to show you two paragraphs in bundle B,
3 and then ask you a question. Do you have bundle B? 2.27 on p.12 of the bundle, if you
4 could read that to yourself A. Yes.

5 Q And p.3.164 on p.54 A. ((After a pause) Yes.

6 Q Is there anything further that you are able to add on the correctness or otherwise of the
7 comparison between Hutchison's rate and the rates of the other operators in your table A.
8 Relating to whether it was a like for like ----

9 Q Like for like A. Well it is a like for like comparison, so it is comparing the prices that
10 those operators charge for the voice termination, which is the relevant question. The actual
11 technology over which it is terminated is not relevant, and you get different prices
12 depending on which technology it terminated over.

13 Q Second question, if you would turn to p.319 in tab 8, which is your report and exhibits. It is
14 a table from the Merrill Lynch report, table 137, "Wireless Penetration Increase", and I want
15 you to look at the fourth row down: "Market Share of Net Additions and Percentages" A.
16 Yes.

17 Q You were questioned about the rate, speed at which a new entrant, such as H3G might be
18 able to increase a subscriber base off the mark. Could you look at the columns for the
19 current year 2007, CYO3 and CYO4, and in particular the figure for Hutchison in CYO4
20 compared to the other operators A. Yes, in CYO4 it is 1A greater share of net ads than
21 the other operators did.

22 Q Is there anything you are able to say about the ability of Hutchison in the early years to
23 acquire customers quickly in comparison with competing operators A. Clearly this is
24 good evidence that Hutchison was able to acquire customers in the early years because it is
25 evidence in 2004 it actually did earn more with more net ads than any other operator.

26 MR. TURNER: Madam, I have no further questions.

27 THE CHAIRMAN: Thank you very much, Dr. Walker.

28 (The witness withdrew)

29 THE CHAIRMAN: Mr. Myers, I think, is next.

30 MR. ROTH: Madam, I do not know how long the Tribunal wishes to sit?

31 THE CHAIRMAN: I think we will make a start on Mr. Myers.

32 MR. ROTH: Whether we have the same sort of situation as yesterday, if we go for half an hour I
33 can see that, but otherwise if we are just going for 15 minutes or so whether it is right to
34 keep him. It is the same point that Miss Rose put to you yesterday about Dr. Littlechild, to

1 keep him, as it were, in purdah if we just ask a couple of questions, and then resume
2 tomorrow and whether it might not, with great respect, be better to start a bit earlier
3 tomorrow with a clean start.

4 THE CHAIRMAN: Well, we will have to start early tomorrow in any event.

5 (The Tribunal confer)

6 THE CHAIRMAN: If we started at half past nine tomorrow morning, Miss Rose, I think that
7 tomorrow I really must keep you to particular times. We have now gone over. We have
8 had one witness for one side, as it were, and another witness for the other side, and we did
9 allow you to adduce a third witness statement from Dr. Littlechild specifically to meet the
10 points in Mr. Myers' second witness statement. How long will you need tomorrow morning
11 to complete your cross-examination of Mr. Myers, and your submissions in relation to this
12 point.

13 MISS ROSE: I would anticipate about two hours for the witness, and two hours for my
14 submissions.

15 THE CHAIRMAN: Well I think that you are going to have to cut back a little on your
16 submissions; we need to finish the price control remedy point tomorrow in order to give
17 Ofcom and the Interveners a fair chance to put in their submissions.

18 MISS ROSE: Madam, I do just want to register my concern that Mr. Roth was permitted to cross-
19 examine Mr. Littlechild for the best part of four hours – Mr. Roth and Mr. Turner together,
20 for four hours, and with some constraints placed on Mr. Turner, but with respect virtually
21 none placed on Mr. Roth, and I do submit that I must be entitled to have an equivalent
22 opportunity to cross-examine Mr. Myers. It is right to say that I cross-examined Dr.
23 Walker, but Dr. Walker is not the witness of the respondent to this appeal, he merely
24 represents an intervener; it is Mr. Myers who is the crucial witness in terms of H3G's
25 appeal.

26 MR. ROTH: If I may assist, madam, I can understand that Miss Rose wishes to cross-examine
27 Mr. Myers, and that two hours is her estimate – it is a matter entirely for the Tribunal but I
28 would not seek to dissuade you from. I do think, however, with great respect to her, we
29 should be able to curtail our submissions considerably. We have put in a lot of material in
30 writing; you have heard this evidence very recently so it is fresh in your mind. H3G put in
31 what is described as “a skeleton” – I think it is about 90 pages – a very, very full written
32 submission covering these matters, so it is a question of just pulling in what one has had
33 from the evidence, and I would hope that I would be also be able to curtail my submissions,
34 which is entirely within our control, and that on that basis if everyone else takes the same

1 course we should be able to complete this tomorrow, and I think, if I may most respectfully
2 suggest, it is on the submissions that the team can work very effectively.

3 THE CHAIRMAN: Yes, I was going to say I understand your point about cross-examination, but
4 I think two hours for your submissions, given that really those submissions should be
5 limited to highlighting particular points that have come out of the evidence, given that we
6 have your extensive skeleton, I think probably two hours would be over generous for that.

7 MISS ROSE: Madam, I am in your hands, but you appreciate the significance of this case for
8 H3G.

9 THE CHAIRMAN: Well the case is significant, and obviously the SMP point is very significant,
10 and we have therefore allowed you a fairly free rein with regard to the timetable in putting
11 your case on that. This point is a fairly narrow point. It is not about the level of the price
12 control, it is about whether there should be any price control, and so if we start at half past
13 nine, and you conclude your cross-examination of Mr. Myers at half past eleven, that gives
14 you the two hours that you have asked for.

15 MISS ROSE: Madam, if you were to give me until lunch that would be an hour and a half for my
16 submissions.

17 THE CHAIRMAN: And Mr. Roth, how long would you then take in the afternoon?

18 MR. ROTH: If my friend is really going to take an hour and a half, and then of course she gets a
19 reply.

20 THE CHAIRMAN: Her reply is going to be in writing, so we are not going to get around to that
21 tomorrow afternoon.

22 MR. ROTH: It nonetheless gives her a further “go”, whether it is oral or in writing. I do not
23 know exactly what she is going to say, but we have had a short opening from her already of
24 about 20 minutes, then I would also wish to have an hour and half. My friend is not reading
25 out sections of statutes, or documents, she is just making submissions, and she says it is a
26 very important case for her clients – I have no doubt it is – but it is also, as you will
27 appreciate, a very important case for Ofcom.

28 THE CHAIRMAN: Who else is going to be making submissions after Ofcom?

29 MISS McKNIGHT: We envisage speaking for about 45 minutes, that is something we have
30 intimated to others about the timetable already.

31 THE CHAIRMAN: Mr. Turner, you are going to be making submissions?

32 MR. TURNER: We are going to be making submissions, we will attempt to cut them back to half
33 an hour; we will aim for that.

34 MR. ANDERSON: I think I can do it in 15 minutes, madam.

1 MISS BACON: 10 to 15 minutes for us too, O2.

2 MISS DEMETRIOU: And the same for Orange.

3 MR. ROTH: Madam, if it helps if Hutchison is given one hour we shall also only seek one hour.

4 THE CHAIRMAN: I think we should go with that, I think one hour is adequate for the

5 submissions on this, so I think we will allocate one hour to Hutchison 3G and then one hour

6 to Ofcom. So if we finish the cross-examination by 11.30, then we have H3G submissions

7 until 12.30, then Ofcom from 12.30 to 1, and 2 to 2.30. Then Vodafone, I think we will

8 limit you to half an hour, Miss McKnight, so that will be from 2.30 to 3. T-Mobile, I think

9 half an hour is reasonable, so 3 to 3.30, and then who else wants 15 minutes? BT, Orange

10 O2, which would take us to 4.15. So has everybody got a note of those times, and we will

11 be very careful tomorrow to stick to those.

12 MISS ROSE: Madam, may I suggest that if you want to stick to those times we could start at 10

13 o'clock, and that would assist me in shortening my submissions, because it would give me

14 just that little bit extra presentation to hone further what I needed to say.

15 MR. ROTH: Madam, if I may – for once – fully support Miss Rose (Laughter). I think it would

16 assist all counsel, preparation does help to shorten submissions, I think we all have that

17 experience, and it will fit within your timetable.

18 MR. ANDERSON: Madam, perhaps I could support my learned friends but for a different

19 reason. Call me an insane optimist, but if that schedule were to be met Mr. Reed (who is

20 not here today) would wish to know whether there is any chance that he might be called on

21 to open the TRD appeal tomorrow afternoon.

22 THE CHAIRMAN: I think we will all have had quite enough by the end of tomorrow, if we

23 manage to get through that, so I think Mr. Reed can be stood down. Let me go through this,

24 so I everybody can be absolutely clear. If we start at 10 then it takes us to 12, the cross-

25 examination of Mr. Myers, or are you saying that you can truncate that from two hours.

26 Right, you really do need to make sure that you cover it in two hours.

27 MISS ROSE: I have got the message, madam.

28 THE CHAIRMAN: Then from 12 until 1 it will be your submissions. Then Ofcom will be from

29 2 to 3; Vodafone from 3 to 3.30, T-Mobile 3.30 to 4. and BT, Orange and O2 take us then to

30 4.45. I hesitate to say “is everyone content with that?” but is everyone prepared to live with

31 that, because I really do think that we need to start on the TRD appeals on Friday morning.

32 Good, well as I say we will be very strict tomorrow keeping people to that, and we expect

33 everybody to prepare accordingly. Thank you for all staying late this evening, and thank

34 you particularly to the two expert witnesses for their tenacity.

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We will then resume at 10 o'clock tomorrow morning. Thank you.

(Adjourned until 10 am on Thursday, 31st January 2008)
