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**IN THE COMPETITION**

**APPEAL TRIBUNAL**

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

31 January 2008

Before:  
VIVIEN ROSE  
(Chairman)

ANDREW BAIN OBE  
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

**BETWEEN:**

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

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**HEARING DAY FIVE**

## 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, 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 S.J. Berwin) appeared on behalf of 02(UK) Limited.

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: Yes, Mr. Roth, you are going to call Mr. Myers?

2 Mr. GEOFFREY RICHARD PLATT MYERS, Sworn

3 Examined by Mr. ROTH

4 Q Mr. Myers, there is quite a large array of files in the case **there**, can you find one that is  
5 lettered K? A. Yes.

6 Q And if you turned to that file and go to tab 4, do you see something called “Witness  
7 Statement of Geoffrey Richard Platt Myers? Is that a statement you made for these  
8 proceedings? A. Yes, it is.

9 Q And Annex A – is that Annex A to your statement? A. Yes, it is.

10 Q And at tab 7, something called “Second Witness Statement of Geoffrey Myers”, with the  
11 annexes 27 pages in all; is that your second statement? A. Yes.

12 Q Mr. Myers, you have a red file there with you, I think that is your copy of the MCT  
13 statement ---- A. That is correct.

14 Q -- in slightly smaller print, with more pages on one A4 page? A. That is right.

15 Q Because I understand you find it easier to work off that? A. That is correct, yes.

16 MR. ROTH: Is there any objection to Mr. Myers having that with him?

17 THE CHAIRMAN: Is there any objection, Miss Rose?

18 MISS ROSE: Madam, it is slightly difficult, because obviously I have not seen what the witness  
19 has. I would prefer for the witness to work off the trial bundles? A. I am happy to do  
20 that, no problem.

21 THE CHAIRMAN: I think that probably would be better.

22 MR. ROTH: Just to ask you this, you are employed by Ofcom, as you say in your first statement  
23 (para.1, tab 4) as Director of Competition Economics and you say you are responsible for  
24 the economic analysis in the MCT review that led to the statement. Were you involved in  
25 taking the actual decision of what should be done? A. No, I was not. That was the  
26 Ofcom Board.

27 Q Just to clarify, do you sit on the Ofcom Board? A. I do not sit on the Ofcom Board.

28 Q Do these two statements represent your personal view, professional view as an economist?  
29 A. Yes, they do.

30 MR. ROTH: Thank you very much, would you stay there, because of course there is questioning.

31 Cross-examined by Miss ROSE:

32 Q Mr. Myers, just to pick up where Mr. Roth left off, you are a senior employee of Ofcom, is  
33 that right? A. That is correct.

1 Q You do not purport to be independent of Ofcom in the evidence that you are giving? A.  
2 The witness statement represents – well I cover both my personal opinions, and also at  
3 times I report what Ofcom’s views are; I hope I distinguish those two. When I am  
4 presenting my personal opinions those are my opinions.

5 Q Yes, I am not disputing that they are your opinions, but those opinions are not independent  
6 of Ofcom, because Ofcom, of course, is your employer? A. Some of my opinions, in  
7 general my opinions may well be independent of Ofcom, I don’t believe there is a  
8 difference between my opinions and Ofcom’s in the points I have made in the witness  
9 statements, but in general that is not correct, sometimes I may have different views from  
10 Ofcom.

11 Q Just to put it in a different way you are not an independent economist unconnected with  
12 Ofcom, being asked to give a view; you are an Ofcom employee defending the decision?

13 A. I am an Ofcom employee giving my personal opinions and reporting Ofcom’s opinions.

14 MR. SCOTT: Mr. Myers, just so that we understand ourselves, are you conscious of your duty to  
15 us as a Tribunal as an expert? A. I am indeed, yes.

16 MR. SCOTT: Thank you.

17 MISS ROSE: I would like to turn first to the question of the welfare analysis. It is correct, is it  
18 not, that at the time the decision was taken, Ofcom did not conduct a separate welfare  
19 analysis considering the welfare gain just from regulating H3G? A. Just to make one  
20 clarification, when we talk about the welfare analysis, I presume you are referring to the  
21 quantification of one of the welfare gains. To be clear to me the welfare analysis would  
22 cover the entirety of all of the gains, so if we are talking about the quantification of the gain  
23 from a more efficient structure of prices, that is correct, there was an assessment done of all  
24 five being non-regulated and not separate for H3G.

25 Q Now, it is the position that you have adopted in your evidence that there is, in fact, a  
26 material welfare gain from regulating H3G by price control, and I would like to explore that  
27 with you. As we know, you have in your evidence sought to construct a welfare analysis  
28 quantifying at least one part of the welfare gain from regulating H3G. That is your analysis,  
29 is it not, it is not an Ofcom decision? A. That is my analysis, yes.

30 Q We know from what you have said, and what Dr. Littlechild has said in response to you that  
31 there is not really a dispute in terms of methodology between you and Dr. Littlechild, the  
32 critical question is the size of the price which it is assumed that H3G would charge if it were  
33 not regulated? A. Both that and I think the interpretation of the result.

1 Q Yes, but I am just looking at the result itself? A. In terms of the result I agree with you,  
2 yes.

3 Q If we just go to your first witness statement (tab 4) at p.91 of the bundle (p.21 internal  
4 numbering)? A. Yes.

5 Q We can see the range of figures depending critically on that input? A. Yes.

6 Q And it increases 10-fold depending on whether you take 10.7 or the monopoly price, 23.9?  
7 A. Correct.

8 Q Ofcom never actually made a finding of fact as to what price H3G would charge in the  
9 absence of regulation, did it? A. In the absence of regulation and the threat of regulation  
10 my recollection is that Ofcom suggested that the monopoly price will be charged.

11 Q I am asking specifically in relation to H3G? A. Yes, that comment would apply to all of  
12 the MNOs, because in this respect they all face similar incentives.

13 Q Now, the question of what price H3G would charge, or would be able to charge in the  
14 absence of regulation by price control is fact sensitive to H3G, is it not? A. Some  
15 considerations will be the same, there may be some factors which may be different but I  
16 would say the bulk of the incentives and position would be very similar as between the  
17 MNOs.

18 Q To give you an example, BTs countervailing buyer power. Now, of course the presumption  
19 that we are operating on here is that there is SMP. That means that it is accepted for these  
20 purposes that BT does not have sufficient CBP to neutralise the dominance that comes from  
21 100 per cent. market share. It does not follow that BT has no CBP at all though, does it?  
22 A. That is correct, and true in relation to all of the MNOs.

23 Q And the extent to which BT would retain CBP, even if you assume SMP depends on the  
24 negotiating position between the parties, does it not? A. That would be one of the factors,  
25 yes.

26 Q And that, as we know from Ofcom's own position is dependent on the proper construction  
27 of the end-to-end obligation? A. Well your point seems to be about the position of H3G  
28 relative to the other MNOs, so in order to reach a different position for H3G as compared to  
29 the other MNOs, the construction of the end-to-end would have to be different as between  
30 H3G and the other MNOs.

31 Q I am sorry, I may not have put my question clearly enough. I do not suggest that the  
32 construction of the end-to-end obligation is the only factor that affects BT's CBP, but will  
33 you agree it is an important factor? A. Yes, it is a factor.

1 Q Because Ofcom's understanding of the situation as reflected in this decision is that when  
2 negotiating a price the parties would do so within the parameters of what was understood to  
3 be a reasonable price under that obligation? A. Yes.

4 Q Is it therefore Ofcom's position that BT is obliged under the end-to-end obligation to pay  
5 the monopoly price of 23 ----

6 MR. ROTH: I am sorry, that is a legal question regarding Ofcom's case. That is not a question  
7 for Mr. Myers, who is here as an expert. I am sorry, that is a legal question regarding  
8 Ofcom's case. That is not a question for Mr. Myers, who is here as an expert witness  
9 specifically responding to Dr. Littlechild, and Dr. Littlechild does not say in his report what  
10 the obligation is under the end-to-end, and it is not right to ask this witness.

11 THE CHAIRMAN: Yes, this witness is not a witness of fact for Ofcom, Miss Rose, is your  
12 question still relevant for him?

13 MISS ROSE: Yes, it is madam, because this witness has constructed a welfare model in his  
14 witness statement suggesting that 23.9p per minute is an appropriate measure to use in terms  
15 of the welfare gain, and the question is: "What is the basis on which this witness thinks that  
16 is an appropriate figure to use?"

17 MR. SCOTT: The word in front of that is "Monopoly" and I think the assumption that we have  
18 made about monopoly – and this goes to Mr. Roth's point – is that we are looking at a  
19 situation absent any regulation.

20 MISS ROSE: Sir, that depends what you mean by "absent any regulation" ----

21 MR. SCOTT: Well I mean a monopoly ----

22 MISS ROSE: This witness has accepted that the end-to-end obligation on BT is a relevant factor  
23 when asking the question what price could be charged by H3G, that has been accepted by  
24 this witness.

25 THE CHAIRMAN: Well perhaps we could ask the witness could you explain where the 23.9  
26 pence per minute comes from, and why you think that that is an appropriate input into the  
27 model? A. Yes, so the 23.9 pence per minute derives from a standard calculation of a  
28 monopoly price, the profit maximising price which takes account of the marginal cost and  
29 the demand function that the monopolist would face, and you make an assumption about a  
30 reasonable figure for the elasticity of demand and the shape of the demand function, and  
31 then establish what the profit maximising price would be within that framework.

32 Q So it is purely a construct; it is not anything to do ----? A. It is a construct, yes, that is  
33 correct.

1 Q It does not take into account the effect of the end-to-end obligation? A. I think it is  
2 neutral on that question, and just to add a further point. You suggested that I had accepted  
3 that the end-to-end was relevant for the purposes of establishing the unregulated price for  
4 the purpose of the welfare calculation; that was not what I intended to suggest.

5 MISS ROSE: Are you suggesting it is irrelevant? A. I am suggesting that on grounds of  
6 economic logic, the economic logic does not determine whether it is relevant, because the  
7 relevant question there would be: which do you take as given? Do you take one obligation  
8 as given in establishing whether or not there should be another obligation, or do you take  
9 the second obligation as given in considering the first. On grounds of economic logic I do  
10 not see that there is a way of establishing that one necessarily comes prior to the other.  
11 They may well be on grounds of legal reasoning but obviously I am not in a position to  
12 judge on that.

13 Q I am just trying to understand your answer. Are you saying that when you considered the  
14 appropriate inputs for the welfare gain, you did not take into account the ambit of the end-  
15 to-end obligation on BT? A. I certainly did not take it explicitly into account, yes.

16 Q In fact, it is right to say, is it not, that Ofcom has never addressed or answered the question:  
17 What is the maximum price that BT could be required to pay under the end-to-end  
18 obligation? A. I am not sure I can answer that question because I am not familiar with  
19 every single statement on that subject.

20 Q It is also the position, is it not, that the maximum price – or the price that H3G would be  
21 able to charge BT would be dependent upon the particular commercial relationship between  
22 H3G and BT? A. Sorry, in the scenario where the end-to-end connectivity obligation is  
23 relevant, is that the scenario?

24 Q In the real world? A. In that situation – I am sorry, I apologise, then could you repeat the  
25 question?

26 Q The maximum price that H3G would be able or willing to charge to BT depends on their  
27 overall commercial relationship with BT? A. It would depend on that and other factors,  
28 yes.

29 Q And that, of course, is distinct for H3G from the other MNOs? A. Yes, of course, how  
30 significant that is is another question.

31 Q Again, that is not a matter that Ofcom has ever investigated or determined, is it – for this  
32 purpose? A. For this purpose, no.

33 Q You agree with that? A. Sorry, I do, yes.

1 Q In your witness statement, paras. 54 to 55, you are responding here to Dr. Littlechild's  
2 position to the unregulated price going forward should be 10.5 pence per minute, we can  
3 argue that that might be better quantified at 10.7. "However, this was not the only price that  
4 H3G charged ... on 2 November 2006 H3G proposed a large increase ..." this is the 16.6  
5 pence per minute. Then you said:  
6 "Furthermore, in my view, this large price increase indicates H3G's willingness  
7 and ability to increase charges in the absence of a price control. Even higher MCT  
8 charges would also be possible, such as up to the monopoly charge."  
9 So you are actually purporting to make a finding of fact there, are you not, based on the  
10 evidence about what H3G charged? A. I am not sure I fully understand precisely what  
11 you mean by "finding of fact"; it says what it says. It says that it indicates their willingness  
12 and ability to increase charges.  
13 Q When you expressed that view, did you investigate the detail of the circumstances in which  
14 H3G had made its OCCN proposal for the 16.6 pence per minute charge? A. I am aware  
15 of some of the circumstances but perhaps not all of the precise negotiations; I do not believe I  
16 needed to be.  
17 Q Why do you not believe you needed to be? A. Because the proposition I am making is  
18 that it indicates their willingness and ability to increase charges in the absence of price  
19 control, and I believe that that is indicated by the 16.6p because that is both consistent with  
20 the underlying economic logic, which would be to maximise profits from termination which  
21 would imply, in my view, a substantially higher charge than 10.7 p per minute, it is  
22 consistent with that and I have not been aware of an alternative explanation which  
23 satisfactorily explains the increase to the contrary.  
24 Q You say you are not aware of an alternative explanation, we will come back to that. A.  
25 Well I have said that I am not aware of a satisfactory alternative explanation.  
26 Q So you are judging whether the explanation is satisfactory or not? A. Well, obviously we  
27 have to talk specifically at this point; the explanation that I understood H3G to have I do not  
28 regard as being satisfactory to explain the increase.  
29 Q Well that is not a decision that Ofcom has ever considered or taken, is it? That is your  
30 personal view? A. That is my view, yes.  
31 Q Ofcom has never considered this question? A. Considered the question of ?  
32 Q Whether H3G would be able and willing to charge 16.6 p per minute if unregulated by  
33 charge control? A. Ofcom has taken the view that H3G would be able and willing to

1 charge up to the monopoly charge. The precise figure of 16.6 is not what I depend on, nor  
2 Ofcom.

3 Q If you could just answer the question. It is right, is it not, that Ofcom has never taken a  
4 decision as to whether or not H3G would be able or willing to charge 16.6p per minute?

5 MR. SCOTT: What Mr. Myers just said ----

6 THE CHAIRMAN: If he can just answer ----? A. I am slightly confused by the question.

7 MISS ROSE: It is a simple question: has Ofcom ever decided, ever addressed the explanation  
8 given by H3G for the 16.6 pence proposal and concluded whether or not that was a  
9 reasonable guide to its future charging? A. I am not sure is my answer.

10 Q I would just like to refer you to two passages in the MCT statement, if you could take up  
11 bundle B, if you turn first to para.5.65? A. Yes.

12 Q "Ofcom's observations on the conduct of negotiations"? A. Yes.

13 Q "Ofcom recognises ... that these attempts to increase (and decrease) charges, and  
14 response of purchases to the proposals, may be considered significant in the context  
15 of an assessment of whether suppliers have SMP and whether any purchasers have  
16 CBP. However, in Ofcom's view the timing of the recent proposals to vary MCT  
17 charges, means that it is very difficult to determine to what extent the behaviour of  
18 the parties has been affected by awareness of the significance which might be read  
19 into such behaviour."

20 Do you see that? A. I do.

21 Q Similarly, if you go to para. 9.205:

22 "Ofcom does not dispute that a reduction in termination rates will reduce H3G's  
23 termination revenues compared to a 'no change' scenario where rates are  
24 maintained at the existing unregulated level. As an alternative comparison, Ofcom  
25 notes that H3G's own business plan does not forecast MCT charges which persist at  
26 the current rates but rather anticipates charges which fall over time."

27 So that was evidence that Ofcom had as to H3G's own business plan relating to MCT  
28 charges, was it not? A. That was evidence, yes, but I do not believe it was evidence of  
29 unregulated charges.

30 Q Can you also, please, take up file C1? If you could turn to tab 5, this is the second witness  
31 statement of Kevin Russell, the chief executive of H3G, who has not been cross-examined,  
32 and whose evidence is unchallenged. I would just like you to read through paras. 14 to 16?  
33 A. Yes.

1 Q Remembering that that is unchallenged evidence, I suggest to you that there is no proper  
2 basis on which it could be said that 16.6p is the appropriate input figure for the welfare  
3 analysis? A. Well, I believe I would disagree with that, because the 16.6p goes far  
4 beyond what would have been necessary for H3G to achieve a degree of parity in charges.

5 Q Just pausing there, why do you say that? A. I was just about to explain. The point about  
6 competitive advantage and disadvantage will depend upon the termination charges that are  
7 actually paid and received, and that of course is the blended charges. Both H3G and the  
8 other 2G/3G MNOs have blended charges. H3G also has 2G termination provided via its  
9 national roaming partners as well as 3G. The increase in the 2G/3G MNOs, blended  
10 charges were, one was slightly above 10 per cent, the others were below 10 per cent,  
11 whereas H3G's increase in its blended termination charge was more than 50 per cent.  
12 Therefore, in order to reflect the change in position of the 2G/3G MNOs, H3G would only  
13 have needed to increase its termination charge by a similar amount to the 2G/3G MNOs,  
14 and not by 50 per cent compared to around 10 per cent.

15 Q Well that is very interesting, but it is not something that appears anywhere in Ofcom's  
16 decision, is it? A. In Ofcom's statements?

17 Q Yes? A. No. Ofcom's statement did not deal with ----

18 Q Nor is it something that has ever been put to H3G at any time? A. Again, I am not sure --  
19 that is possibly true, I am not sure.

20 Q At any stage of these proceedings? A. I do not believe that point has come up during  
21 these proceedings.

22 MR. ROTH: I am sorry, we do in our defence deal with this, but it is not for this witness to  
23 respond to that as to what Ofcom has said, and I can quite understand he does not know, but  
24 I can take you later to the defence.

25 MISS ROSE: (To the witness) The question of the extent to which Mr. Russell's explanation for  
26 the 16.6 charge is satisfactory, is a matter for Ofcom to consider, not for you to just give  
27 your personal opinion on, is it? A. I have been asked in the witness statements, as I  
28 understand it, to give my personal opinion on it. In terms of the statement Ofcom did not  
29 deal with the question of the 16.6p either way; that was a matter that was under dispute at  
30 the time that Ofcom was making the statement, and therefore it did not address the question  
31 and left that to be addressed in the termination rate disputes.

32 Q Moving on to consider the welfare analysis more generally, you have explained in your  
33 evidence that this only went to one element of what Ofcom perceived as the potential  
34 welfare gain from regulation? A. Yes.

1 Q You do not deny, do you, that this was an important element which Ofcom took into  
2 account in deciding whether price control was a proportionate remedy? A. It was one of  
3 the important points, yes.

4 Q And that therefore if that welfare analysis was not done properly that would flaw Ofcom's  
5 decision, would it not? A. No, I do not believe it would flaw the decision, because that  
6 would depend on what the other reasons were, and whether those other reasons were  
7 sufficient which, in my opinion they would be sufficient.

8 Q Well let us say that the result on the welfare gain was wholly misleading and incorrect, are  
9 you saying that that would have no impact on the validity of Ofcom's decision? A. No, I  
10 did not say it would have no impact, I said that I do not believe in my personal opinion that  
11 it would reverse the decision because of the other important effects, such as competitive  
12 distortion.

13 Q I think we can agree that it would not necessarily reverse the decision ----? A. Okay.

14 Q -- but it would suggest that the decision should be reconsidered, would it not? A. That is  
15 not a question for me to answer, I believe.

16 Q At para.14 of your first statement you identify some of the limitations of the welfare  
17 analysis. You make the point that it does not consider longer term consumer choices, does  
18 not identify or evaluate distributional effects, and we agree also at para.13 that the  
19 limitations of the welfare model are not in dispute. It is at an industry aggregate level and  
20 does not distinguish the competitive market structure or competitive interactions. In fact, I  
21 would suggest to you that this model is not a particularly good tool for measuring that gain?  
22 A. It is fit for the purpose for which it was used by Ofcom which was a very limited  
23 purpose, as I explained in my first witness statement.

24 Q You say that Ofcom used a qualitative analysis for determining the other elements of  
25 welfare gain? A. Yes.

26 Q But in fact, what we see in the statement is merely assertions that there will be benefits  
27 without any attempt to consider the scale of those benefits, is that not right? A. There is  
28 reasoning and conclusions, but there is no quantification – if that is what you mean by scale  
29 – apart from an overall judgment that Ofcom made that there were material overall welfare  
30 gains from regulating H3G.

31 Q So, for example, if you take long term choices by consumers we do not know whether in  
32 relation to H3G the impact of a regulated or unregulated choice on those long term  
33 decisions for consumers will be very small, of moderate impact or very significant, do we?

1 A. Well that is a question of judgment which was not informed by precise quantification,  
2 and my judgment would be that that was significant.

3 Q But in fact that is never a question that Ofcom never addressed at all because Ofcom never  
4 considered the regulation of H3G as an individual company separately, did it? A. Yes, it  
5 did.

6 Q In this respect? A. Well the same reasoning would apply as for the other MNOs, so there  
7 was no separate wording in relation to H3G but in my view there would not need to be  
8 because the same considerations would apply.

9 Q You say “the same considerations would apply”? A. Yes.

10 Q But of course the extent of the gains you are talking about ----? A. No, in terms of the  
11 quantum.

12 Q -- may be very different? A. In terms of the quantum I agree with you, yes.

13 Q And therefore if you are probably looking at weighing the costs and benefits of regulating  
14 each individual company you were not in a position to do that for H3G? A. Ofcom made  
15 an overall judgment about the net welfare gains from regulating H3G.

16 Q One of the points that you make at para.14 of your witness statement is that Ofcom assumed  
17 in the welfare model that MNOs do not make excessive profits so it did not analyse the  
18 consumer welfare gain from removing the first detriment identified above, excessive prices  
19 overall. Are you suggesting that nevertheless that the potential for excessive prices overall  
20 was a welfare gain affecting the decision? A. Generally – is your point?

21 Q Yes? A. Generally, Ofcom’s position on that was that that was possible but it explicitly  
22 did not rely - I believe the wording was “did not rely heavily”?

23 Q Yes? A. I would have to turn to the statement to get the precise wording.

24 Q Let us turn it up, it is at bundle B, tab 1, and it is para.7.40? A. Yes, I have it.

25 Q “... while the practical evidence is not conclusive, Ofcom remains of the view that the  
26 waterbed effect is unlikely to be complete. Given the inconclusive nature of the evidence,  
27 however, Ofcom has decided not to rely heavily on this view when determining what  
28 conditions should be imposed on MNOs to address the detriment arising from excessive  
29 MCT charges ... if the waterbed effect were fully effective, excessive termination charges  
30 may give rise to other detriments.”

31 So Ofcom acknowledged in the decision that the evidence on excessive charges was  
32 inconclusive? A. It depends what you mean by “excessive prices”.

33 Q Retail prices? A. Well this is in fact dealing with overall profitability compared to  
34 efficient cost, taking account of both termination and retail.

1 Q The point that is being made is that they were not sure whether competition at the retail  
2 level was sufficiently intense to, as it were, eradicate from the system excess profits? A.  
3 Yes, as it says, "... remains of the view that the waterbed effect is unlikely to be complete."  
4 Q Yet they cannot say for sure? A. Yes, that is correct.  
5 Q So the point that you make at para.14 does not take us any further since this was not a key  
6 point for Ofcom anyway in deciding whether to impose a charge control? A. Yes, it was  
7 merely descriptive, para.14, yes.  
8 Q Will you agree that the material welfare gains that you have not quantified, as regards H3G  
9 are likely to be considerably smaller than as regards the other MNOs because of H3G's  
10 smaller market share? A. That is generally the case, yes.  
11 Q Well because Ofcom never gave separate consideration to the welfare gain of regulating  
12 H3G individually, it is also right, is it not, that Ofcom did not balance that welfare gain  
13 against distortions to competition which were going to be introduced as a result of this  
14 statement? A. Well Ofcom rejected the idea that this decision would introduce the  
15 distortions of competition and in fact had the contrary view that it would reduce distortions.  
16 So the question did not arise therefore.  
17 Q Can I just pause you there for a moment, because I want to suggest that that is actually  
18 incorrect? A. Okay.  
19 Q In fact, this decision expressly acknowledged that the very charge controls which Ofcom  
20 was introducing would produce a distortion for competition. Let me explain what I mean.  
21 Under the United Kingdom system if somebody ports their number to a different network  
22 the MCT charges still are charged at the same rate that applied to their old network, that is  
23 correct, is it not, in respect of that number? A. That is the current regime, yes.  
24 Q So if somebody used to be on the Vodafone network, and they take their Vodafone number  
25 to H3G, when their friends terminate calls on H3G's network H3G will only be paid the  
26 Vodafone MCT rate? A. That's correct, yes.  
27 Q Conversely, if an H3G subscriber ports their number to Vodafone, Vodafone will get the  
28 benefit of H3G's higher MCT rate. Correct? A. That is correct.  
29 Q It is also the case, is it not, that these windfalls are not taken into account when calculating  
30 the target average charge? A. Yes, that is correct.  
31 Q So, for example, H3G is not entitled to say to Ofcom 20 per cent of our subscribers, for  
32 example, have ported numbers so we are getting a lower MCT rate for the, we want to  
33 compensate by having a higher average MCT rate for the rest of our subscribers. They are  
34 not allowed to say that, are they? A. They are not allowed to say that? Oh, I see ----

1 Q ---- the charged involved you have imposed? A. Sorry, it was the word "say" that  
2 slightly confused me.

3 Q Sorry, they are not having to rely on that? A. They are not allowed to increase their  
4 charges to take account of that, yes.

5 Q All of their subscribers are deemed to be receiving calls at the H3G rate? A. I guess so,  
6 yes.

7 Q Now, the effect of this, this effect is the direct result, is it not, of the charge control being  
8 imposed on the five MNOs in this decision? A. I am sorry, which? The porting regime is  
9 unaffected by the charge control? I don't quite understand your point.

10 Q No, that is not what I am saying? A. Yes, I'd like clarification, please.

11 Q Okay, it is because of the form of regulation ----? A. Yes.

12 Q That H3G's price is capped? A. Yes.

13 Q And that it cannot take into account the fact that it is actually receiving the lower price for a  
14 proportion of its customers and that it will only receive the lower price for its customers.  
15 That means H3G is actually going to receive less revenue from its call termination than this  
16 statement envisages is cost effective? A. That is not correct because that would also  
17 depend upon two considerations. First, the fact that the price control imposed on H3G  
18 through the decision was a glide-path where in initial years before the final year of the price  
19 control charges are significantly above costs; secondly, the tone of this statement, in fact, on  
20 the same day I believe as this statement consultation was issued in order to address the  
21 specific point that you are dealing with and that would have been known by Ofcom at the  
22 time that they made the statement that ----

23 Q I am going to come on to the consultation in a minute. I want to address your first point  
24 about the glide path, because the glide path was introduced for other reasons unrelated to  
25 this problem of ported numbers, was it not? A. Yes, that is true, yes.

26 Q So you cannot argue that the existence of the glide path compensates H3G for the ported  
27 numbers problem? A. But you were suggesting that there was a competitive distortion  
28 against H3G.

29 Q Oh yes. A. And that would require H3G's effective charges to be below cost, and for that  
30 the glide path is extremely relevant.

31 Q No, no, wait a minute, that is not right. That is not right. Ofcom made a decision that  
32 different charges were appropriate to H3G and the other operators for sound reasons partly  
33 due to exogenous costs, partly due to H3G's different situation in the market. We heard a  
34 lot from Mr. Roth yesterday about how H3G had endorsed asymmetric regulation to that

1 extent ----? A. You said “H3G”, but Ofcom, yes. Ofcom imposed asymmetric  
2 regulation, that is correct.

3 Q So you cannot say that that results in H3G having an unjustified competitive advantage, that  
4 is the decision of the regulator? A. I am sorry, that is not the question that I was asked.

5 MR. ROTH: It is a question of levels, and certainly this point is nowhere featured in the skeleton  
6 or the notice of appeal; it may come into the price control submission, where the glide path  
7 and how it compensates.

8 THE CHAIRMAN: I think we should let Miss Rose take this – if you could ----?

9 MISS ROSE: I will, madam.

10 THE CHAIRMAN: I think we are not improving matters by ----

11 MISS ROSE: Let us go to the consultation, and we will see how Ofcom itself characterises the  
12 problem, bundle F4, p.4. As you have just told us, this consultation paper was produced by  
13 Ofcom on the same day as the MCT statement – correct? 27<sup>th</sup> March, yes? A. That is  
14 correct, yes.

15 Q The same day as the MCT statement, so these are matters that Ofcom was clearly aware of  
16 at the time it imposed price control on H3G, correct? A. Yes.

17 Q If just look at the summary for a moment, we can see first of all a reference to the MCT  
18 statement at para.1.1, and then we see that the consultation is immediately proposing a  
19 modification to the charge controls which have been imposed on the same day? A. Yes.

20 Q And the reason for that is the impact of indirect routing for mobile number portability on the  
21 effective termination charge? A. I am sorry, which paragraph are you at?

22 Q Paragraph 1.2? A. Thank you.

23 Q Then we see the problem that we have just been debating is described in the following  
24 paragraphs, and in particular at 1.6 it said:

25 “The disadvantage of the existing charging mechanism for calls to ported-in  
26 number sis that, for as long as the current charging and routing arrangements for  
27 calls to ported-in numbers apply , the MNOs will receive an average effective  
28 termination rate that differs from the ceiling for wholesale termination charges set  
29 by Ofcom in the Statement.

30 1.7 Further, because of these arrangements, and their interaction with the charge  
31 controls, there is the potential for distortions to: (i) the incentive to encourage  
32 subscribers to switch; and (ii) the incentive to encourage subscribers that do switch  
33 to port/change their number”

1 So Ofcom is identifying at 1.7 a specific competitive distortion that flows from this  
2 problem, do you see that? A. Yes.

3 Q Then we see the options set out at 1.8. Then Ofcom analyses the problem. If we go to 2.20.  
4 “The overall financial impact of indirect routing for the 2G/3G MNOs varies being  
5 roughly neutral for Orange and T-Mobile, but positive for Vodafone and O2.”

6 So Vodafone and O2 actually get an advantage from this distortion, but it is neutral for T-  
7 Mobile and Orange.

8 “For H3G the impact is negative. It receives less than it would if there were direct routing,  
9 because it is receiving a lower termination rate than its own termination rate for a significant  
10 proportion of calls. The impact is calculated by taking into account the proportion of  
11 minutes for each MNO that are terminated on ported-in numbers.

12 “The impact on H3G will reduce as H3G’s charges become more closely aligned with those  
13 of the other MNOs, but the effect will remain whilst indirect routing continues.”

14 If we then move on in this statement to para 4.20 where Ofcom is considering the  
15 disadvantages of doing nothing, under the heading “Disadvantages of this option”, and the  
16 option they are considering is “do nothing”.

17 “4.20 If Ofcom follows this option and does nothing then the MNOs’ average  
18 received termination charge will differ from [the target average charge] since  
19 ported-in minutes are charged at a different rate. MNOs with a higher TAC  
20 (particularly H3G) will receive a lower effective termination charge relative to t  
21 heir TAC and MNOs with a lower TAC will receive a higher effective termination  
22 charge relative to the TAC. The magnitude of the financial effect of the current  
23 charging arrangements on an individual MNO depends on its TAC and the volume  
24 of its minutes that are terminated on ported-in numbers. These financial effects  
25 will be at least as great as the figures quoted in paragraphs 4.47-4.48”.

26 If we then go to 4.47 to 4.48, the impact on the five MNOs would vary.

27 “For example, Ofcom estimates that, under the current charging mechanism, in the  
28 first year of the charge control H3G could receive between £20-30m more  
29 termination revenue if Option 4 were implemented.”

30 So that means that the adverse impact on H3G of this problem is between £20-30 million a  
31 year at least, on Ofcom’s analysis? A. Adverse impact of the portability regime, yes.

32 Q Combined with the charge control, because this problem does not arise ----? A. Yes.

1 Q -- if H3G is not subject to charge control, does it? A. Well it does arise – it depends what  
2 you mean by “this problem”, but the porting regime depends currently on donor network  
3 charges.

4 Q Oh but let us be clear, the adverse impact on H3G arises because H3G cannot raise its  
5 average charge above that which Ofcom has fixed in the MCT statement? A. Sorry, my  
6 understanding, having just read this now, is that this is comparing the difference between  
7 the headline charges on the price control and the effective charges. That is the difference  
8 between two levels of charges, that does not bring in costs.

9 THE CHAIRMAN: No, we are not talking about costs. The point is a fairly simple one, that if  
10 H3G were unregulated it could increase its MCT charge to take account of this, what is  
11 called “a distortion” which is that it does not actually receive that MCT charge for all the  
12 minutes that are terminated on it, sometimes it receives the cheaper Vodafone. Now, it  
13 must be right that they could do that if they were not regulated – whether that would be a  
14 good thing or a bad thing is something else, but it must be right that they could do that if  
15 they were not regulated? A. That’s correct, but my point was that this is a quantification  
16 of the difference between the headline rate and the effective termination rate and if H3G  
17 increased its headline rate that would increase the difference between the headline rate and  
18 the effective termination rate, and I suspect that would therefore increase this number,  
19 because it is simply a difference between two charge levels. This is the difference between  
20 the effect of two different charge levels.

21 Q And what he is saying is that, yes, you could bump up your charge but then the differential  
22 between what you receive for ----

23 MISS ROSE: But madam I think you have the point, that that does not solve the actual financial  
24 impact which is because of the regulation H3G cannot bump up its charge, so it suffers the  
25 loss of ----

26 THE CHAIRMAN: It is because the charge control does not allow them to do that, but you could  
27 modify the charge control to enable them to take that into account, so I am not sure whether  
28 this point really goes to the question of whether a price control ----

29 MISS ROSE: Madam, you will hear my submission on it later, but can I just finish the point?

30 THE CHAIRMAN: Yes.

31 MISS ROSE: (To the witness) So that is the adverse financial effect on H3G. If we go back to  
32 4.21 it is not simply adverse financial effects, because there are other adverse competitive  
33 effects. If we look at 4.22:

1 “These differences between the effective termination rates that MNOs receive relative to  
2 their TAC have the potential for distortion of incentives in retail markets. Because of the  
3 current charging arrangements for calls to ported-in numbers, and their interaction with the  
4 charge controls ...”

5 You will notice that – “their interaction with the charge controls” –

6 “... there is the potential for distortions to (i) the incentive to encourage subscribers  
7 to switch from one network to the other and (ii) the incentive to encourage  
8 subscribers that do switch to port/change their number.

9 4.23 This distortion can be shown by a simple example. Where operator A’s  
10 termination charge [H3G in this case] exceeds operator B’s termination charge,  
11 operator B may have an increased incentive to target A’s subscribers (in the hope  
12 they will port their numbers to B) to obtain higher termination revenue.”

13 It is free revenue because it does not have to be taken into account when determining your  
14 TAC.

15 “This may create an adverse competitive impact on operator A, whose customers  
16 are being targeted because of regulatory differences between the two operators  
17 rather than from normal competitive conditions. Operator B could also face  
18 reduced competition for subscribers because Operator C will prefer to target its  
19 customer acquisition efforts against A’s subscriber base as opposed to B’s.”

20 In other words, H3G’s subscribers are now more valuable to the other four MNOs, because  
21 if they port their numbers they carry a higher charge with them. Then further, another  
22 distortion on competition:

23 “... if operator A persuades a subscriber from B to switch, the termination rate it  
24 receives for calls to that subscriber would be below its own termination charge, and  
25 possibly its underlying costs of providing termination. This might dissuade  
26 operator A from competing for B’s subscribers.

27 4.25 These effects are likely to be more serious where the differences between  
28 individual MNOs’ TACs are significant. For example, in year 1 of the charge  
29 control the TAC charge ... will be 5.5ppm compared to 8.9 ppm for H3G, giving  
30 900/1800 MHz operators a clear incentive to target customers on H3G number  
31 range.”

32 So clear competitive distortions identified by Ofcom in this consultation paper arising out of  
33 the interaction of the ported numbers’ regime, and these charge controls. Right? A. The  
34 charge controls reduce these distortions because they bring the termination charges closer

1 together, and it is the difference in termination charges that increases these distortions.

2 Sorry, you are shaking your head.

3 Q I am shaking my head ---- A. But that is the case, the distortion described here arises  
4 because H3G has a significantly higher termination charge than the other operators, that is  
5 what causes it to be attracted potentially to other operators to get subscribers who subscribe  
6 to H3G to port to them and, as you put it, carry H3G's termination charge with them. That  
7 distortion is being reduced by the price controls because it reduces the difference in  
8 termination charges, and this statement is dealing with the underlying problems to the extent  
9 to which these issues arise from the portability regime itself, that is what this consultation  
10 was seeking to address in a targeted way.

11 Q Are you seeking to suggest then that there was no connection between this consultation and  
12 the decision whether to impose charge control.

13 THE CHAIRMAN: Well as he is not on the Board of Ofcom, I am not really sure he would  
14 know.

15 MISS ROSE: Well let us look at the decision itself, and we will see what Ofcom said about it.  
16 Back to bundle B, para.9.231. If you look at these paragraphs 9.231 to 9.234, Ofcom  
17 records the submission that H3G made that the existing porting arrangement gives an  
18 incentive to other MNOs to focus customer acquisition strategies on H3G's customers.  
19 Then:

20 "Ofcom is presently considering responses to a consultation on possible changes ..."

21 THE CHAIRMAN: Perhaps the witness can read.

22 MISS ROSE: Sorry, I beg your pardon. The key passage is at 234.

23 "Ofcom considers that such an arrangement, if adopted, would represent a material  
24 change to the proposals set out in the September 2006 consultation. As such  
25 Ofcom considers it appropriate to reconsult on this matter."

26 And then this:

27 "Given the relative size of the financial impact of (i) the possible changes  
28 reflecting the impact of MNP and (ii) the wider charge controls, Ofcom does not  
29 consider that it would be appropriate to delay implementing the new charge  
30 controls until after Ofcom has reconsulted on this matter."

31 Do you see that? A. Yes.

32 Q So Ofcom takes there a proportionality decision, does it not?

33 MR. ROTH: I am sorry, I do strongly object to this line of questioning. Mr. Myers has come, as  
34 he says in his statement, to comment on the statements of the expert adduced by H3G, Dr.

1 Littlechild. He is not here as an expert to speak to Ofcom's policy, or decision making. I  
2 would also remind the Tribunal that part of this decision dealing with precisely this point  
3 was withdrawn following the O2 appeal which modified dealing with this specific point, as  
4 it were, by consent, and they are now exploring an area which it is not within this witness'  
5 competence to deal with, it is not part of the economic evidence, and it is not part of his  
6 evidence.

7 THE CHAIRMAN: Well I think there is some ----

8 MISS ROSE: Well, madam, it was the evidence of this witness that there were no competitively  
9 distorting effects that arose out of Ofcom's decision to impose charge control on H3G.  
10 What I have sought to demonstrate is that in fact Ofcom knew at the time that there was  
11 going to be a distortion, and that what Ofcom did was to purport to weigh the financial  
12 impact of that distortion against the benefits of imposing the charge control. You will  
13 appreciate immediately the problem with that. It had not separately analysed ----

14 THE CHAIRMAN: This is a matter of submission now.

15 MISS ROSE: It is, madam, but you understand the point.

16 THE CHAIRMAN: We understand the point. I do not think that this ----

17 MISS ROSE: Madam, I will move on.

18 THE CHAIRMAN: -- witness can really ----? A. But may I address the position about the  
19 competitive distortion point because ----

20 MISS ROSE: Well madam, he cannot have it both ways.

21 MR. ROTH: No, I am sorry, he has been asked that point, he is entitled to respond? A. I  
22 believe I have been misrepresented by Miss Rose.

23 THE CHAIRMAN: Well perhaps we can just put this question: have you a view on whether there  
24 were competitive distortions in the market which would have justified not imposing a price  
25 control on H3G? Is that a fair question to put? A. Overall, no.

26 Q Well I think perhaps we could move on.

27 MISS ROSE: Just to wrap this point up, this consultation has not progressed to a decision, has it?  
28 A. That is correct.

29 Q And the reason for that is that Ofcom has decided to delay any decision on this consultation  
30 pending the outcome of these appeals?

31 THE CHAIRMAN: That is not really for this witness to say.

32 MISS ROSE: Madam, I will move on.

33 THE CHAIRMAN: Thank you.

1 MISS ROSE: (To the witness) I would like to turn to the question of impact assessment  
2 generally. You appreciate, I would imagine, that Ofcom is under a statutory duty to  
3 undertake impact assessment when it makes decisions of this type? A. Yes.

4 Q And Ofcom has produced a policy document setting out the approach that it will follow  
5 when undertaking impact assessment, correct? A. Yes.

6 Q We can turn that up, it is in bundle F1, p.488A. I imagine this is a document that you are  
7 very familiar with, is that right? A. Yes, I have some familiarity with it.

8 Q Well presumably when you are conducting your economic analysis ----? A. Yes, it is  
9 consistent.

10 Q -- it is done on the basis of the guidance in this document? A. Yes, that is correct.

11 Q And is it right that this is the approach that you were seeking to follow when you were  
12 undertaking your analysis in this case? A. I would have to re-read the document in order  
13 to given an absolute answer to that, but my understanding is “yes”.

14 Q Well would it be normal for you to act consistently? A. Absolutely, that would be  
15 normal, yes.

16 Q If we go to p.488C: “Why is Impact Assessment important”? The point is made that  
17 Ofcom’s decisions can impose significant costs on our stakeholders and  
18 “... it is important for us to think very carefully before adding to the burden of regulation.”  
19 And then in the box:

20 “The option of not intervening ... should always be seriously considered.  
21 Sometimes the fact that a market is working imperfectly is used to justify taking  
22 action. But no market ever works perfectly, while the effects of ... regulation and  
23 its unintended consequences may be worse than the effects of the imperfect  
24 market.”

25 Would you agree with that? A. Yes, I would.

26 Q So that the mere fact that a regulator charges more efficient does not necessarily mean it is  
27 the best option, does it? A. That is correct, one needs to take account of the implications  
28 of regulation, yes.

29 Q And the implications of regulation, not simply on the narrowly defined market that you are  
30 regulating, but more generally on the circumstances of stakeholders, consumers, and related  
31 markets, correct? A. Yes, I would agree.

32 Q Then at 1.4:

33 “In identifying options, we will aim to consider a wide range of options, including  
34 not regulating. Where appropriate, we will explore more risk-based, targeted

1 approaches to regulation and will consider whether there are alternatives to formal  
2 regulation.”

3 If we go over now to para.2.1, which is a description of what an impact assessment is.

4 “Subject to the principle of proportionality, an Impact Assessment will generally:

- 5 \* identify the impacts of each option on the interests of particular groups  
6 of stakeholders.
- 7 \* identify any impacts which each option would have on competition.
- 8 \* identify and, where possible, quantify costs and benefits flowing from  
9 the impacts which each option would have;
- 10 \* assess the key risks associated with each option.”

11 Would you agree with that approach? A. Yes, in general, yes.

12 Q Then at para. 3.3: “At the outset we should identify the issue to be addressed and the  
13 options available to us”, and then this:

14 “We will start by considering the option of not changing the regulatory framework,  
15 either by not introducing regulation or by retaining existing regulation. This option  
16 - no new intervention – will generally be the benchmark against which other  
17 options are judged.”

18 Do you see that? A. Yes.

19 Q So you should always include as an option retention of the status quo? A. Retention of  
20 existing regulation.

21 Q Yes, retention of existing regulation. We see the same point emphasised at a number of  
22 other parts of the decision. If you go to para. 5.13? A. Sorry, of the same document?

23 Q Yes. You see the same point made: “... generally start by considering the option of not  
24 changing the regulatory framework”, and then again if you go to the end of this document,  
25 p.23 on the internal numbering, there is a summary here of main points raised in the  
26 consultation responses – yes? A. Yes.

27 Q And para. B12:

28 “It was suggested that we should always consider the option of not changing the  
29 regulatory framework, i.e. examining what would happen anyway, as well as the  
30 option of removing regulation. We agree with this suggestion and have clarified  
31 the section of the guidelines which deal with the selection of options.”

32 Do you see that? A. Yes.

1 Q So very strongly emphasised in this document that you should always include the status quo  
2 as an option in impact assessment. Yes? A. Yes, it depends what quite what you mean  
3 by “status quo”, but yes.

4 Q Yes, of course. Also, at B5, before I leave p.23:  
5 “Stakeholders felt we should emphasise more the importance of considering  
6 possible unintended consequences, in particular the impact on the whole value  
7 chain. This is something we have sought to do, stressing the need to minimise the  
8 risk of unintended consequences by thinking widely about possible impacts and  
9 engaging with stakeholders to canvass their views.”

10 Do you see that? A. Yes.

11 Q So it is not sufficient, is it, for Ofcom just to adopt a narrow view, looking at what is  
12 efficient for a particular market, you have to look at the impact on stakeholders more  
13 generally, more broadly? A. Well yes, the impact on stakeholders and consumers, yes.

14 Q And stakeholders, of course, in this case, would include each of the five MNOs? A. Yes.

15 Q If we just go to look at the Impact Assessment that Ofcom did in this case, bundle B ----  
16 THE CHAIRMAN: I should draw to your attention at this point, Miss Rose ----  
17 MISS ROSE: Half time.  
18 THE CHAIRMAN: -- you are at half time, yes.  
19 MISS ROSE: Madam, you will be delighted to hear that I am exactly half way through my note.  
20 If we go to p.104 we see the start of the section ----? A. Sorry, can I just clarify is that  
21 the page within the document?

22 Q The external, main bundle numbering. A. Yes, I have p.104.

23 Q Do you have: “Section 6 Impact Assessments – Introduction”, do you see that? A. Yes.

24 Q It is said:  
25 “The analysis presented in sections 6 to 9 below, when read in conjunction with  
26 the rest of this document ... as defined in section 7 of the Communications Act”,  
27 do you see that? A. Yes.

28 Q Then para.6.9: “The options considered before reaching the conclusions set out in this  
29 Statement”, do you see the heading? A. Yes, I see that, yes.

30 Q So here Ofcom sets out the options that are being considered as part of the impact  
31 assessment? A. Yes.

32 Q “In Section 7 .. Ofcom assessed the detriment likely to arise from the exercise of  
33 SMP in the absence of ex ante regulation. Ofcom concluded ... the option to ‘do  
34 nothing’ is not appropriate.”

1 6.10 Ofcom has also taken into consideration the ERG common position on the approach”  
2 and then it says at 6.12: “... conclusion that charge controls should be imposed on all five  
3 MNOs.” Do you see that? A. There is no consideration here of what is the regulatory  
4 status quo, and is there an option of maintaining it, is there? That question is not raised at  
5 all? A. Well that paragraph does not seem – well let me read the paragraph again.

6 Q Please do? A. (After a pause) Well the status quo would have involved no price control  
7 beyond end of March 2007 because that is when the price controls ran out.

8 Q No, just pausing there, you are talking there about the temporal limit on the price control?  
9 A. Yes.

10 Q Of course, all regulation is likely to have a temporal limit, do you really consider ----?

11 A. Some does and some does not.

12 Q Do you really consider that the impact assessment guidelines are saying that if you have a  
13 situation where the market is regulated in a particular way and you are considering whether  
14 that regulation needs to be changed, you ignore the current regulation as the starting point  
15 because that would expire in the future? A. I am not saying you ignore it, but I am  
16 saying the starting point should be to take it out of the fact that regulation runs out and a  
17 cautious decision should be made in order to reimpose such regulation.

18 Q I want to suggest to you that that is sophistry? A. Well obviously I would disagree with  
19 your suggestion.

20 MR. SCOTT: Can I just ask a small question here, and that is would you take into account the  
21 fact that in the statement that imposed the price controls which expired at this point  
22 mention had been made of the fact that it was going to be necessary to review the situation  
23 in relation to H3G, as H3G’s situation developed? A. Sorry, are you referring to a  
24 particular part of the statement?

25 Q I am referring to the earlier statement? A. Oh, the previous market review.

26 Q The previous market review? A. The relevant full market review?

27 Q Yes, in which H3G, this was the subject of the re-assessment, of course? A. Well in fact  
28 that point related not just to H3G but all 3G termination, and indeed perhaps that  
29 emphasises my point which is that the continuation of the previous regime, or in my view  
30 actually reintroducing the previous price control would not of course have covered 3G  
31 because the previous price control would not of course have covered 3G because the  
32 previous price control only covered 3G.

33 THE CHAIRMAN: Yes, but the point being put to you is that Ofcom did not consider as an  
34 option whether it should simply renew, as it had in 2005, the existing regime, it compared

1 no regulation with the proposed regulation? A. I understood I was being asked to  
2 comment on a particular paragraph but within the document Ofcom did consider such a  
3 proposition.

4 MISS ROSE: We are talking about the Impact Assessment, if you would like to go to section 7?

5 A. Within section 7 Ofcom considered that point.

6 Q If you look at the Impact Assessment, what it says is: “Benefits of regulation vs no  
7 regulation”? A. Which paragraph are we looking at?

8 Q We are looking at the heading to section 7. What is said is:

9 “Ofcom has concluded that each of the five MNOs has SMP. This section  
10 discusses the detrimental effects that arise absent any regulation. Ofcom believes  
11 that absent regulation, or the threat of regulation, MNOs would have the ability and  
12 incentive to set excessive charges for MCT. Ofcom considers that excessive  
13 charges result in detrimental impacts on consumers, and therefore regulation of  
14 MCT is appropriate.”

15 There is no identification there, is there, of saying what is the status quo and is there a case  
16 for maintaining it, and what are the costs and benefits of doing so? A. That was  
17 addressed in section 7. I believe I commented on that in my first witness statement. I am  
18 just trying to find the reference. Yes, it is my first witness statement paras. 18 and 19 I  
19 believe are the most relevant ones:

20 “Ofcom drew a distinction in s.7 of the statement between detriments which would arise ...”  
21 and the paragraph reference to para.7.69. “In the absence of regulation on any MNOs, and  
22 for a particular application of regulation on any MNOs.

23 “The welfare model and much of the discussion in Section 7 was focussed on the  
24 former, i.e. a comparison between regulating or not regulating all five MNOs.  
25 However, in that section Ofcom also recognised that asymmetric regulation of the  
26 MCT charges as between MNOs may also create an additional detriment for  
27 consumers in the form of competitive distortions.”

28 Then it continues on talking about asymmetric regulation.

29 Q Just pausing there, what you say at para.19 is correct. It is quite right, that the welfare  
30 model and much of the discussion was focused only on a absence of regulation of any  
31 MNOs, but that Ofcom did take into account its position that asymmetric regulation was  
32 additional detriment, that is absolutely right. What Ofcom did not do, did it, was to say:  
33 “Looking at the status quo overall what are the costs and benefits of maintaining that

1 position as compared with a situation of extending regulation to all five MNOs.”? A. I  
2 believe Ofcom did do that ----

3 Q Well that is not what your statement says? A. Well, perhaps you would allow me to  
4 answer the question. I believe the statement did do that. I covered some of those points in  
5 my second witness statement, perhaps annex 2 may be relevant on some of these points  
6 where I comment that Ofcom is judging us on particular points, considered the net benefits  
7 both the benefits from regulation and the disbenefits from regulation. In relation, for  
8 example, to the effects on competition there was a net judgment made of the net effect of  
9 both effects, and the same applies in relation to the efficient structure of prices, the benefits  
10 of lower prices to each of H3G consumers which would arise in the context of high  
11 termination charges was taken into account in netting off against the detriments to  
12 consumers from high termination charges.

13 So on both of those heads the net judgments were made. As for other points there are  
14 comments in the document relating those issues. There may not be a single place where all  
15 of those are collected together, but there are comments in the document which address all  
16 of these points.

17 Q And it is your position, is it, that this adequately deals with the requirements in the impact  
18 assessment guidance document? A. Yes, I believe it does.

19 MR. SCOTT: Sorry, while we are in this document, Mr. Myers, can you just turn to para.7.6 and  
20 just look at para.7.6 – there is no need to read it out? A. (After a pause) Yes.

21 Q 7.7 and 7.8 and 7.28? A. Yes, 7.28, indeed, this is the paragraph that makes the overall  
22 comment.

23 THE CHAIRMAN: Is your point, Miss Rose, that they ought to have considered regulating the  
24 2G/3G MNOs both on their 2G and 3G termination rates, but not regulating H3G, or was  
25 the status quo not regulating 3G for everybody?

26 MISS ROSE: Well the status quo, in fact, was not regulating 3G for anybody, and not regulating  
27 H3G to the extent that it was terminating on a 2G network, so there were two policy  
28 decisions in the status quo. The first was not to regulate 3G and the second was not to  
29 impose a price control on H3G for either its 2G or 3G terminations. In my submission,  
30 those were both policy considerations that should be considered in the States.

31 THE CHAIRMAN: We have Mr. Myers’ answers on that.

32 MISS ROSE: Just to pick that point up, at para.74 of your first statement, you criticise  
33 Mr. Littlechild. A. I am sorry, would you bear with me ----

34 Q Yes, it is tab 4, p.95 of the external numbering, 24 of the internal numbering. A. Yes.

1 Q You criticised Mr. Littlechild and said:

2 “The decision that Ofcom made in its 2004 market review was to impose no price  
3 controls on 3G supplied by *all* the five MNOs. That decision was not specific to  
4 H3G, and H3G was treated in the same way as the other MNOs, in that there was  
5 no regulation of 3G voice termination charges at all.”

6 That is not a complete description, is it, of the 2004 decision? A. Well, it is one  
7 paragraph when it was a long statement, but clearly not ----

8 Q It is not a complete description of the regulation that was imposed specifically in relation to  
9 H3G? A. I find that difficult to comment on in the abstract, if you give me something  
10 more specific.

11 Q The point is the one I have just made, that in fact a decision was taken not to impose a  
12 charge control on H3G when terminating on a 2G network? A. That was an additional  
13 decision made, yes.

14 Q So there was a decision not to regulate the charges of H3G at all? A. That is correct.

15 Q So your criticism of Mr. Littlechild here is somewhat incorrect? A. No, I disagree. His  
16 point was that the – or I understood his point at least, perhaps I was wrong to do so, but I  
17 understood his point being in relation to 3G.

18 Q Madam, we do not need to turn it up, but if I can just give you the document reference for  
19 the relevant paragraphs for the 2004 statement. It is bundle F1, p.88, paras.S.9 to S.13, and  
20 then 5.27 to 5.31. (To the witness) Now you have sought to rely in response to this point  
21 on para.7.28. I would like to have a look at para.7.28. As Mr. Scott rightly points out, this  
22 is the passage in which Ofcom seeks to deal with H3G’s submissions in relation to this  
23 point. It will be my submission that this is, in relation to proportionality, the equivalent of  
24 para.5.154 in relation to SMP. It is the paragraph which crystallises the errors in Ofcom’s  
25 approach:

26 “Ofcom is not persuaded by H3G’s argument that because it has relatively few  
27 subscribers regulation will be of limited net benefit. First, H3G will grow over the  
28 period of the control and Ofcom does not consider that the consequent volume of  
29 terminated minutes will be insignificant.”

30 Just pausing there, Ofcom were not suggesting, were they, that at its current size the  
31 terminated volume of minutes was significant. That was predicated on the proposal that  
32 H3G would grow? A. No, I do not believe you can infer that. It simply does not  
33 comment on that particular question.

1 Q It does not say, does it, its current volume of minutes is not insignificant, it says, when it  
2 grows? A. It makes a comment neither way on that point.

3 Q It does, it says:  
4 “Ofcom does not consider that the consequent volume of terminated minutes will  
5 be insignificant.”

6 A. That is in the context of – that sentence deals with growing, it does not deal with what  
7 the judgment would be if H3G did not grow.

8 Q Indeed. A. It just does not deal with the question.

9 Q Exactly, it does not deal with the question.  
10 “Second, Ofcom’s analyse of the financial effect on H3G ... suggests that the  
11 proposed remedy will not undermine H3G’s overall financial position ...”

12 Just pausing there, the point that Ofcom is making is that H3G will not exit the market as a  
13 result of this decision – right? A. That specific point, yes.

14 Q They are not saying, “When we consider the severity of the impact of this decision on H3G,  
15 does the consumer gain from imposing it justify doing it” – they are not asking that  
16 question, are they? A. That is dealt with in the final sentence, the overall welfare gains  
17 from the regulation of H3G.

18 Q Then they say:  
19 “... moreover, H3G’s reduced MCT termination revenue would be small compared  
20 to its overall revenues.”

21 It is hard to see what that point goes to. “Therefore” – that is the key point:  
22 “Therefore, for the reasons argued here and in section 9 Ofcom considers that there  
23 are material overall welfare gains from the regulation of H3G.”

24 There has been no assessment, has there, anywhere in this statement of the extent of the  
25 welfare gains from regulating H3G? A. Yes, there has been an assessment.

26 Q No, there has been an assessment of the welfare gains from regulating all five MNOs.  
27 A. No, I am sorry, you seem to be suggesting that the only assessment that is relevant is a  
28 quantified assessment, and I just do not accept that. There are many effects that it is  
29 extremely difficult to quantify, and that does not mean that one cannot make judgments  
30 about their importance.

31 Q You will accept, I think, that Ofcom had not made any quantified assessments of the welfare  
32 gain from regulating H3G? A. The only quantified assessment is the one in this  
33 paragraph which is a judgmental one about overall gains, significant overall gains, yes.

1 Q It is clear from the MCT statement and also from your own statements that you regard  
2 asymmetric regulation as a detriment to be avoided – is that not correct? A. In general,  
3 yes.

4 Q If we just look at your first statement on this, para.7, you say:

5 “Overall, I conclude that the benefit of introducing regulation on H3G’s mobile  
6 termination charges is significant, for example, by reducing the distortion of  
7 competition caused by asymmetric regulation.”

8 That statement involves an assumption, does it not, that asymmetric regulation is a  
9 distortion to be avoided? A. It involves a conclusion that asymmetric regulation distorts  
10 competition in these circumstances. I would not accept the characterisation as an  
11 assumption.

12 Q Nowhere in the MCT statement do we find any discussion of the question of whether  
13 asymmetric regulation would distort or promote competition in the circumstances of this  
14 case, do we? A. I believe there is.

15 Q Can you show me where it is. A. Yes. One example is 7.56.

16 Q Let us just have a look at that. A. And that brings in the reasoning in 7.55, “it is not  
17 efficient for this competition to be based on excessive charges for MCT”.

18 Q So the reasoning, as you rightly say, is that it is not efficient for competition to be based on  
19 excessive charges for MCT, and therefore different regulation of H3G is not appropriate –  
20 correct? A. Well, different regulation of H3G was imposed by Ofcom, but it was not  
21 appropriate to leave H3G unregulated.

22 Q It would not be completely unregulated. Let us be clear, because there has been a lot of  
23 discussion about being completely unregulated. There are other options open to Ofcom  
24 other than a charge control, are there not? A. And those would be forms of regulation,  
25 yes.

26 Q Exactly, so it is not a question of completely unregulated or price control, it is a question of  
27 it is a form of regulation?

28 THE CHAIRMAN: Let us keep focused on this point, which is does the MCT statement deal  
29 with the question of whether, in the circumstances of this market, asymmetric regulation is a  
30 good or a bad thing? A. Understanding asymmetric regulation to be the extreme of no  
31 price control at least. There is an important distinction here because other types of  
32 asymmetric regulation were, of course, decided in Ofcom’s decision. Ofcom imposed  
33 asymmetric regulation, just not the extreme form of no regulation on H3G.

1 MISS ROSE: The point I am making is that this paragraph that you rely upon starts from the  
2 assumption that asymmetric regulation is inefficient. It does not consider whether, given  
3 the circumstances of H3G, it might actually be a good thing and promote competition, does  
4 it? A. I do not accept that that is an assumption. It is a conclusion and a judgment.

5 Q Nowhere in this statement do we find the reasoning for that conclusion or judgment, do we?

6 A. I think it is set out here and in some other places.

7 Q Please show us where it is set out. A. This point, dealing with this question in general  
8 about competition between fixed and mobile, MNOs may in future prove to be a strong  
9 competitor to BT. It is not efficient for this competition to be based on excessive charges  
10 for MCT. I am just reviewing para.7.69.

11 Q Let us look at 7.69, because this is a paragraph in which Ofcom addresses a submission  
12 made by T-Mobile. T-Mobile made the point that regulation was distorting competition  
13 because H3G could set unregulated termination charges almost double of the other MNOs.  
14 Then it was said:

15 “This last point is not related to Ofcom’s general analysis of detriments in this  
16 section but to the current particular application of regulation of mobile termination  
17 across MNOs. As discussed below, Ofcom considers that it is appropriate to  
18 impose charge controls on all MNOs, thereby addressing the concern raised by T-  
19 Mobile.”

20 So again, the assumption is simply asymmetric regulation leads to an unfair advantage. Let  
21 me put it very clearly ----

22 THE CHAIRMAN: What he says is it is not an assumption, they have considered it and this is  
23 what they say. You make submissions that this is an inadequate description of the process,  
24 but that is a legal submission, it is not really something for this witness to address.

25 MISS ROSE: Nowhere in this statement do we find, do we, any consideration of the question of  
26 whether, given H3G’s position as a late entrant with a smaller market share, given the  
27 particular competitive conditions in the market, given the traffic imbalance and given all the  
28 points that are referred to in the ERG consultation paper, asymmetric regulation might be  
29 appropriate – there is no discussion about it in this paper? A. There is discussion of those  
30 points, and Ofcom reached their conclusion. For example, they disagree with some of the  
31 propositions being put forward by H3G on the grounds of analysis and reasoning and in  
32 some cases specific evidence, and reached an overall conclusion that it was not appropriate  
33 to leave H3G unregulated and to engage in the form of entry assistance that would  
34 constitute. There is a very explicit comment about entry assistance in one of the annexes,

1 and the reasoning there applies much more generally as well, which I have referred to in my  
2 second witness statement, I believe.

3 Q Are you familiar with the ERG consultation paper? A. Yes.

4 Q It is at file F4, p.589. This paper was the outcome of work done by two ERG working  
5 groups – is that correct? A. That is correct, yes.

6 Q Ofcom participated in it – is that correct? A. Yes.

7 Q Do you know when the working groups started work? A. I could not recall, no.

8 Q Was it last year? A. I do not know the specific date. It probably was, but I do not know.

9 Q Do you know whether it was before or after the MCT decision was taken by Ofcom? A. I  
10 do not know.

11 Q This document was approved by the ERG in plenary session, was it not, in December?

12 A. I do not know on what basis it was approved. I note that on p.1 of the document it says  
13 that it is a draft comment position and some aspects are not consensual for now. Beyond  
14 that I could not comment on exactly what was approved because I was not present at the  
15 plenary.

16 MISS ROSE: Just for the tribunal's note, we asked some questions of Ofcom and we did receive  
17 a response.

18 THE CHAIRMAN: Yes, we have seen that.

19 MISS ROSE: Yes, madam, and you will see that it was said it was approved on a consensual  
20 basis. (To the witness) I want to be exactly clear about what Ofcom's position on this,  
21 because from the cross-examination of Mr. Roth yesterday I understood it to be Ofcom's  
22 position that the factors that are referred to in this paper as being justification for  
23 asymmetric regulation are factors that Ofcom accept are relevant to the level of charge  
24 control, but which it does not accept are relevant to the question of whether to approve a  
25 charge control. Would that be accurate? A. This paper deals only with level, not with  
26 whether to impose a price control. It does not address that question. A further very  
27 important point is that Ofcom's view is that the circumstances in the UK are materially  
28 different in important respects, particularly with regard to competitiveness in the retail  
29 market, which means that a read-across from what is being done in other countries would  
30 not be appropriate in terms of what the right conclusion is in one country to a conclusion in  
31 the UK.

32 Q Of course the application of principles set out in the ERG draft is going to depend on the  
33 circumstances in each Member State – we can agree on that? A. Yes.

1 Q Is it Ofcom's position that the principles set out in here are relevant at least to the setting of  
2 the level of a charge control?

3 MR. ROTH: These are questions about Ofcom's ----

4 THE CHAIRMAN: Can we ask you, as an expert, whether you think that they are relevant to the  
5 question of level of price control? A. I would say in some circumstances, although I do  
6 not believe those circumstances apply in the UK, they are relevant, some of them anyway. I  
7 could not comment on everything that is stated in this paper.

8 MISS ROSE: Just to be clear, one of the points that is made in this paper is that NRAs should  
9 carefully consider the source of any traffic imbalance – do you see that, p.675? A. Yes.

10 Q It is also suggested in this paper, is it not, that asymmetric regulation may be appropriate  
11 because of competitive distortions that disadvantaged the new entrants, including on-  
12 net/off-net price discrimination? A. That is correct.

13 Q Other EU regulators have also taken the position that traffic imbalance is relevant to  
14 asymmetric regulation, have they not? A. Yes, they have.

15 Q In particular, the French and Portuguese regulator? A. Indeed, yes.

16 Q Turning to mobile number portability, Ofcom accepts, does it not, that the current system of  
17 MNP in the UK is inadequate – is that correct?

18 THE CHAIRMAN: Is that your view – whether it is Ofcom's view, we do not know. It is not for  
19 this witness to say. Would you say that the system is inadequate? A. I do not have a firm  
20 view on that question.

21 MISS ROSE: We can see Ofcom's view if we take file F4, p.515.

22 THE CHAIRMAN: It cannot really be contentious given that they are now proposing to change  
23 it?

24 MISS ROSE: No, madam, but it is interesting just to see what they identify as the disadvantages  
25 of the current MNP system. This is Ofcom's statement on telephone number portability,  
26 29<sup>th</sup> November 2007 – do you see that? A. Yes.

27 Q If you go to 1.2, the last sentence:

28 "Ofcom considers that the UK arrangements no longer serve the interests of  
29 consumers in the most appropriate manner, as demonstrated by comparison with  
30 international best practice."

31 A. Yes.

32 Q Paragraph 1.15:

33 "Ofcom considers that the process of porting a telephone number should be  
34 consumer-friendly, quick and simple. Ofcom has concluded that the existing

1 process of porting a mobile phone number relies too much on customers to co-  
2 ordinate the actions of their old and new suppliers. The process may also deter  
3 providers from recommending to new customers that they should bring their old  
4 number with them (which may explain the very low levels of consumer awareness  
5 of the right to port mobile phone numbers). Ofcom has concluded that consumers  
6 should not have to contact their existing supplier before the process of porting their  
7 number can start, and that gaining providers should be empowered to lead the  
8 process.”

9 Do you see that? A. Yes.

10 Q And 1.17:

11 “In Ofcom’s view, a recipient-led process will offer the following benefits ...  
12 ... greater convenience for customers ...

13 It will remove the disincentive on recipient providers to promote porting (which  
14 arises from the threat that prospective new customers may be persuaded not to  
15 switch when they are required to re-contact the donor provider to arrange for their  
16 phone number to be ported), Greater consumer awareness of the option to port can  
17 be expected to lead to ...

18 more customers electing to port their number; and

19 more customers switching who, absent awareness of the option to port, would have  
20 considered a switch involving a number change unacceptable.

21 As a consequence of the process being simpler (as well as more widely known  
22 about) more switching customers will port their number when they switch. These  
23 customers would otherwise have incurred the inconvenience and possible expense  
24 of changing their number. For the same reason, it is also possible that more  
25 customers will switch.

26 Convenience, ease and speed in porting mobile numbers will not only deliver a real  
27 consumer benefit but will also facilitate further switching in the retail mobile  
28 market. Competition may be strengthened as a consequence of consumers’  
29 increased propensity to switch.”

30 A. Yes.

31 Q Just to give the tribunal some references – I do not think we need to read these – paras.2.10,  
32 2.11, 2.13 and 2.14. So the current maintain arrangement may deter customers from porting  
33 their number if they do switch, or from switching because they do not realise they can port  
34 their number? A. That seems to be what this document is saying, yes.

1 Q That is likely to have a worse impact on H3G than on other MNOs, is it not? A. That  
2 depends on – that is quite possible, but I do not know that for sure. I have not seen the  
3 evidence and reviewed it in relation to that point.

4 Q In that case there is probably no purpose in me questioning you about it. Turning to the  
5 question of traffic imbalance, back to bundle B, p.183. Paragraph 9.211, this is a paragraph  
6 that was confidential, but we have now waived that:

7 “Ofcom recognises that H3G currently originates more calls than it terminates, and  
8 therefore has net out-payments ... Ofcom considers it appropriate that mobile  
9 termination charges are cost oriented and this implies that net purchasers of  
10 termination will have net out-payments and net receivers will have net receipts. In  
11 addition, Ofcom does not accept that this balance of traffic is an inevitable and  
12 unavoidable result of H3G being a more recent entrant and currently a smaller  
13 competitor ... Ofcom does not agree with H3G’s argument that targeting  
14 subscriber types who tend to make more calls than they receive was the only entry  
15 strategy available to H3G. Ofcom notes, for example, that previous entrants to the  
16 UK market have targeted price sensitive customers and focused on ‘Pay as you go’  
17 products ...”

18 Just to unpick that for a moment, Ofcom says that it does not accept that the traffic  
19 imbalance is an inevitable and unavoidable of H3G being a late entrant? A. Or a small  
20 network.

21 Q Or a smaller network. Ofcom did not actually investigate fully what the causes of the traffic  
22 imbalance might be, did it? A. I am not sure I am in a position – this reports the  
23 conclusions of Ofcom’s analysis. Precisely what went into that, I do not have close  
24 personal knowledge.

25 Q In that case there is no need for me to cross-examine you further on this paragraph. Madam,  
26 that completes the cross-examination.

27 THE CHAIRMAN: Excellent. Mr. Scott, any brief questions?

28 MR. SCOTT: Just one brief question. Could you take up bundle H1 and turn to tab 8. This is the  
29 Act. Section 3, which is on p.2 of 168. A. Yes, I have not.

30 Q You will observe 3(2)(a) and (b). Would you now take up the statement, B/1, 7.3, p.109.  
31 A. Yes, I have that.

32 Q You will see inputs from BT and then C&W, Cable & Wireless. A. Yes.

33 Q “In C&W’s view this results in an inefficient use of scarce spectrum resources and  
34 will discourage investment in next generation fixed networks.”

1 That is why I took you to 3(2)(a) and (b) of the Act. The point is simply this: we have got  
2 asymmetry of regulations and we have focused on the difference between mobile operators.  
3 What is being argued in 7.3 is the question of asymmetric regulation as between mobile  
4 operators and fixed network operators. I think it is uncontested that BT are regulated as to  
5 their termination charges, we heard that earlier on. In considering the question of whether  
6 or not to regulate the prices of H3G, or indeed of any other MNO but here we are focused  
7 on H3G, would you expect, in advising Ofcom as an economist, Ofcom to take into account  
8 in relation to H3G those matters of the optimal use of the spectrum and investment in fixed  
9 network operations, and the differential that would apply as between regulating H3G and  
10 not regulating H3G. In other words, we have talked about investment by H3G, and  
11 Miss Rose is especially concerned about that, but here the concern is about investment in  
12 fixed networks? A. Yes, I would advise so, and that is the relevant consideration, and  
13 indeed it was taken into account by Ofcom. The detriment called distortion of consumer  
14 choice in particular deals with that question.

15 Q So if we take up the detriment on consumer choice, if Ofcom saw a situation in which M2M  
16 calls and M2F calls were being priced at a level that was lower because of the rate of  
17 termination charges being charged by mobile operators than F2M calls, then there would be  
18 two effects there: one would be a relative tendency to use the radio spectrum rather than  
19 fixed network, and also, because you have explained that these prices are above cost, is a  
20 distortion taking place as between investment in mobile networks? Money becomes  
21 available for investment in mobile networks, and there would be a net shift on an efficient  
22 cost basis from fixed to mobile networks. A. As you characterise the issue, the pricing  
23 distortion would arise because it wouldn't result in relative prices of different services that  
24 reflected relative costs, and therefore led to distorted choices for consumers as with regard  
25 to the underlying resource costs. That would be the problem, and that would be manifest in  
26 a number of different ways in terms of some of the points you have made - sub-optimal use  
27 of the spectrum; potential for under-investment in fixed networks because of that distortion  
28 of consumer choices.

29 PROFESSOR BAIN: Mr. Myers, I would like just to go back to the point where you thought  
30 there was a danger that you were being mis-represented, to see if I can clarify. This, you  
31 remember, was the point where we were discussing the mobile number portability, and the  
32 effect that the covenant arrangements had whereby H3G received less revenue on ported-in  
33 numbers and their competitors received more revenue on ported-out numbers. I think the  
34 figure was £20 to £30 million on an under-the-counter arrangement. The question I want to

1 put to you, just to make quite sure of what your position is is the following: Does the price  
2 control on H3G introduced by the MCT statement increase or decrease that distortion as  
3 compared with having no price control on H3G? A. Sorry? The distortion of the number  
4 portability regime? Is that the question?

5 Q Number portability is leading to the revenue being less or more -- different from what you  
6 would get using ---- A. Yes, that is the distortion.

7 Q That is the distortion. Does the introduction of the MCT statement increase or decrease that  
8 distortion so far as H3G is concerned? A. This was one of my points - that it reduces that  
9 distortion.

10 Q Thank you.

11 THE CHAIRMAN: That depends on what price they would choose to charge in the absence of  
12 regulation. A. But as long as the price that they would choose to charge would be higher  
13 than the price under the price control, it reduces the distortion.

14 Q Any re-examination, Mr. Roth?

15 Re-examined by MR. ROTH

16 Q Just three short questions, Mr. Myers. Just picking up what Mr. Scott just asked you about,  
17 could you turn to Bundle B in the statement, to para. 7.52? If you just read that paragraph  
18 to yourself (there is no reason for me to read it out loud) -- (Pause whilst read): Is that  
19 relevant to the answers that you were giving -- the reasoning there -- to Mr. Scott a few  
20 moments ago? A. Yes, that indeed states the point that I was making.

21 Q Is there any reason in your view to think that this point does not apply to H3G as compared  
22 to the other MNOs? A. No. I would expect it to apply to H3G and I cover that in my  
23 witness statement.

24 Q Thank you. The next question: while we have it open, could you look at para. 7.56 in  
25 Bundle B? Again, if you could read that to yourself? (Pause whilst read): In your view  
26 does that paragraph, or does it not, indicate consideration of the extreme form of  
27 asymmetric regulation specifically as regards H3G? A. Yes, this is precisely on that  
28 point - specifically about asymmetric regulation and in relation to H3G.

29 Q Thank you. The third question: If you could now go into your first statement in Bundle K,  
30 but keep the MCT statement that we have just been looking at out as well -- Your first  
31 statement is at Tab 4. If you could go in that to para. 74, at p.24 within the statement.

32 "In my view Dr. Littlechild mis-characterises Ofcom's previous argument and so  
33 makes an invalid comparison. The decision Ofcom made in its 2004 market review  
34 was to impose no price controls on 3G MCT supplied by all of the five MNOs. That

1 decision was not specific to H3G. H3G was treated in the same way as the other  
2 MNOs in that there was no regulation of 3G voice termination charges”.

3 You are responding to Dr. Littlechild there. It was suggested to you in cross-examination  
4 by Miss Rose that you are mis-characterising what happened in the 2004 statement. Could I  
5 ask you to turn back to Dr. Littlechild’s report in the paragraph that you have referred to  
6 here in your para. 73 - para. 63 of Dr. Littlechild’s first statement, at the end of Tab 1. Dr.  
7 Littlechild said in the second sentence,

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

13 He refers to a decision at para. 2.39. That reference is not actually to the last decision - it is  
14 to the summary of the last decision in this decision. So, it is para. 2.39 of this MCT  
15 statement. If you could read that to yourself -- (Pause whilst read): You see the sentence  
16 Dr. Littlechild has quoted is the penultimate sentence of that paragraph. A. Yes.

17 Q What that paragraph at 2.39 says, as you see, just looking at it is,

18 “Consequently, Ofcom determined there was insufficient evidence to conclude that  
19 regulation of 3G termination charges was a proportionate approach. Any adverse  
20 effects on consumers were likely to be small given H3G’s very small subscriber  
21 base relative to the wider mobile sector.”

22 As you understand it, is that description there a reference to the previous decision regarding  
23 regulation of 3G charges or is it regarding ----

24 THE CHAIRMAN: What is the relevance of this?

25 MR. ROTH: It was suggested to Mr. Myers in cross-examination that he had mis-characterised in  
26 his para. 74 the 2004 statement. That was the allegation put to him.

27 THE CHAIRMAN: This is to do with the difference between whether the decision was not to  
28 regulate 3G or not to regulate H3G.

29 MR. ROTH: No, madam. It is to do with the suggestion that in para. 74 Mr. Myers mis-  
30 characterised what Dr. Littlechild was saying and I wish to rebut that - that in fact he was  
31 not. It is a small point. That was the point being put - that he was mis-characterising Dr.  
32 Littlechild. It is a very simple question: As you understand it, is the reference in para. 2.39  
33 to the adverse effect on consumers there -- is it to the decision not to regulate 3G charges or  
34 is it to the decision - the separate part of the decision - not to regulate H3G’s 2G charge.

1 MISS ROSE: Madam, I am sorry. I object to this. The statement says what it says.

2 THE CHAIRMAN: Let him just answer the question and we will make of it what we will in due  
3 course. A. It deals only with the question of 3G charges -- regulation of 3G termination  
4 charges in relation to all the MNOs. It does not deal with the question of whether H3G's  
5 2G termination charges should be regulated.

6 Q So, you do not think that you mis-characterised. A. I don't believe so.

7 MR. ROTH: That was the only point, madam. Of course it is accepted that the 2004 statement  
8 did also decide not to regulate 2G termination charges. I have no further re-examination.

9 (The witness withdrew)

10 THE CHAIRMAN: Miss Rose, you now have your submissions to make.

11 MISS ROSE: Madam, my submissions on remedy will be made in the following order: (1) the  
12 legal framework and Ofcom's statutory duties when imposing a price control condition; (2)  
13 Ofcom's reasoning in relation to remedy in the MCT statement; (3) The flaws that we say  
14 are evident in that decision, in particular the following: first, the failure to identify or  
15 evaluate the risk of excessive pricing that would have an adverse effect on consumers;  
16 secondly, the failure to identify or quantify the costs and benefits of regulating H3G by  
17 price control by comparison with maintaining the status quo; thirdly, the erroneous  
18 assumption that asymmetric regulation was necessarily a detriment; fourthly, the error in  
19 concluding that H3G's traffic imbalance and the causes of that imbalance were irrelevant to  
20 the proportionality of imposing a price control; and, finally, I shall deal with the evidence to  
21 support H3G's submission that defects in the MNP system contribute to the traffic  
22 imbalance.

23 Dealing first then with the legal framework -- I do not propose to take you back - you will  
24 be delighted to hear - to the directives or to the 2003 Act, but simply to note that the  
25 relevant provisions in the Framework Directive which is at H1, Tab 6, are Articles 16.2 and  
26 16.4. Then, in the Access Directive it is Recitals 13, 15, Article 8.2, 8.4 and 13.1. As far as  
27 the 2003 Act is concerned at H1, Tab 8, the relevant provisions are s.45(2)(b)(4), s.45(7),  
28 s.45(8), s.7 (which is the duty to conduct an impact assessment), s.47, and s.88. This  
29 tribunal, of course, is very familiar particularly with ss.47 and 88. Those provisions impose  
30 what we say are stringent pre-conditions for the imposition of a price control condition  
31 because price control is a highly intrusive form of regulation which may have unintended  
32 adverse consequences, both for the company being regulated and, more generally, for  
33 competition. The implications for a business of not being able to set the price for its own  
34 service over a four year period in a dynamic and fast-changing market are very severe. That

1 is a matter which is obviously a matter that should be at the forefront of Ofcom's mind. The  
2 tribunal has seen the statement in the box at the front of the impact assessment - a warning  
3 to Ofcom.

4 We do submit that there is an onus on Ofcom to carry out a proper analysis of the risks,  
5 costs and benefits of imposing any new form of regulation, and, most particularly, price  
6 control before it decides to do so, and that that analysis must be undertaken by reference to  
7 the particular costs and benefits applied to the individual undertaking. It is not sufficient to  
8 lump together all five MNOs in the market.

9 I referred Mr. Myers, when he was giving his evidence, to specific paragraphs in the Impact  
10 Assessment Guidance. I do commend the tribunal to the whole of that document, which I  
11 submit is a valuable and important indication of the analysis that Ofcom should have  
12 undertaken, but which in my submission it did not. Can I refer in particular, without turning  
13 it up, to paras. 1.1, 1.4, 2.1 to 2.4, 3.3, 3.7, 5.4, 5.12 to 5.18, 5.21, 5.22 to 5.25, 5.30, 5.32,  
14 5.34, Annexe A and Annexe B. That, we would say, is the relevant legal framework and the  
15 nature of the exercise that Ofcom must undertake.

16 We now come to Ofcom's actual reasoning for imposing a price control condition on H3G.  
17 I would like to turn up the MCT decision in Bundle B. We turn first to s.6 where we have  
18 the Introduction to Impact Assessment. I submit there is no proper analysis of the range of  
19 options which Ofcom ought to have been modelling and comparing for their relative costs  
20 and benefits. Most importantly, it was the position, as Mr. Roth has helpfully agreed, that  
21 under the 2004 statement it was not merely the case that 3G charges were not regulated, but  
22 a decision was taken not to regulate H3G in relation to 3G or 2G charges, and no proper  
23 consideration, in my submission, was given by Ofcom to the relative benefits of maintaining  
24 that position and extending regulation to H3G. It ought to have been the starting point.

25 Madam, you heard, with respect, what was a bizarre answer given by Mr. Myers when I put  
26 this point to him. He said, "Well, the existing regulation was due to terminate in March  
27 2007. Therefore, the right status quo was no regulation versus regulation". If you look  
28 back at Ofcom's defence you will see that that is, in fact, the position that Ofcom have  
29 adopted in their defence. In my submission it is quite obviously fallacious and contrary to  
30 the guidance given in Ofcom's own impact assessment. It is not good enough for a  
31 regulator who has introduced a scheme of regulation over a period which is due to expire  
32 within six months to say, "Oh, well, the status quo is that there's no regulation because this  
33 regulation will expire in six months". In my submission, a plain error of approach which  
34 flaws Ofcom's impact assessment.

1 When we look at s.7 we see that the very premise of s.7, reflected in its title, is regulation  
2 versus no regulation -- the benefits of regulation versus no regulation. In my submission,  
3 when you read ss.7, 8, and 9 as a whole, which are the crucial parts of the impact  
4 assessment, that is the whole mindset of Ofcom - regulation versus no regulation.  
5 I accept that it is correct that there are some paragraphs in this decision where Ofcom  
6 addresses submissions made to it by H3G where H3G is saying that it is not right to extend  
7 this regulation for us, and that in those circumstances Ofcom's reply, consistently, is, "Oh,  
8 well, that will be asymmetric regulation. That's a detriment to efficiency. We're not having  
9 it". In my submission, that wholly misses the point because Ofcom should not have been  
10 saying, "Well, regulation versus no regulation. This one MNO is making special pleading  
11 for its situation". The whole starting point should have been different. The starting point  
12 should have been, "This is the current regulatory situation. Is there any good reason to  
13 extend regulation from the current position?" because the starting point for the principles of  
14 good regulation is that you do not impose extra burdens. The question should have been:  
15 What are the implications of imposing extra burdens? Is it really necessary to do so? You  
16 will recall that in my brief opening three principles of proportionality, one of which is that  
17 the means taken must be the least onerous of meeting the regulatory end. So, we submit  
18 that the whole starting point is flawed.

19 In particular, para. 7.28. Madam, this is a paragraph on which Ofcom place heavy reliance,  
20 but, in my submission, in fact, that paragraph is flawed. This is, in essence, the entirety of  
21 Ofcom's reasoning in response to H3G's submission that price control should not extend to  
22 us. So, the first point that is made is, "You will grow over the period. The consequent  
23 volume of terminated minutes will be insignificant". We submit that that is inadequate  
24 because Ofcom is imposing a charge control that starts now - not a charge control that starts  
25 when H3G reaches a particular market share. So, the fact that Ofcom has predicted that  
26 H3G will grow in the future to a point where its terminated minutes are significant, in my  
27 submission, is not a reason for opposing charge control now.

28 The vice of that is compounded when one understands - and it is plain, in my submission,  
29 from H3G's evidence (the evidence of Mr. Russell and Mr. Dyson) - that the imposition of  
30 this charge control will, in itself, impede H3G's ability to grow. Therefore, one has the  
31 paradox that Ofcom imposes a charge control now on the basis of the impact that H3G  
32 might have when it grows in the future, but the imposition of the charge control impedes  
33 H3G in growing to that point.

1 To make it clear, the reasons why this charge control impedes H3G's ability to grow are  
2 simple and are set out by both Mr. Russell and Mr. Dyson. Because of the very large net  
3 out-payment because of the traffic imbalance, and because of the relative levels of the  
4 charges, H3G is left in a situation where it has two choices: either it must raise its retail  
5 charges to a level that covers the full cost of the net out-payments of MCT that it must make  
6 to the other MNOs. If it does that, it will no longer be competitive in the retail market, and  
7 we will lose market share; or, it must keep its retail charges down to a level at which it can  
8 continue to compete for market share with the other MNOs. If it does that, each customer  
9 that it wins will cost it money. It will lose money on each customer. That is the dilemma  
10 that H3G faces as a result of Ofcom's decision.

11 MR. SCOTT: Just to characterise what you are saying -- what you are saying is that as a mobile  
12 network operator you are subject to a price squeeze from the regulated rate of MCTs.

13 MISS ROSE: I beg your pardon, sir?

14 MR. SCOTT: You are subject to a price squeeze - in other words, the retail margin available to  
15 you is insufficient.

16 MISS ROSE: Sir, I do not want to use any technical economic terms - or someone will probably  
17 tell me that it is not a price squeeze, but some other kind of squeeze ----

18 MR. SCOTT: The reason I use it for a legal reason - not for an economic reason. Price squeeze is  
19 one of the things mentioned in the legislation to which you pointed us.

20 MISS ROSE: Absolutely. It is one of the things mentioned in s.88. That is right. But, in my  
21 submission, it does not matter how you characterise it. The point is simply that the  
22 imposition of the charge control on H3G impedes its ability to grow the market share which  
23 Ofcom is taking into account as part of the rationale for imposing the charge control on  
24 H3G. So, there is a circularity. So, that is the first defect in para. 7.28.

25 Second, it is said that Ofcom's analysis of the financial effect on H3G at paras. 9.2 et seq  
26 suggest the proposed remedy will not undermine H3G's overall financial position. Again,  
27 we say that that is not an adequate response because what Ofcom ought to be considering is:  
28 What is the actual extent of the welfare gain in extending this regulation to H3G? Does the  
29 burden imposed on H3G with the consequential effects that that might have on competition,  
30 and so forth, warrant the imposition of that extra regulation? Dr. Littlechild put it very well  
31 when he said, "Is the gain worth the candle?" The problem here is that Ofcom never  
32 considered or quantified the welfare gain of extending regulation to H3G. Mr. Myers  
33 concedes that they did not do it in relation to the specific welfare analysis. He says, "Oh,  
34 well, they did do it in relation to the other benefits, and it's lumped in in s.7". With respect

1 to him, that will not do because it is not sufficient for Ofcom to identify, for example, a  
2 distributional effect, or an effect on consumer choice. Ofcom needs to consider what is the  
3 extent of that effect, given the small size of H3G. If, for example, you are talking about a  
4 distortion in retail prices for other operators, when the other operators are terminating only a  
5 very small percentage of calls on to H3G's network, the effect of that is going to be **de**  
6 **minimis**.

7 So, it is not enough for Ofcom to identify in relation to all five MNOs a series of efficiency  
8 gains, and then say, "Oh, well, these apply to H3G as well. So, forget about it". What they  
9 have got to do is ask themselves the question: Given the size of H3G, given the extent of the  
10 properly quantified welfare gain, is it worth imposing this degree of an adverse financial  
11 impact on this particular undertaking? That question was never even addressed by Ofcom.

12 That brings me, of course, to the vexed question of 16.6 pence. The key point about this is  
13 that Ofcom never even considered whether 16.6 pence was, or was not, a price that would  
14 be available to H3G, or that it would have the incentive to charge. In order to make that  
15 assessment, Ofcom would have had to consider what was the maximum price that BT was  
16 obliged to pay under the end-to-end obligation, because that follows from its reasoning in  
17 relation to SMP. It was never considered by Ofcom. It simply did its modelling based on a  
18 monopoly price. There was no basis for quantifying the welfare gain in relation to H3G.  
19 You have seen our positive case that, in fact, the right rate to take would have been 10.7  
20 pence per minute. You have sent that there is considerable evidence from H3G as to the  
21 very unusual circumstances in which the 16.6 pence was put forward. That has never been  
22 their policy. It has never been their intention. 10.7 pence represents what they thought was  
23 the right rate, and the rate that they had agreed with BT.

24 However, the tribunal does not need to make a determination on that question. The crucial  
25 point is that it is Ofcom that should have determined, but did not determine that question.  
26 Coming back to 7.28, the third argument is that H3G's reduced MCT termination revenue  
27 will be small compared to its overall revenues. Well, it is hard to see how that is even  
28 relevant to the question of whether it is proportionate to impose this burden on H3G. What  
29 Ofcom ought to be considering is not whether the reduced MCT revenue is small compared  
30 to H3G's overall revenues, but whether the reduction in revenue is, or is not, outweighed by  
31 the welfare gain in regulating H3G. That question is not even addressed in this paragraph.  
32 Therefore it is said, "For the reasons argued here in s.9 Ofcom considers there are material  
33 overall welfare gains from the regulation of H3G". We say that conclusion simply does not  
34 follow from the reasoning in the paragraph which does not address the right questions that

1 would need to have been considered and determined by Ofcom before it could answer that  
2 question.

3 Madam, some further brief points on Part 7 of this decision. You already have the point at  
4 7.40 - that Ofcom did not rely heavily on the risk of excessive pricing at the retail level, yet  
5 nevertheless Mr. Myers sought to rely on that as one of the gains in his evidence.

6 At para. 7.49 it refers to the welfare analysis and the purpose of the welfare analysis and the  
7 price that was used for that analysis.

8 Distortion of consumer choice is dealt with at para. 7.52. You can see all five MNOs dealt  
9 with together, with no separate analysis of the extent of the impact of H3G rates on  
10 consumer choice.

11 At para. 7.56 we have a paragraph where Ofcom does consider H3G's position. Again, the  
12 reasoning is based on H3G's anticipated growth.

13 Then at para. 7.57 - inequitable distributional effects. Again, all five MNOs are considered  
14 together.

15 The risk of anti-competitive behaviour - 7.65 - 7.66. It is H3G, in fact, that is most likely to  
16 be the victim of such behaviour. So, it is hard to see how that could be a factor in favour of  
17 regulating H3G.

18 Paragraph 7.69. Again, we have looked at this. This is where T-Mobile's concerns about  
19 asymmetric regulation are addressed. We submit that the assumption throughout this  
20 paragraph, and throughout the whole of the document, is that asymmetric regulation is a bad  
21 thing, and therefore we will try to avoid it. There is no consideration of the question: Given  
22 the particular circumstances of this market, given the particular circumstances of H3G,  
23 might asymmetric regulation not only be not a bad thing, but the appropriate form of  
24 regulation?

25 Moving on to s.8 - regulatory options are considered. Again, the tribunal will note that there  
26 is no consideration of the status quo as one of those regulatory options. At s.9 - charge  
27 control options are considered. Again, the focus is overwhelmingly on consideration of all  
28 five MNOs or none.

29 Some additional points on s.9. You will see a number of references in this section to the  
30 degree of uncertainty about the estimates of costs. Can I just give you some paragraph  
31 references: 9.32, 9.77, 9.79 to 9.81, 9.152 to 9.153, 9.160. Ofcom repeatedly stresses that it  
32 is extremely uncertain what is the efficient level of charge over the next four years, and  
33 identifies a number of parameters that could be set at different levels, and the question of

1 the cost of the 3G spectrum as being key levels of uncertainty. This leads to very wide cost  
2 benchmarks, particularly in relation to 3G termination charges.

3 You already have my submissions about the tables at pp.303 and 307 which show that in  
4 fact it would appear that H3G's initially set rate in the initial negotiations with BT were  
5 either at, or possibly below, its efficient cost based rate, and only rose above it at some time  
6 between 2005 and 2006, depending on which benchmark you take. I submit that may well  
7 be the reason why Ofcom has been careful not to suggest that there was actually any  
8 evidence of excessive charging by H3G.

9 MR. SCOTT: On p.303, what is very clear in Figure A30.4 is that the 3G-only line is coming  
10 down steeply from 2004 to 2007. But, contra, the rate stays at 10.7 pence ----

11 MISS ROSE: You have got the point, of course, that Ofcom expressly indicated that you could  
12 not rely on the party's actual behaviour in the run-up to this decision because it was all  
13 undertaken in the knowledge of the ongoing market review. So, in my submission that  
14 point takes you nowhere, sir.

15 MR. SCOTT: I merely observe that that was going on, and that you said 10.7 pence was the right  
16 rate.

17 MISS ROSE: Sir, I do not make any submission about what is the right or the wrong rate. That is  
18 a matter for the Competition Commission. The submission that I make is that at the time the  
19 rate was agreed with BT there is a strong probability that it was below H3G's efficiently  
20 incurred costs. What is uncertain is the date at which it rose above the efficiently incurred  
21 costs because that depend on what benchmark you use.

22 Traffic imbalance. 9.148 to 9.149. I am slightly impeded on this because these paragraphs  
23 are partly confidential. It is not quite clear to me, again, why they are. Perhaps I could have  
24 a license to ----

25 MR. SCOTT: Just a general point on this: at some stage can you let us have the overall revenues  
26 of H3G for a period and also the period for the incoming payments and the outgoing  
27 payments because we have mentioned a lot of them -- we have mentioned changes in them -  
28 - but actually having a table that shows them would be helpful - at some juncture.

29 MISS ROSE: Over which period, sir?

30 MR. SCOTT: The latest period available to you.

31 MISS ROSE: You may find that that material is in the witness statements of Mr. Russell and Mr.  
32 Dyson.

33 MR. SCOTT: I think that is right, yes.

34 MISS ROSE: Can I refer you to those?

1 MR. SCOTT: Absolutely. Just give us the references.

2 MISS ROSE: Sir, it is slightly difficult for me to do that right now. Can I just make the point? I  
3 do not want to deter you, sir, from intervening, but can I say that if there are further  
4 interventions I would wish to bank them against extra time?

5 9.148 to 9.149. They are no longer confidential. You will see that at 9.148 there is in fact  
6 a summary of the traffic imbalance complaint. There are also references to the uncertainty.  
7 Ofcom says that it does not agree with H3G's argument that charge control should be set to  
8 ensure net neutral revenue flows, relevant benchmarks and assessment of efficiently  
9 incurred costs rather than a desire that aggregate payments and revenue should cancel out  
10 regardless of volume solved.

11 That is important because that is an indication of Ofcom's position that the traffic imbalance  
12 was irrelevant to its decision. What Ofcom is saying there is, "It doesn't bother us whether  
13 you are a net payer or a net receiver. We are only looking at a cost-related charge".

14 Madam, in my submission, that is an inadequate analysis. As we have seen from the  
15 impact assessment, it was incumbent on Ofcom to consider not simply the effects of this  
16 regulatory decision on the market it was regulating, but also more generally the effects on  
17 stakeholders, and the effects on related markets. For the reasons that are explained in the  
18 witness statements of Mr. Russell and Mr. Dyson, the effect of the traffic imbalance  
19 combined with the price control were going to be very severe for H3G and we submit it was  
20 wrong in principle for Ofcom to say that they were not relevant to the decision.

21 That reasoning is then further developed in a passage that we looked at at 9.211 to 9.212.  
22 We looked at that earlier today. Here we see repeated the assertion of Ofcom that it  
23 considers it appropriate that mobile termination charges are cost oriented, and that this  
24 implies net purchasers of termination will have net out-payments and net receivers have net  
25 receipts. So, that is the same point - i.e. it is not relevant.

26 Then they go on to make two further points: first, they say they do not accept that traffic  
27 imbalance is an inevitable and an unavoidable result of H3G being a new competitor; then  
28 they say that it is the result of H3G's strategy in entering the market.

29 Now, there are two points that we make about that: it is absolutely clear from Ofcom's  
30 position in these proceedings that Ofcom did not conduct an investigation into the causes of  
31 H3G's traffic imbalance. Indeed, the reason why Ofcom opposed our application for  
32 permission to amend to make a positive case that the traffic imbalance was, in part, caused  
33 by on-net/off-net price discrimination, was that Ofcom would have to conduct such an  
34 investigation and have not done so. We submit that flaws its decision.

1 You have seen the ERG paper and the importance that the ERG paper attaches both to  
2 traffic imbalance and to on-net/off-net price discrimination as a cause of that imbalance and  
3 of disadvantage to the new market entrant. We submit it is not good enough for Ofcom to  
4 say to H3G, “You should have raised this point. It’s Ofcom that’s the regulator. It’s Ofcom  
5 that has the obligation to ensure that its regulation is proportionate”.

6 It is right that H3G has only come latterly to appreciate the significance for it - the on-  
7 net/off-net price discrimination issue. That is hardly surprising because H3G was not privy  
8 to the details of the tariffs and the circumstances of the other MNOs. It is Ofcom that was  
9 the regulator and that Ofcom should have investigated that question. That is the first point.  
10 The second point - saying that it was not an inevitable result of H3G’s entry - we submit is  
11 inadequate in its analysis. It is not appropriate to compare, as Ofcom seeks to do here, the  
12 circumstances of H3G seeking to enter this market with the circumstances of the previous  
13 entrants to the UK market which targeted price-sensitive customers and focused on pay-as-  
14 you-go products.

15 You will see in the evidence of Mr. Russell that he explains why that strategy was not open  
16 to H3G, both because of the prices of the 3G handsets and because of the fact that H3G was  
17 entering a very different market to the market which the other MNOs entered. Now, there  
18 has been some discussion about whether the market was saturated; whether it was mature;  
19 how much scope there was. But, with respect, this is really immaterial. There were 49  
20 million mobile ‘phone subscribers in the UK market at the time that H3G entered into it.  
21 You cannot compare that remotely to the situation in which T-Mobile or Orange entered the  
22 market in the 1990s. There is a massive difference in terms of the availability of new  
23 customers.

24 In my submission it is quite obvious that in order to thrive and to grow market share, H3G  
25 had to win customers from other networks. It could not simply rely on the cheap pay-as-  
26 you-go already unallocated people.

27 One interesting point that we do ask you to stress is that this submission is in fact supported  
28 by the evidence of Vodafone. Can I just invite you to look, briefly, at para. 60 of the  
29 witness statement of Mr. Tillotson in Bundle C2 at Tab 13. Vodafone, of course, put in this  
30 witness statement against H3G’s position on this appeal. Therefore I submit that this  
31 paragraph ought to carry particular weight. This is para. 60 at p.530 where Mr. Tillotson  
32 says,

33 “Whilst H3G has positioned itself as a discount brand, by offering very cheap voice  
34 calls, its strategy has not been helped by the fact that the cost of 3G handsets was,

1 and remains, significantly higher than the cost of 2G handsets. Vodafone's data  
2 show that 3G handsets were, on average, more than double the cost of 2G handsets  
3 in 2004 and 2005 and are still significantly more expensive today. Mr. Russell  
4 himself acknowledges that the 3G handsets that H3G had to use when it launched  
5 were much more expensive than the 2G handsets available at the time. For as long  
6 as 3G handsets costs remain above 2G handset costs (which seems likely given their  
7 enhanced functionality) H3G will remain at a disadvantage compared with other  
8 MNOs in competing for customers at the lower end of the market".

9 THE CHAIRMAN: You would say that by the time that you entered the market, the way in  
10 which handsets are generally heavily subsidised was established.

11 MISS ROSE: Yes, and there was very little that we could have done about that as a new entrant if  
12 we were to gain any market share at all.

13 THE CHAIRMAN: Whilst we are on Mr. Tillotson's statement, I noted - and I do not want you  
14 to deal with this now - that in para. 73 he points up some inconsistencies in the figures. It  
15 might be helpful - or you might want to consider whether it is helpful at a later stage - to  
16 deal with those discrepancies.

17 MISS ROSE: Madam, I will take a note of that.

18 Coming back to para. 9.211, we submit that it is obvious from this paragraph that the  
19 analysis of Ofcom that 'other entrants have targeted price-sensitive customers and focused  
20 on pay-as-you-go products, and so H3G could have done that too' is plainly inadequate. It  
21 is again illustrative of the insufficient consideration and investigation of the question of  
22 traffic imbalance and its causes, and its potential relevance to price control.

23 Next, madam, paras. 9.229 to 9.234. This is the ported numbers problem. The tribunal saw  
24 this morning the consultation paper on ported numbers. We do submit that this problem  
25 identified in these paragraphs - 9.229 to 9.234 - illustrates an adverse effect on H3G arising  
26 directly out of the imposition of this charge control, the scope and impact of which were not  
27 properly considered by Ofcom because of Ofcom's failure separately to analyse the net  
28 welfare gain of regulating H3G.

29 Madam, you have heard from Mr. Myers. Professor Bain, being also an economist, would  
30 appear to take a similar view - that the effect of the charge control is to reduce the distortion  
31 because that depends on the difference between the regulated prices, and if we are able to  
32 put our price up higher, then our customers are more valuable. Madam, I do take that point,  
33 but the problem that is not addressed by that is the simple practical one - that we can  
34 compensate, if our price is unregulated -- We can compensate for the fact that we obtain less

1 revenue from those who port their numbers to us from other networks by charging higher  
2 MCT rates in relation to other terminated charges. We cannot do that if our charge is  
3 regulated in the same way as the other MNOs. That is why we suffer an irrecoverable loss  
4 as a result of the imposition of the charge control without the sorting out of the ported  
5 numbers problem.

6 Ofcom itself recognised at para. 9.234 that -- I am trying to find the passage which I read  
7 out before, where they recognised that this was -- It is actually in the ported numbers  
8 statement. You will recall that they recognised that it was a distortion that arose from the  
9 combination of the ported numbers with the imposition of this charge control. Ofcom  
10 specifically considered the question at 9.234 whether they should delay implementing the  
11 new charge controls until they had re-consulted on this matter. They obviously understood it  
12 to be a problem arising from the imposition of charge control.

13 The reason they gave for not delaying was that when you compare the overall welfare gain  
14 of this regulation with the cost that they had identified as arising out of the ported numbers  
15 problem, the overall welfare gain outweighed it, and therefore there was no need to delay.

16 One can entirely understand that analysis on the way that Ofcom approach the problem  
17 because Ofcom's welfare analysis had produced huge figures at the £1 billion level.

18 Therefore, you can see why, counteracting against that, that figure of £20 to £30 million a  
19 year, I was not going to make much impact. But, course, what Ofcom has not considered  
20 here is the separate question of the proportionality of not delaying the charge control on  
21 H3G, because then you have a different consideration. H3G is bearing all of the brunt of  
22 the ported numbers problem and the net welfare gains in relation to H3G and the imposition  
23 of this charge control are much smaller than in relation to the other operators because of its  
24 much smaller market share. Therefore, in my submission, the calculation would inevitably  
25 have been different to the calculation at 9.234 had Ofcom been asking itself the right  
26 question of the net welfare gain in relation to H3G. This is the clearest possible  
27 demonstration, in my submission, of the way that Ofcom went wrong in its decision-making  
28 process. The result is that H3G is now £20 to £30 million per year worse off because of a  
29 market distortion imposed upon it by this very decision. We submit that cannot be a  
30 proportionate result.

31 It is being pointed out to me that Mr. Myers said in evidence that Ofcom rejected the notion  
32 that any distortion was caused by the price control. In fact, of course, in the MNP statement  
33 they accepted - and they accept here as well - that there was such a distortion.

1 Madam, the consultation on the ported numbers has stalled completely. Can I just give you  
2 the references? It is F4, p.350A and F4, p.420A. You will see there correspondence  
3 between H3G and Ofcom in which H3G begs Ofcom to deal with the ported numbers  
4 problem and Ofcom says that it will not do so while this appeal is pending. We therefore  
5 have the situation that the decision that we are appealing against is fully implemented and  
6 we suffer the adverse effects. But the decision which Ofcom recognise was necessary to  
7 take in order to mitigate those adverse effects upon us has not been taken, and will not be  
8 taken for the foreseeable future.

9 Finally looking at the decision, at s.10 of the decision, at p.191, rather belatedly off comes  
10 to set out the statutory tests and consider whether it has fulfilled its statutory functions.

11 Madam, I accept that there is no obligation on Ofcom to set out its statutory obligations at  
12 any part of its decision. It can structure its decision as it wishes. But, in my submission,  
13 perhaps part of the explanation for why Ofcom went wrong here is that it made its decision  
14 and then wondered whether that decision complied with its statutory tests rather than first of  
15 all identifying what its statutory obligations, in taking the decision that was compliant with  
16 them.

17 We see in particular, at para. 10.30 -- This is the only paragraph where Ofcom expressly  
18 addresses s.88. It is said that s.88 authorises the setting of an SMP condition where there is  
19 a relevant risk of adverse effects arising from price distortion as noted in para. 7.41 to 7.51.  
20 That is important because Ofcom is there identifying the source in its decision where it says  
21 it has analysed the relevant risks of price distortion.

22 So, if we go back to 7.41 to 7.51, it is actually headed 'Inefficient Structure of Prices'. The  
23 argument is that MNOs do not have the incentive to set sufficient prices as the competitive  
24 conditions with the MCC and other mobile retail services are different. Then it is said that  
25 if MNOs set excessive charges there will be an inefficient price structure. With respect to  
26 Ofcom this section does not address at all the question: Is there a relevant risk of price  
27 distortion, and, if so, is the risk at such a level that it will have an adverse impact on  
28 consumers? It was never considered. In my submission, it was very important for Ofcom  
29 to consider that question because as Ofcom itself had recognised, the extent to which the  
30 MNOs were able to raise prices did depend on the proper construction of the end-to-end  
31 obligation. Therefore it was wrong for Ofcom to proceed - because Mr. Myers said that  
32 they did - purely on the basis of economic theory, and say, "Well, a monopolist will charge  
33 a monopoly price", because that is to disregard Ofcom's own reasoning when it found SMP.  
34 Ofcom did not find that BT had no countervailing buyer power at all. What it found was

1 that BT's countervailing buyer power was not sufficient to offset SMP because a reasonable  
2 price might be appreciably above the competitive level. But, nowhere did Ofcom say,  
3 "Well, a reasonable price might be a monopoly price".

4 That goes back to the submission that I made in relation to SMP of the complete failure by  
5 Ofcom here to grapple with the question of what it meant by excessive pricing. Again, we  
6 say it taints the decision.

7 Madam, that finishes my analysis of the decision. Inevitably, I have made some of my  
8 submissions about the flaws in it while dealing with the reasoning.

9 Can I just make some general comments on the evidence that the tribunal has heard? You  
10 have heard from two independent experts - Dr. Littlechild and Dr. Walker. You have heard  
11 from Mr. Myers. Now, with all due respect to him - and I say this not in any sense to  
12 disparage Mr. Myers - he cannot be treated as an independent expert because, self-  
13 evidently, he is a senior employee of Ofcom and he was involved in the taking of this  
14 decision. I do not mean to suggest that in any way he acts in bad faith, but his evidence in  
15 terms of general economic opinion simply cannot be treated as the evidence of an  
16 independent expert in those circumstances.

17 THE CHAIRMAN: We will hear what Mr. Roth has to say about that.

18 MISS ROSE: Yes. In my submission, madam, it would be wrong in principle to treat it in that  
19 way.

20 In considering Mr. Myers' evidence we do submit that the tribunal needs to carefully  
21 distinguish between opinions that he gives and glosses that he seeks to put on Ofcom's  
22 original decision because in my submission it is not appropriate for this tribunal to take into  
23 account re-interpretations or glosses on the decision made after the event by Mr. Myers.  
24 That goes back to the principles in NAP 3, which I referred to a couple of days ago. The  
25 decision stands. It is a final administrative act and Ofcom is to be judged upon it. It is not  
26 for Ofcom, or a witness on behalf of Ofcom, to seek to expand upon, or improve upon, the  
27 reasoning in the decision.

28 THE CHAIRMAN: You say that is the case even though we have to decide this on the merits,  
29 rather than ----

30 MISS ROSE: Yes, madam. The question you are deciding on the merits is: Is the decision made  
31 by Ofcom flawed in law or assessment? Not: Could Ofcom have made a better decision if it  
32 had thought about it for longer and expanded or improved its reasoning? That is an  
33 important point that goes to both issues.

1 Dr. Littlechild and Dr. Walker covered similar ground. We do, with respect, invite you to  
2 prefer the evidence of Dr. Littlechild. He brought with him not only the expertise of an  
3 economist, but also the experience of a regulator, and his understanding of what factors  
4 regulators ought to take into account when taking this sort of decision. In my submission it  
5 was plain from hearing him, and from seeing his evidence, that he was scrupulously  
6 independent; that he was not seeking to go further than he properly could; that his  
7 statements were carefully qualified where they needed to be.

8 In my submission, there was a stark contrast between him and Dr. Walker. With all due  
9 respect to Dr. Walker, he was an advocate for T-Mobile. He refused to accept any  
10 proposition from me which might be adverse to the interests of T-Mobile, even when it was  
11 plain, from the evidence that he was looking at, that the position that he was maintaining  
12 was unsustainable. To give you a couple of examples: one related to the evidence in  
13 relation to the number of minutes that ported customers and non-ported customers -- the  
14 number of incoming call minutes. After looking at it for a minute he developed his position  
15 on it. First of all he said it was relevant. Then he thought about it and said, "No, actually  
16 it's not relevant because this could be explained by other factors. It could be explained by  
17 the fact that these kinds of customers are more likely to make outgoing calls". Now,  
18 madam, that might, or might not, be right. It might or might not be right. But, you could not  
19 say that that evidence was irrelevant to the question of the impact of MNP on the traffic  
20 imbalance. In my submission, his immediate willingness to go so far in explaining it away  
21 indicates, with all due respect, a degree of bias.

22 Similarly in relation to the churn figures - recent, up-to-date data from Ofcom as to the  
23 number of customers who switch and the number who have ever switched network. He  
24 simply was not prepared to accept it because it did not accord with the T-Mobile view of the  
25 word. In my submission, there are indications from that that he was not as neutral as he  
26 might have been.

27 Also, in my submission, his evidence does go beyond what is properly the sphere of  
28 expertise. It is not for him to say what is the charge that H3G might have been able to  
29 charge in the absence of regulation. Apart from anything else he is in no position to say  
30 what is the maximum charge BT could be obliged to pay under the end-to-end obligation.  
31 He simply is not in a position to make that assertion - but that was not going to stop him.  
32 Another point - the suggestion that a different commercial course should have been  
33 followed by H3G, that it should have sought to set itself up as a virtual network when it  
34 launched. Again, that is not a question for an economist. That is a commercial question,

1 depending on knowledge of H3G's business and what the conditions were when H3G  
2 entered the market. Again, his willingness to give that kind of factual evidence beyond his  
3 expertise indicates the extent to which he was arguing in favour of T-Mobile's position, and  
4 not simply here to assist the tribunal with independent evidence.

5 However, we say that he did make some important concessions. Now, I am slightly  
6 handicapped in this because we have tried to get the transcript of yesterday, but have been  
7 told it is not yet available. So, I do not make any warranty that these are verbally accurate.  
8 When we do have the transcript we will check and provide you with the exact references.  
9 The following: (1) to the extent that the traffic imbalance was caused by a distortion in the  
10 market, Ofcom ought to have addressed that distortion in reaching the decision; (2) that it  
11 was correct that H3G should have higher outgoing and incoming calls than each of the  
12 bigger MNOs by virtue of the size of its subscriber base; there might be competitive factors  
13 which could justify the asymmetric regulation of a new entrant, although the tribunal will  
14 recall that he was very reluctant to elaborate on what those competitive factors might be. I  
15 would suggest that it occurred to him that his evidence might be adverse to T-Mobile. (4)  
16 the competitive factors, whether or not cost based, which were exogenous, should have been  
17 taken into account by Ofcom in reaching its decision; and (5) that if MNP was a barrier to  
18 expansion by H3G it should have been taken into account by Ofcom.

19 Madam, that brings me briefly to identifying each of the heads of the errors that we say  
20 Ofcom has made. The first is the failure to identify or evaluate the risk of excessive pricing.  
21 The tribunal is very familiar with the detail of this argument. In summary, there is no  
22 analysis in this decision of what is the maximum reasonable price that BT will be obliged to  
23 pay under the end-to-end obligation. On Ofcom's own reasoning, this was the maximum  
24 price that H3G would be able to charge. No explanation of how this could be the monopoly  
25 price. Secondly, as Ofcom concedes, no evidence of excessive pricing by H3G in the past.  
26 Thirdly, unchallenged H3G evidence of its desire to keep MCT prices down. Fourthly, we  
27 say that having failed to evaluate the risk, Ofcom are not in a position to conclude that price  
28 control was a proportionate remedy. So, those are the submissions on the first point.  
29 Secondly, the failure to identify or quantify the costs and benefits of regulating H3G by  
30 price control by comparison with maintaining the status quo. We submit that there is no  
31 question but that Ofcom did fail to do that. Both the impact assessment and the welfare  
32 analysis expressly and explicitly proceeded on the basis of regulation of all five or  
33 regulation of nobody. It cannot be cured by the **ex post facto** model created by Myers.  
34 Critical to that model is the termination price. Myers is not in a position to say what it is.

1 Ofcom has not assessed it. Therefore, there is simply no basis for the welfare analysis in  
2 relation to H3G. That means H3G was not in a position to balance the costs and adverse  
3 effects on H3G and competition with a gain to consumers because it lacked an essential  
4 tool. It is no answer to that to say that the welfare analysis is only part of the jigsaw. If one  
5 part of the jigsaw has had a piece cut out of it, you will not be able to complete the jigsaw.  
6 As Dr. Littlechild put it, the question was: Is the game worth the candle? Ofcom could not  
7 answer that question unless it had properly calculated the net welfare gain.

8 Of course, Ofcom do rely on the other welfare gains which they did not quantify. It was Dr.  
9 Littlechild's evidence that the impact of H3G's unregulated charges on those gains was  
10 negligible. Mr. Scott specifically said that he would like to hear cross-examination from Mr.  
11 Roth on that point, and Mr. Roth said he would come back to it. With respect, he did not  
12 come back to it, and that evidence from Dr. Littlechild is unchallenged.

13 The next point is the ported numbers point. We submit that if Ofcom had correctly  
14 undertaken the welfare analysis in relation to H3G it would have appreciated that it could  
15 not impose a charge control on H3G until it had sorted that problem out because it would be  
16 disproportionate to do so. The conclusion at para. 9.234 would have had to be  
17 fundamentally re-evaluated.

18 Next, we say there was a failure by Ofcom to appreciate the very significant effect on H3G,  
19 both in isolation and in comparison with its competitors. Can I just refer you to some  
20 passages in the evidence of Mr. Russell and Mr. Dyson? Mr. Russell's first statement at  
21 paras. 28 to 35, (Bundle C1, pp. 112 to 114); his second statement at paras. 51 to 70  
22 (Bundle C1, pp. 252 to 256); Mr. Dyson's witness statement at paras. 22 to 35 (Bundle C1,  
23 pp.429 to 434). We say that these adverse effects and the constraint that was going to be  
24 imposed on H3G's business development, market share and profitability ought to have been  
25 properly taken into account by Ofcom and was not.

26 Next, asymmetric regulation wrongly assumed to be a detriment. The tribunal is very  
27 familiar with this argument. We rely on the evidence of Dr. Littlechild on the underlying  
28 academic articles, particularly those by Peitz; the decisions of the Portuguese and French  
29 regulator, and the ERG draft. We submit that Ofcom should have considered whether the  
30 conditions in this market are such that asymmetric regulation are not only not a detriment,  
31 but positively the most appropriate form of regulation, and they did not.

32 Now, it has been suggested by Mr. Roth that this goes only to the level of the price control,  
33 and not to the question of whether or not to impose. We submit that is not correct because  
34 if Ofcom had correctly proceeded on the basis that the likely price that H3G would charge

1 was 10.7 pence per minute, and if Ofcom had correctly approached the question of  
2 asymmetry, then there is at least a strong probability that off would have concluded that  
3 there was not a risk of excessive pricing by H3G that would have an adverse effect on  
4 consumers on the basis that that level of asymmetry was appropriate overall because of the  
5 needs of H3G as a new entrant, because of other structural problems in the market. On that  
6 basis it would be disproportionate to impose price control. Indeed, there would be no legal  
7 basis for doing so under s.88.

8 Next, the error in concluding that the traffic imbalance and causes of that imbalance were  
9 irrelevant. We submit it is plain from the Impact Assessment Guidance, and also as a  
10 matter of principle, that it was not sufficient for Ofcom to focus narrowly on the market that  
11 it was regulating. The Impact Assessment Guidance requires it to consider the  
12 consequences, including the unintended consequences of its regulation on related markets  
13 and on stakeholders.

14 Dr. Walker argued that the traffic imbalance was irrelevant because he said that all that  
15 matters is that the MCT charge is higher than the costs of terminating the call on your  
16 network. If that is so, there is no competitive problem, and the cost of your outgoing calls is  
17 covered by your retail pricing and so it does not matter if there is a traffic imbalance.  
18 The flaw in that reasoning is self-evident as soon as you look at the evidence of Mr. Russell  
19 and Mr. Dyson. Now, what he says is that”, You’re right in terms of pure empirical  
20 economic analysis, but it fails in the real world because it assumes that you are not  
21 disadvantaged if you have to raise your retail price to that level”. The problem for H3G is  
22 that the other MNOs can use the revenues that they get from mobile call termination and  
23 reduce their retail prices, but H3G, as a significant net out-payer of call termination, not  
24 only cannot do that, but is forced to raise its retail costs, and therefore is impeded in  
25 competing.

26 Again, we say that it was incumbent on Ofcom to investigate this properly to ensure that the  
27 traffic imbalance was not caused by distortion in the market. Ofcom did not thoroughly  
28 investigate the causes and therefore was not in a position to conclude that the traffic  
29 imbalance was irrelevant. Just to give you a reference to this, H3G’s commercial strategy -  
30 whether H3G was constrained to adopt that strategy -- Can I refer you also to Mr. Russell’s  
31 evidence at Bundle C1, Tab 5, paras. 26 to 28? You already have my reference to Mr.  
32 Tillotson’s evidence at para. 60.

33 Finally, if I can just deal with the question of the evidence to support H3G’s submission that  
34 defects in MNP contribute to that imbalance -- Madam, rather than dealing with it orally, we

1 have reduced that position to writing. If I can just hand up a note -- (Handed) It contains  
2 confidential information marked in yellow.

3 THE CHAIRMAN: This should only be handed to people who are within the confidentiality ring.

4 MISS ROSE: Madam, I now have the references that Mr. Scott asked for on the traffic imbalance  
5 figures as: C1, Tab 3, pp.126 to 127, 210, 213 to 219; C1, Tab 5, pp.319 to 322, 324 to 328,  
6 330 to 338.

7 MR. SCOTT: Thank you very much.

8 MISS ROSE: Unless I can be of any further assistance, those are H3G's submissions on remedy.

9 THE CHAIRMAN: Well done, Miss Rose. You have provided a glowing model to which I hope  
10 the other parties will look and learn. I want to consult my colleagues on one point before  
11 we break for lunch. (After a pause): Just one point on which we are agreed and which  
12 might assist the other parties in making their submissions: we do not need to hear  
13 submissions on the points you made about the independence of the experts. We are  
14 ourselves an expert tribunal and we are well able to assess the points that they make,  
15 bringing our own knowledge and experience to bear. So, the parties, who are very limited  
16 in time, I just want to signal, do not need to take up any of that time in responding to the  
17 points that you made in that regard.

18 MISS ROSE: Madam, can I just make one final point before I sit down? Of course, in the limited  
19 time, I have sought to focus on the main points. I should not be taken to be resiling from, or  
20 abandoning, any of the points in our skeleton argument.

21 THE CHAIRMAN: Absolutely understood.

22 MISS BACON: I have a question regarding the status of this document. The problem is that this  
23 is confidential. That means that I cannot show it to my clients, who are here. Can I take it  
24 that if we do have any objections to any part of it, or comments on any part of it, we could  
25 reply in writing once we have actually received a non-confidential version of this table?

26 MISS ROSE: Madam, there are only three confidential figures in it. We can provide them with a  
27 non-confidential version today. We can do it over the short adjournment, madam.

28 THE CHAIRMAN: Thank you. I am wondering whether, when we come to the submissions of  
29 people who are currently quite far back in the room - if it was not unduly disruptive for  
30 them to move forward, unless those positions are going to be occupied this afternoon. I flat  
31 that up in case the parties want to vary the arrangements.

32 We will resume at two o'clock.

33  
34 (Adjourned for a short time)

1 THE CHAIRMAN: Yes, Mr. Roth?

2 MR. ROTH: Madam, may I start with the same disclaimer, as it were, that Miss Dinah Rose  
3 made, namely I will concentrate on the main points. The other points are covered in our  
4 written submissions and defence, and the fact that I do not mention them does not mean, of  
5 course, you do not rely on them. Secondly, as regards the transcript, we did just receive,  
6 just as you rose, I think, the transcript for yesterday afternoon but we have not had time to  
7 go through it. So perhaps we could send any references in later in writing.

8 May I make two preliminary observations on remedy. First of all, the issue has to be  
9 decided on the basis of H3G's notice of appeal, which of course can be elaborated, as it has  
10 been in the skeleton argument and oral submissions, but it cannot be amended by such  
11 submissions. That remains the basis of this appeal.

12 Secondly, following the evidence that the tribunal heard yesterday from Dr. Littlechild, a  
13 number of the points, we say, that H3G relied upon seem either entirely, or to a large extent,  
14 to fall away for reasons that I shall briefly explain.

15 In the notice of appeal, which is in your bundle C1, tab 1, section E, and at p.36 of the  
16 stamp numbering you have para.13.2 on p.37. Section E is the section on the remedy, as it  
17 is called now, and then under 13.2 are the four grounds that are relied on.

18 Then in the next section, 14, are set out helpfully the statutory provisions, some of them,  
19 from the 2003 Act which we are familiar with.

20 The starting point of course is the regulatory framework conspicuously absent from the  
21 notice of appeal as it is indeed from H3G's skeleton argument, which in some 74  
22 paragraphs and various sub-paragraphs devoted to remedy, the EC provisions are not  
23 referred to even once. The relevant provisions in the access directive, the key one is article  
24 8.2, which is bundle H1, tab 4. That leads to the various options, you will recall. Could I  
25 ask you to look at that very quickly, at tab 4. Article 8, para.2, I do not have to read it. It  
26 says when SMP is found then the NRA must impose one of the following obligations in  
27 articles 9 to 13. Article 13 is the price control obligation and article 13, paras.1 and 2, are  
28 relevant:

29 "A national regulatory authority may, in accordance with the provisions of Article  
30 8, impose obligations relating to cost recovery and price controls, including  
31 [various] obligations ... in situations where a market analysis indicates that a lack  
32 of effective competition means that the operator concerned might sustain prices at  
33 an excessively high level or apply a price squeeze to the detriment of end-users."

34 That is the basis on which the domestic statute gives effect to in s.87(9) and s.88.

1 Then para.2 of article 13:

2 “National regulatory authorities shall ensure that any cost recovery mechanism of  
3 pricing methodology that is mandated serves to promote efficiency and sustainable  
4 competition and maximise consumer benefits ...”

5 That is taken forward in s.88(2).

6 Madam, we submit, as we did at the outset, that the 2003 Act is to be interpreted and  
7 applied in accordance with the underlying EC directives, and I do not think that is a  
8 controversial submission.

9 Madam, if you go to s.88 in the statute – I am in the Grey Book, so I have not got the tab  
10 number, but it is in the same bundle.

11 THE CHAIRMAN: It is tab 8.

12 MR. ROTH: Tab 8, I am grateful. Section 88: Miss Rose submitted that the starting point for  
13 Ofcom should not be no regulation of price, but the status quo of existing regulation. You  
14 will recall that submission a short while ago, namely price control on 2G/3G is not on H3G.  
15 We say, with respect, that is wrong in law. The old control expired. Under article 13 of the  
16 access directive and s.88, what Ofcom had to consider was whether the conditions for  
17 imposition of a new price control were made out. The old one did not continue until  
18 withdrawn, it was for a fixed time. So we had to go through again the analytical exercise  
19 that Ofcom had gone through in 2004 of asking whether those conditions in s.88(1) and (2)  
20 are satisfied for all the MNOs.

21 THE CHAIRMAN: What is it that fixes the length of time for which the price control lasts?

22 MR. ROTH: I think it was the terms of the decision, and obviously the regulator has to take a  
23 reasonable view. I suppose it is how far forward you can rationally predict.

24 In s.88(1) there is the reference to the relevant risk of adverse effects. Then (3), we say,  
25 defines relevant risk, it is, effects arising from price distortion if the dominant provider  
26 might, not “will”, not “already has”, but “might” so fix and maintain prices at an excessive  
27 level so as to have an adverse effect on end-users. I am collapsing the longer wording. Of  
28 course, it seeks to apply article 13, para.1, one can trace it through.

29 One has assistance as to what this test means from this tribunal’s 2005 judgment. I do not  
30 ask you to turn that up. The reference is H2, tab 12. That was, as you will recall, a  
31 challenge to SMP only, because the remedy on H3G was just a transparency obligation,  
32 very like remedy, but one of the various arguments that H3G advanced, why it said it had no  
33 SMP was that for SMP it said the regulator has to show not just the ability to charge  
34 excessive prices but an incentive to do so. Ofcom had not held that H3G had such an

1 incentive. That is para.57 of the judgment. The tribunal held that is not relevant to SMP  
2 incentive, and so it was bad argument, but it may be relevant to remedy. That is para.61 of  
3 the judgment. With respect, we agree and adopt that. Under s.88 one has to show more  
4 than the mere ability, because that is the test for dominance. It is an incentive to do so, so as  
5 to cause an adverse effect to consumers. That is how that fits together.

6 THE CHAIRMAN: Do you say that incentive plus ability equals risk?

7 MR. ROTH: And adverse effect, yes, equals risk; and then you have to show adverse effect on  
8 consumers which exceptionally might not arise, but normally it would.

9 Miss Rose said before lunch that Ofcom had not properly considered this at all, the s.88 test,  
10 and she referred in the statement, you will recall, to para.10.30. Can I ask you to turn to the  
11 statement in bundle B, tab 1, and perhaps the tribunal can keep the statement open because  
12 we will be coming back to it again and again. You will recall that she took you to  
13 para.10.30 and said that is the only discussion of s.88(1) and it is very cursory.

14 With great respect, I listened with some surprise to that submission. I hope I understood  
15 that is what was being said, because if you turn to the previous page this discussion here of  
16 s.88 was with regard to the condition being imposed to provide network access on  
17 reasonable request. It was not with regard to the price control at all. What Ofcom did was  
18 go through the various conditions being imposed. Just below 10.25, MA1 is the  
19 requirement to provide network access, just above 10.35 the requirement not to discriminate  
20 unduly. Then we come to conditions MA3 and MA4, which are the price control  
21 conditions. Indeed, when you come to discussion of the price control conditions you come  
22 to discussion again of s.87(9) and s.88. It is 10.51, 10.52, 10.53, 10.54. 10.54 says:

23 “Ofcom has performed its duties also by ensuring that, for the purposes of  
24 imposing a charge control, the tests set out in section 88(1) of the Act have been  
25 met. As discussed above in Section 7 ...”

26 So it refers back to the discussion and carries it forward.

27 The suggestion is that there is something wrong is the reference to the statutory section,  
28 s.88, is in part 10 of the document and not at the beginning of the document, or not in part 7.  
29 With great respect, that is a preposterous submission. Of course it has to be read as a whole  
30 and the idea that people were not thinking about the statutory section because they put in  
31 s.10 is just absurd.

32 We say that Ofcom did look at this, and we expressly found in para.7.1 of the statement and  
33 record the finding, that Ofcom believes that absent regulation or the threat of regulation  
34 MNOs would have the ability and incentive to set excessive charges for MCT. We go on to

1 say that these would result in detrimental impacts on consumers, exactly having an eye to  
2 what is required under the statute.

3 We say we are fully entitled to do that without going through each of the MNOs  
4 individually for a number of reasons. First of all, since these MNOs, all of them, have 100  
5 per cent share, absolute barriers to entry, insufficient countervailing buyer power to negate  
6 SMP, we say it would need exceptional circumstances to displace a finding that there was  
7 no real incentive for an operator to price at an excessive level. One can see that from the  
8 position last time, the 2004 statement, the reason why Ofcom not only did not impose price  
9 control on H3G for 3G, that is because it did not impose any price control for 3G, it was not  
10 an H3G, but it also did not impose price control, as was pointed out this morning, on H3G  
11 for 2G alone on H3G. It explained why, because it was uncertain whether H3G had the  
12 incentive to increase 2G costs for a particular reason, namely that H3G was actively seeking  
13 to migrate its 2G traffic to its 3G network. Because of that, Ofcom took the view, rightly or  
14 wrongly, that in those circumstances it was not clear – it did not actually say no incentive, it  
15 said, “We are not sure” – that they would have an incentive to increase their 2G price. So  
16 no price control conditions. The references very briefly in the 2004 statement are paras.5.69  
17 and 5.71, F1, pp.128-129. That refers back in terms to the December 2003 consultation,  
18 which is in bundle J, tab 1, p.78, paras.5.128-129. So very special circumstances there.  
19 We say there are no exceptional circumstances. It is entirely reasonable to reach the  
20 conclusion without detailed or individual reasoning MNO by MNO. Dr. Littlechild frankly  
21 accepted in answers to cross-examination from Mr. Turner that firms like H3G have the  
22 ability and incentive under a CPP system to increase their termination charges. He said,  
23 yes, of course firms like to make more money rather than less, that was self-evident. Then  
24 in answer to me in explanation – and I have not got the reference because that is the  
25 afternoon – of his opinion in his second witness statement, para.40, that H3G would be  
26 willing or constrained to maintain its MCT at a level not exceeding 10.7ppm, he meant, he  
27 said, he was constrained by action on the part of Ofcom in the manner set out in his third  
28 witness statement at footnote 10, that is to say an undertaking they gave to the regulator or  
29 threat of regulation, which he accepted could be called a form of price control although it  
30 might be different in scope or enforceability. You will recall that evidence. It is transcript  
31 for day 4, p.30, line 5, to p.31, line 2. That means, absent such constraint, taking all these  
32 answers together, there is an appreciable chance that H3G would be likely to raise its  
33 termination charges as high as they could. Dr. Littlechild’s point was that a regulator  
34 should prevent that, but he said other means short of full charge control would do, or at least

1 should be considered (day 4, p.32, lines 1-21). In other words, Dr. Littlechild did not refute  
2 the notion that there was incentive on H3G to increase its prices but was questioning the  
3 wisdom of the regulator choosing this particular remedy.

4 That does not take H3G out of s.88(1)(a). On the contrary, it puts them firmly within it in  
5 terms of the prerequisites being satisfied. One can then argue about proportionality and  
6 remedy but that is a different point.

7 The next point on this is that this MCT statement is not written in a vacuum. It is produced  
8 after a series of consultations, stages that are summarised in the statement at paras.1.5 to  
9 1.9. I will not read those paragraphs but in summary June 2005 a preliminary consultation,  
10 March 2006, detailed consultation, September 2006, third consultation. To each of those  
11 consultation documents H3G made detailed written responses. While the preliminary  
12 consultation was more general, the second and third consultations indicated Ofcom's  
13 provisional view that imposition of charge control might be appropriate. In its responses to  
14 the second and third consultations H3G vigorously argued that it had no SMP because of  
15 BT's CBP. They have been entirely consistent about that. When they proceed in the  
16 alternative to discuss remedy, H3G never suggested that if found to have SMP it did not  
17 have the incentive to price at an excessive level, they said that price control was not  
18 appropriate on ground of distortion to investment and innovation, competition and other  
19 grounds they have been relying on now. The reference is bundle F2, the document starts at  
20 p.243, and the discussion of remedy is at pp.259-276. Then the third consultation, their  
21 response, bundle F3, the document starts at 193, responses on remedy pp.217-226.

22 I cannot give you a reference to the discussion of incentive to no incentive to increase  
23 prices, because they do not say anything about it. They do not make the point, so I cannot  
24 give you a reference specifically for that. That is relevant when you consider, how far does  
25 Ofcom have to go in the final document in dealing with the point.

26 Miss Rose submitted in her overview, road map opening of remedy that Ofcom failed to  
27 evaluate and quantify the risk in terms of s.88(1) (day 3, p.81, lines 19-21). We say, with  
28 respect, that is wrong in law. There is no requirement to quantify the risk, not to say,  
29 "There is a 40 per cent risk you will engage in excess or a 60 per cent risk or a 15 per cent  
30 risk", of course not. The only evaluation required is to be satisfied that there is the incentive  
31 and that such pricing would have adverse consequences for end users, which here it clearly  
32 would as under and S CPP regime higher MCT charges would feed through to higher costs  
33 for consumers, as Ofcom indeed notes in the statement.

1 Miss Rose then said no such risk because H3G are constrained by the scope of BT's end-to-  
2 end obligation and the reasonableness requirement in BT's obligation which would be  
3 interpreted by Ofcom in a dispute if a dispute were referred, and that would influence the  
4 negotiations. This, with respect, is a recycling of the argument that the tribunal heard at  
5 great length - perhaps there was even a risk of excessive length – in the SMP stage of this  
6 appeal. If it worked there and there is no SMP you do not have to worry about remedy. If it  
7 does not enable H3G to escape from SMP then it cannot enable them to escape from s.88(1)  
8 once SMP has been found. Otherwise one goes round in circles. It becomes the same point  
9 and the same response.

10 The notice of appeal on this point also relies on H3G's actual pricing and makes the claim –  
11 para.17.4 of the notice of appeal, but you need not turn it up, the sentence is this:

12 “H3G's MCT rate has been below the other MNOs 3G rates for almost the whole  
13 of H3G's existence.”

14 That is the plea.

15 We make two points in response to that. First, the comparison with the underlying 3G rate  
16 for the other MNOs is irrelevant. In looking at how pricing relates to a notional competitive  
17 price, one looks at what customers are paying for what they get. From the customer's point  
18 of view it is irrelevant whether the MCT is on a 3G network or a 2G network because the  
19 functionality is the same. We say that the relevant table or graph of comparative prices is  
20 that exhibited by Mr. Russell to his second witness statement, KSR/12, bundle C1, tab 5.  
21 Page 247 is where Mr. Russell introduces KSR/12, but if we go on to p.261 you have, I  
22 hope, in a colour copy the table of average mobile termination rates. The colours are not  
23 always easy to distinguish but H3G is the line about 10.7. You see H3G starts in about  
24 March 2003 ----

25 THE CHAIRMAN: Is this anywhere in tabular form, because it is rather difficult to read this.

26 MR. ROTH: I do not think it is in tabular form. Mine is like that. There was a larger copy when  
27 originally served which I have to say I did find easier to read and it may be that we can  
28 supply you with one. This shows the average mobile termination rate, as it says, of all the  
29 different MNOs. Just to explain it very quickly, you can see, for example, at July 2004 all  
30 the others except H3G come down because that is the first SMP price control. Mr. Russell  
31 explains this in his witness statement. He gives a sort of commentary. H3G continues and  
32 then you have the little spike, the 16.6 in January 2007. Looking backwards you can see  
33 that in July 2003 there is again a fall for everybody else. That is the price cap on 2G

1 imposed by Oftel following the CC report. Then there is the further fall. As Mr. Russell  
2 says in his witness statement, para.13:

3 "No other MNO apart from H3G charged a specific 3G rate at this time."

4 They all charged the same rate for 3G as 2G over this whole period.

5 We say that is the relevant comparison both as regards competition in the retail market  
6 where the MNO is charging for an equivalent upstream wholesale service and regarding  
7 adverse effect consequences for consumers, which you will recall under s.88(3) is the other  
8 test, because there is no difference to the consumer calling their friend, whether the friend is  
9 on a 3G network or a 2G network. Indeed, even Hutchison, if it is out of 3G coverage it  
10 will be received on their roaming arrangement 2G coverage. The caller does not know and  
11 does not care. It shows the other rates falling and H3G's rates staying the same.

12 Did we rely on this? Did Ofcom rely on this in the statement? No, they did not. Can we  
13 rely on it now? Certainly we can, to rebut a claim being put forward in this appeal by H3G.  
14 When Ofcom is faced with an appeal and evidence put in, it must be able to rebut that  
15 evidence and say, "No, look at this, it is wrong". So that is the first reason we say the  
16 underlying 3G rate is irrelevant.

17 The other reason is that we say that the statement that I quoted, H3G's MCT rate as below  
18 the other MNO's 3G rates for the almost the whole of H3G's existence, is actually not  
19 correct on the basis of Mr. Russell's own evidence. We do not refute the figures he puts  
20 forward, we rely on them. You have the exhibit that we have just looked at which shows  
21 the actual average rate. So once blending is introduced by the 2G/3G MNOs, that is their  
22 blended rate. For H3G it is the same rate carrying through. When the others did introduce a  
23 different underlying rate for 3G, you have the position set out in Mr. Russell's next exhibit  
24 which is p.286. Again, perhaps we can send in a larger version because it is particularly  
25 hard to see Orange, which is yellow and is very faint.

26 THE CHAIRMAN: A larger version and if we could have a table with the figures in rather than a  
27 graph, that also might be helpful.

28 MR. ROTH: These are Mr. Russell's tables. They are the source of the figures. With a bit of co-  
29 operation from H3G that can, I am sure, be done.

30 What this shows is, as you see, Vodafone going right across to September 2004, because  
31 Vodafone were the first to introduce a distinct underlying 3G rate, and Hutchison at about  
32 10.7 also starting in September 2004. The other three MNOs, 02, Orange and T-Mobile, are  
33 shown only starting in about September 2006, because that was when they had a separate  
34 3G rate from their 2G rate. Of course, they were offering 3G services long before

1 September 2006. That is not when they started to offer 3G. That is not shown on this table.  
2 When they were doing that before they charged the same rate for 3G as 2G. So what they  
3 were actually charging for 3G was the 2G rate, which you can see on the previous table,  
4 which is way below Hutchison's rate. That is why we say it is just not correct, as a matter  
5 of fact, to say, as asserted, that for most of Hutchison's existence the 3G rates of the other  
6 MNOs were above H3G's 3G rate.

7 This inaccuracy not only invalidates the assertion in para.17.4 of the notice of appeal, it also  
8 invalidates one of the assumptions that Dr. Littlechild relied upon in his reasoning. It is his  
9 first witness statement, para.37. You will recall Mr. Turner asked him about this, and he  
10 said he took it from the notice of appeal. He had, in fact, never read Mr. Russell's  
11 Mr. Russell's second witness statement or had the opportunity to consider the detailed  
12 position.

13 THE CHAIRMAN: Where do we have the dates on which the other MNOs started terminating on  
14 their 3G network?

15 MR. ROTH: We will have to check. They commenced at different times. They are publicly  
16 available figures and perhaps we can send them in.

17 THE CHAIRMAN: I think they are somewhere in the evidence.

18 MR. ROTH: I think they are somewhere, yes, I have not got them at my fingertips, I am sorry.  
19 What the statement did find is that H3G's charges at the time the statement was issued were  
20 well above cost – that is para.9.205 – not that they have yet reached an excessive level –  
21 there was no such finding, Ofcom did not find that – but they were well above the  
22 efficiently incurred cost. That finding is nowhere challenged in the notice of appeal, or  
23 indeed in the skeleton argument, but Miss Rose sought to refute that point in a rather  
24 elaborate argument advanced for the first time in her reply on SMP by reference to the  
25 graphs in annex 13.

26 THE CHAIRMAN: Are we sure it is not challenged in the price control matters?

27 MR. ROTH: That I am not sure, madam, no, I meant in this appeal. I am really not sure. I think  
28 it is challenged in the price control, yes. We deal with it in the price control. It is relied on  
29 now here, and it was incorporated by reference in the submissions just before lunch. It is  
30 based on figures, you will recall, at A13.4 and A13.8 and extrapolating from A13.8 to  
31 A13.4. It is a complicated point. May I just hand up a very short note that I will not take  
32 you to that we say explains the fallacy in what has been done. We have, in fact, copied into  
33 the note one of the figures from the MCT statement, because it makes it easier to follow.  
34 Could I ask you, please, not to read it now because it is a detailed thing and it will ruin my

1 timing. There is a fallacy in this – this is the smoke and mirrors that Miss Rose played with  
2 the figures.

3 So we say s.88(1)(a) satisfies, and then one comes to s.88(1)(b), you will recall, promoting  
4 efficiency, promoting sustainable competition, conferring the greatest possible benefit on  
5 end users. This is where the pros and cons of giving H3G alone exemption from charge  
6 control that is applied to its four competitors in the retail market comes in.

7 May I make one observation at the outset and then deal briefly with what I think are the  
8 main specific points alleged, but I cannot cover all. H3G likes to refer to itself as a new  
9 entrant. We have heard it again and again. That may, madam, have been an appropriate  
10 description at the time of the first market review in 2004. The present market review in the  
11 MCT statement of 2007 is a forward looking statement for the period 2007 to 2011. H3G  
12 cannot, on any sensible view, be regarded as a new entrant for this period. It has not been  
13 there as long as the others, so it is a newer entrant than they are, and it will remain a newer  
14 entrant than they are for the next 20, 30 or 40 years, but it is now an established presence in  
15 the market. Ofcom found – and although in his first report Dr. Littlechild criticised Ofcom  
16 for failing to consider this, he subsequently accepted they did consider it, and I quote from  
17 his evidence, “Ofcom effectively addressed the possibility of H3G exiting the market”.  
18 That is his third report, para.34(c). Ofcom found – as he said, they did not use the word  
19 “exit”, but they effectively addressed the point by saying the financial implications are not  
20 such as to cause real problems.

21 His only remaining criticism is that this was done in s.9 of the statement, not in s.7, though  
22 he said he was not sure whether the reference to s.9 in para.7.28 was sufficient to  
23 incorporate its reasoning (transcript day 4, p.8, line 11 to p.9, line 10).

24 With the forthcoming release of further spectrum, which is well within this market review  
25 period, those operators coming to the market on that basis, they will be new entrants. H3G  
26 is one of the incumbents that those new entrants have to face.

27 So we come to the key points. The MCT statement lists in para.7.28, as you will recall, the  
28 five heads that Ofcom considered, and then the following paragraphs go through each one  
29 of those heads in detail one by one. I think the three major criticisms made by H3G are,  
30 first, that as regards the second of those five heads, inefficient structure of prices, Ofcom  
31 used a welfare model that was worked out in terms of gain for regulation compared to non-  
32 regulation of all MNOs and not the position of H3G separately. That is the first criticism, I  
33 think, relied on very strongly.

1 Secondly, the adverse traffic balance means that H3G exceptionally suffers a competitive  
2 disadvantage as it has to make a net payment of MCT to the other MNOs; and further, this  
3 is due to a regulatory failing by Ofcom due to the MNP regime.

4 Thirdly, Ofcom gave excessive weight to the avoidance of asymmetry without considering a  
5 particular asymmetry in favour of H3G as a smaller “new entrant”.

6 These are the matters really that the expert witnesses, or the witnesses, went into. In the  
7 light of your observation just before lunch I need not go into that in any detail. I will simply  
8 say that it was somewhat remarkable that the submission regarding Mr. Myers was  
9 advanced at all on the basis, it seems, only if the tribunal give very little weight to his case  
10 can H3G’s case really succeed. We say, no, you should give weight to his evidence, and as  
11 it was not effectively challenged in any way it dents their case considerably.

12 First, the welfare model, no, Ofcom did not do this separately for H3G. There is no issue  
13 about that. To put it in context, first of all, it applied to only one of the five aspects being  
14 considered. Secondly, even there it was used for a very limited purpose (statement  
15 para.7.49). Thirdly, the experts agree that such models have significant limitations  
16 (Dr. Littlechild’s second report, para.5, agreeing with Mr. Myers’ first report).

17 Then, now that it has been done on the methodology agreed as acceptable, it became clear  
18 in the evidence of Dr. Littlechild that far from pointing against a regulator imposing a  
19 constraint on H3G’s pricing, it supports the introduction of a regulatory constraint, using  
20 Dr. Littlechild’s words. The purpose for which Mr. Myers put forward this model  
21 specifically for H3G, as explained in his first witness statement at para.53, was to do for  
22 H3G specifically what the statement had done for all the MNOs. That is what he was  
23 addressing his mind to, namely, to compare a scenario where MCT regulation applied as set  
24 out in the statement that H3G was unregulated, to look at that as the counter-factual  
25 situation. That is the table at A3 to Mr. Myers’s second witness statement, bundle K, tab 5,  
26 p.32.

27 As Dr. Littlechild explained in cross-examination, the reason he thought 10.7ppm should be  
28 used as the benchmark price is that he thought it unrealistic to assume that Ofcom would  
29 leave H3G free from appropriate regulatory constraint. He had a different view of what  
30 might be appropriate.

31 Mr. Myers was asking a different question. He was asking the question, “If there is no  
32 constraint, what might H3G prices realistically reach?” As one obviously cannot predict  
33 that precisely he applied several alternatives. He applied the two alternatives that were used  
34 in the statement, annex 19, the monopoly price and a benchmark, and he also included 16.6

1 because that had actually been done in charge control. He is not saying that is actually what  
2 would happen, but saying one can look in those regions and see what is the isolated welfare  
3 gain from regulating H3G. So he is doing exactly what H3G complained was the omission  
4 by applying the model exclusively to H3G on the same methodology used in the statement.  
5 If one just concentrates on the monopoly price Dr. Littlechild was not able to say, then the  
6 game was insignificant although he did not say that it was significant. He said, "I really do  
7 not know".

8 So we do not accept there is any failing by Ofcom that they did not do this in the statement,  
9 but if we are wrong on that and they should have done this expressly for H3G. As I have  
10 explained, doing this calculation nonetheless supports the conclusion, and it really would be  
11 extraordinary to suggest you should quash and remit for Ofcom to go through the motions  
12 of re-adopting the statement with this now included. So that is the welfare model.

13 Second point, traffic imbalance: the complaint is that this led to a payment to the other four  
14 MNOs. We make five responses. First, Dr. Littlechild addressed this at some length in his  
15 statement, but he agreed when I asked him about it that this would be adequately dealt with  
16 by setting an MCT so as to achieve net payment zero, preferably by a stricter price control  
17 that puts the MCT at, in fact, zero, though there are alternative ways of avoiding a net  
18 payment through different levels. So this goes not to whether price control should be  
19 introduced, but the level of price control, which is a matter for the Competition Commission  
20 (transcript day 4, p.20, line 13, to p.21, line 31. We say that really is the end of the point.

21 Despite that frank and clear statement from H3G's own expert, Miss Dinah Rose would not  
22 let go of it, although I noted that when she introduced the point near the start of her  
23 submissions today she said this, if my note is correct, "Because of the large net out-payment  
24 and the level of charges, H3G is left in a situation of either raising its retail charges to cover  
25 the net out-payment, or keeping its retail charge and losing customers, or keeping the retail  
26 charges down, and that is the dilemma that H3G faces". It is because of the large net  
27 payment linked with the level of charges that have been set. So we say it is a price control  
28 issue, and that is that.

29 Secondly on this, Dr. Littlechild accepted that the point that he made in his statement that it  
30 is not normal for a company to make payments to its competitors does not apply to a  
31 network industry such as telecommunications. Indeed, he agreed that it is entirely normal  
32 (transcript day 4, p.22, line 31, to p.23, line 20). What he accepted further was that it may  
33 be that an unusual feature is that here the incumbent actually has to buy inputs from a new

1 entrant if it wants to interconnect, so the unusual feature is you have then got payments the  
2 other way.

3 Thirdly, if this point has any validity at all, it is only with regard to mobile-to-mobile calls,  
4 as regards any imbalancing calls between H3G and the fixed networks, BT and the others,  
5 there is no suggestion or evidence that any imbalance results in a net out payment. That  
6 would be extraordinary because the termination charges for the FNOs are regulated at a  
7 much lower level. The figure given by H3G in its intervention in BT's price control appeal  
8 is 0.4 ppm and we tend to accept that. Of course, BT and the FNOs are not competitors of  
9 H3G anyway because the fixed and mobile markets are defined as separate markets.

10 The fourth point, and this has reappeared now under the guise of MNP on the basis that it is  
11 a regulatory failure that causes the problem, and so it is said that H3G should have a  
12 dispensation from price control so as to make good the defect. We say that still goes to  
13 levels, but we just say why, briefly. We say it is clearly not caused by MNP.

14 First, there is the high level of churn in the United Kingdom. The evidence of Dr. Walker  
15 citing industry figures, which remained, we would submit, entirely solid despite persistent  
16 cross-examination by Miss Rose, and those figures for churn are produced also – the same  
17 tables from one of the accountancy firms, I think.

18 THE CHAIRMAN: Merrill Lynch.

19 MR. ROTH: Thank you very much. Merrill Lynch, are produced and they are also relied on by  
20 Mr. Barden, para.9 of his witness statement, (bundle C2, tab 9, p.384). He is a director of  
21 T-Mobile consumer business, who presumably knows about churn, and his evidence is not  
22 being challenged, specific evidence on the figures. Mr. Tillotson, from Vodafone, also  
23 gives figures for the level of churn actually at Vodafone, confidential figures, and he  
24 distinguishes carefully between switching and churn and return; he goes into that point  
25 (Tillotson paras.26 to27, bundle C2, tab13, p.520) also not challenged.

26 Then there is the fact that the market has expanded by some 40 per cent in the number of  
27 active subscribers since H3G's entry, that has gone up from 49 million to 70 million. Miss  
28 Dinah Rose made some point that 49 million when it entered was about the adult population  
29 of the United Kingdom. Certainly, if I am allowed to make an observation I tend to see it is  
30 not only adults who use mobile phones. (Laughter)

31 In a new note handed in just before lunch, a rather detailed note. It mostly goes I think to  
32 Mr. Barden's and Mr. Tillotson's evidence, but it is a very detailed note and we have not  
33 had chance obviously to work through it. Some of it I think affects churn; if we have  
34 anything can we respond in writing?

1 The fifth point, the figures in Ofcom's defence on which Miss Rose cross-examined, can I  
2 ask you to look at those, that is bundle C2, tab 1, pp 61 to 62. There are two tables, one on  
3 p.61, one on p.62 comparing incoming and outgoing traffic and the H3G figures are  
4 confidential.

5 Miss Rose made the good point that one would expect, as H3G has a much smaller number  
6 of active subscribers than the other MNOs, one would expect that for H3G subscribers the  
7 average number of minutes for off-net calls would be higher than the average number of  
8 minutes of off-net calls for a subscriber of any of the other MNOs, and that must be right as  
9 a matter of logic. She put that point, you will recall, to Dr. Walker.

10 But this does not resolve or effectively refute the point being made when one looks at the  
11 actual figures with some care and take the basis that has been put forward that H3G's  
12 market share of active subscribers is 5 per cent.

13 THE CHAIRMAN: Which of these tables then is the one that you are relying on?

14 MR. ROTH: We can rely on both but the second one is more relevant because, as explained, the  
15 second one compares active subscribers – H3G to the other MNOs; the first one calculates  
16 the figures on all H3G subscribers, and the industry is as active for reasons explained in the  
17 footnote, which I will not take time on. Can I hand up a note on this point? (Document  
18 handed to the Tribunal) which I cannot fully read out because some figures are confidential,  
19 but one thing I would ask you to note on the table on p.62, that for the figures in the table  
20 for incoming traffic – exclude on-net – for other MNOs, and H3G. So for the other  
21 MNOs, the figure of 43 to 71 minutes excludes on-net. The figure for H3G that I cannot  
22 mention also excludes on-net.

23 For the outgoing traffic, the figure for the other MNOs includes on-net, but for H3G  
24 excludes on-net, because we have not been provided with the figures including on-net. This  
25 is paragraph 2 of our note.

26 THE CHAIRMAN: Well we will look at your note then.

27 MR. ROTH: If you can look at that. Basically what we have done is to gross up the figures ----

28 THE CHAIRMAN: This is dealing with the point that Dr. Walker was trying to deal with on the  
29 hoof, as it were, about if one looks at relative market shares does this actually still hold  
30 good?

31 MR. ROTH: Absolutely, that is exactly the point, and we say "yes, it does." I think when you  
32 work through it you will see this is really a very simple point. Those were my five points.  
33 I should just add two supplements. One is that Miss Rose today submitted that Ofcom  
34 should have examined the cause of the traffic imbalance, and she relied on the ERG paper to

1 say that it could have been caused by off-net versus on-net, and the submission that she  
2 made, if my note is correct, Ofcom did not conduct an examination of the cause of traffic  
3 imbalance (see ERG paper and the importance it attaches to on-net versus off-net. It is not  
4 good enough to say to H3G: “You should have raised the on-net versus off-net point”; given  
5 the ERG position paper Ofcom should have done so itself, or of its own initiative.

6 We say that is, with respect, an attempt to run the on-net versus off-net argument again, and  
7 that is not open to H3G in this appeal.

8 Then there was a new point only advanced through cross-examination of Mr. Myers about  
9 the MNP consultation. You recall the document at F4, p.1, and Miss Rose said in her  
10 submissions the MNP consultation has stalled. She put the consultation document to Mr.  
11 Myers. This really is, with respect, quite unfair. The position is this, Ofcom issued a  
12 consultation on amending the level of the charge control under this statement by reference  
13 to the various porting issues, the issues that Miss Dinah Rose raised with Mr. Myers. H3G  
14 urged Ofcom to proceed with that consultation. All the other MNOs of course put in  
15 responses all saying different things, I fear, as usual, and the issue is raised expressly in  
16 H3G’s price control appeal in these proceedings (para.9.2 of H3G’s notice of appeal on the  
17 price control matters). It is addressed by the statements of intervention from the other  
18 MNOs in the price control appeal, and since that is an issue that is going to the Competition  
19 Commission in this case, Ofcom decided that in those circumstances it would not be  
20 appropriate to amend the charge control on that ground before the Competition Commission  
21 has ruled on it, and that is what has happened. That, I would say, is entirely distinct from  
22 the MNPs statement which was issued by Ofcom on 27<sup>th</sup> November 2007, which does have  
23 effect and will go ahead save that we heard yesterday that it has now been appealed by  
24 Vodafone.

25 The last of the three points is asymmetry, and we simply say there is an obvious and  
26 fundamental difference between asymmetry and the level of price control which may be  
27 appropriate in certain circumstances in which Ofcom indeed applied here in H3G’s favour,  
28 striking a balance, as explained in s.9, between an allowance both for H3G’s higher 3G  
29 costs, and therefore the end point, 5.9 pence for H3G, 5.1 for the others, and also in a glide  
30 path which seeks to avoid too sudden a drop to take account of the risk to investment  
31 incentives for H3G interests of consumers and so on, and that is explained in paras. 9.190 to  
32 9.191 of the statement.

33 An extreme form of asymmetry, whereby all other players in the market are subject to price  
34 control but just one is free of it altogether for four more years, as to that it is striking that

1 none of the material relied on by Dr. Littlechild expressly supports such an extreme form of  
2 asymmetry as you, of course, acknowledged.

3 If this were a valid approach to the problem we say that would be an extraordinary omission  
4 in all these discussions. One NRA whose decision he relied upon, namely the Portuguese  
5 who imposed a very limited and short-term asymmetry in rates as you saw, was told to think  
6 again by the Commission in its comments under Article 7 of the Framework Directive, and  
7 the reference to that is bundle C1A, tab 9. Dr. Littlechild said to that dismissively, “Well,  
8 that’s the European Commission; they were enthusiastic about symmetry, and the  
9 Portuguese go further than the Commission is comfortable with.”

10 That is all very well but the Portuguese NRA, like Ofcom is bound under Article 7 of the  
11 Directive to take the utmost account of the Commission’s view. The Portuguese are  
12 obviously now reconsidering whether to go ahead or not in the light of that, so the  
13 Commission’s view is very important for the regulators under the common framework.  
14 The case against this extreme form of asymmetry is set out in the statement in s.7, in  
15 particular as regards distortion of consumer choice, and it is distortion not only because the  
16 feather-bedding of one competitor, whether large or small does not lead to competition on  
17 the merits. It of course helps that competitor but not competition. It may produce some  
18 short term reduction in pricing for its customers at the retail level, just like predatory  
19 pricing, of course, produces short term reductions in pricing – it does not mean it promotes  
20 competition and it is inequitable pricing between consumers under a CPP system, who are  
21 making calls to persons with mobiles according to whether their friend happens to be an  
22 H3G subscriber, or a subscriber to another MNO. It also distorts choice between fixed and  
23 mobile (para.7.52 of the statement that Mr. Scott referred to) and of course that applies as  
24 much to H3G as it does to the others.

25 Finally, proportionality – in two minutes – which goes also to s.47. You see from the notice  
26 of appeal that the alternatives to price control that are suggested are either “fair and  
27 reasonable pricing condition”, or a transparency obligation. That is paras. 18.7 to 18.8 of  
28 the notice of appeal (C1. tab 1, p.57). They are not – either of them – the preferred  
29 alternatives advocated by Dr. Littlechild in a situation where Ofcom might be concerned  
30 about the prospect of H3G pricing too high (third statement, para.11 footnote 10). His  
31 preferred approach was an undertaking that the operator would not price above the specified  
32 level and/or an indication that if H3G did increase its average price then Ofcom would  
33 reconsider its decision not to regulate H3G at the level specified in the new charge control.

1 We submit it is entirely reasonable for a regulator, having regard to the approach of the  
2 Access Directive in Article 13 to conclude that if one is going to impose pricing constraint  
3 by regulation it is clearer and more appropriate to achieve certainty by the charge control,  
4 and that really as between what Dr. Littlechild suggested and what has been done one is  
5 really arguing about very little. But as to H3G's suggested alternatives, which is what is put  
6 in the notice of appeal, if s.88 is satisfied as we say – and must say – that it is, then we say  
7 that a mere transparency obligation would be wholly inappropriate. The alternative of a fair  
8 and reasonable condition with guidelines was carefully considered by Ofcom at paras. 8.41  
9 to 8.53 of the statement – quite a long discussion – and the extensive reasoning there is  
10 given for rejecting that remedy. We say they are convincing reasons, and that no effective  
11 challenge against those reasons has been made in any of H3G's submissions. So with  
12 respect this is an empty point.

13 In conclusion, as to remedy, we say the idea that if there is anything wrong at all, or omitted  
14 from this statement then the Tribunal must quash and remit it to Ofcom is simply wrong. If  
15 there is a material flaw that vitiates the decision then of course that is right, but it must be a  
16 material flaw and it must vitiate the conclusions in the decision.

17 I say, not by way of any concession but that it really would be remarkable if, in a statement  
18 of almost 200 pages, and 16 annexes there is nothing which a whole team of lawyers  
19 pouring over it cannot effectively criticise. There has to be some commonsense about this,  
20 you read the statement as a whole, and you should take a view overall having regard to the  
21 points made and examine in the light of that your powers under s.195 of the Act.

22 I am two minutes over, I am sorry.

23 THE CHAIRMAN: Yes, we did start a little bit late. Mr. Scott, anything to add?

24 MR. SCOTT: It is really picking up on your last point. The statement in this case has already  
25 reached 429 pages. In the impact assessment guidance the word “proportionality” occurs.  
26 In 6.1 on p.104 (or 101 of the internal numbering) we are told that you have to read the  
27 analysis in conjunction, not just with the rest of this document, but with the consultation  
28 documents. We hear what you are saying and in due course we will get a written reply from  
29 Miss Rose, but clearly Ofcom's task has to be do-able. The point I was going to make is  
30 this: to what extent do you think it is right for us to take into account ways in which the  
31 submissions of the parties, to one of which you have referred, influenced the way in which  
32 Ofcom devotes its effort in analysis?

33 MR. ROTH: Sir, I am grateful for the point. We do rely – as indeed we did last time, as the  
34 Tribunal records in its judgment – on the whole process. If a party says “Well you are

1 wrong in doing something”, and it is a point they have made, then of course they can say  
2 that, but if it is a point relating specifically to them and they have put in responses in detail,  
3 right through the process and they have not taken the point, then to come up and say: “This  
4 statement is incomplete because it does not go into this” we say that criticism has to be  
5 scrutinised very carefully. I do not say they are estopped as a matter of law, but I say (as  
6 you say) as a matter of proportionality and good sense: Why should Ofcom go into great  
7 detail and discussion of dealing with that with whichever party it might be, when in those  
8 submissions they have made on these points – and you can trace it through those  
9 consultations – it is not one they have put forward?

10 THE CHAIRMAN: Thank you.

11 MR. ROTH: May I finally, and it is not part of my submission, but I promised to produce, at the  
12 request of H3G, an amended table on the SMP with the 2G/3G included – you will  
13 remember the new entrants’ table I handed up.

14 THE CHAIRMAN: This is the current regulatory status?

15 MR. ROTH: Yes. It has been circulated to everybody and nobody has any comments as yet.  
16 (Document handed to the Tribunal) I just mention also that in fact the position in other  
17 Member States – is not as up to date as this – is referred to in the statement itself at 2.38.  
18 You will see it is in the third column after the countries, under the name of new entrant in  
19 bold; H3G is always 3G, some of them are 2G, 3G, I think one of them is 2G. I have to say  
20 in our submission to the point on SMP it does not make any difference, but we were asked  
21 to do this.

22 THE CHAIRMAN: Thank you very much, Mr. Roth. So now it is time for Miss McKnight.

23 MISS McKNIGHT: Thank you. We would like to start on a point, which is more or less where  
24 Mr. Roth left off in response to Mr. Scott’s question, and that is really what is it that  
25 Hutchison 3G needs to prove in this case in order to succeed on this element of its case?  
26 We agree with Mr. Roth, that if there were minor deficiencies in Ofcom’s decision, that  
27 would not be sufficient to justify setting aside the decision.

28 It is not sufficient for Hutchison 3G to show that in theory other points could or should have  
29 been considered in this decision. They have to show that there is good evidence to suggest  
30 that if Ofcom had looked at matters more thoroughly, or had looked at additional matters to  
31 which Hutchison 3G had drawn attention there is a real prospect that a different substantive  
32 decision would have been reached. We think that is commonsense, and we think that is the  
33 substance of the appeal on the merits.

1 We do not think Miss Rose's account of the *Napp* case assists her. The *Napp* case was  
2 looking at a finding of an infringement of the Chapter II prohibition under the Competition  
3 Act where a very substantial financial penalty had been imposed. The Tribunal in that case  
4 accepted that the Chapter II provisions amount to *quasi* criminal provisions, and that in that  
5 particular case it is very important to exercise severe constraint on the extent to which in  
6 that case the Office of Fair Trading can rely on additional evidence in order to buttress a  
7 decision at the appeal stage, because that would risk depriving the defendant of its rights of  
8 defence in *quasi* criminal proceedings. However, in that case the Tribunal did, in fact  
9 exercise its own s.26 powers under the Competition Act to obtain additional disclosure  
10 directly from that and was content to allow that evidence to be used to buttress the OFT's  
11 decision on the basis that the Tribunal was satisfied it had, in the course of the Tribunal  
12 proceedings, allowed *Napp* an adequate opportunity to exercise its rights of defence to  
13 respond to that additional evidence. So we do not consider that the *Napp* case is at all  
14 supportive of the proposition that Ofcom has to be able to defend its decision its face  
15 without resort to the additional evidence that is now raised in these proceedings.

16 I think you should have a note that has just been handed up from me – do you have that to  
17 hand? The points that I have just covered are in the opening paragraphs of my note. I want  
18 to go on and test whether any of the points that H3G have raised in these proceedings do, in  
19 fact, amount to anything more than a theoretical possibility that some other points could  
20 have been relevant to Ofcom's decision.

21 I look first to the points that Dr. Littlechild has raised. In para.4 I outline the points which  
22 he said he thought a regulator could or should have considered in making this sort of price  
23 control decision. Rather than take you through para.4, which sets them out, I would like to  
24 go on to look at them individually as we go through later parts of the note. But at para.5 I  
25 do make the point that Dr. Littlechild was absolutely clear in admitting that he was not  
26 familiar with the factual evidence in respect of these points; he had not even read all the  
27 witness statements, so we have to bear in mind that he is only raising theoretical  
28 possibilities of things that might turn out on investigation to have some significant effect on  
29 the decision. He was not saying they would have had a significant effect, and Hutchison  
30 will have to look to other evidence to show that these theoretical points are of real  
31 significance.

32 The first point which Dr. Littlechild made was that Ofcom should have looked at whether  
33 the static welfare benefits of regulating Hutchison 3G might be too small to justify  
34 regulation Hutchison, as well as the other MNOs.

1 You have already heard Ofcom say that they looked at the static welfare effects of  
2 regulating five MNOs in aggregate, and we say that was a perfectly correct, permissible  
3 way to proceed and we would like to illustrate the limitation of what Dr. Littlechild is  
4 saying in this point.

5 At this point he is not relying – it seems to us – on any particular characteristics of  
6 Hutchison 3G other than the fact that it is the fifth MNO to be regulated and was not  
7 previously regulated. We contest what he is saying by considering a market where there are  
8 20 mobile network operators, all of equal standing, all of whom entered the market at the  
9 same time, and all of whom have similar market shares.

10 In such a situation, according to Dr. Littlechild, substantially all the benefits of regulating  
11 termination charges would be achieved if one were to regulate any 19 out of the 20 mobile  
12 network operators. Now why, in that situation, would it be correct to regulate the 20<sup>th</sup> as  
13 well? Why would one not just pick a lot and say: “You are the lucky one, you are not going  
14 to be regulated”, because one would not be losing very much, and one would introduce this  
15 creative tension into the market of one mobile operator competing on an completely  
16 different cost base.

17 The only suggestion that Hutchison has put forward today as to why Hutchison should be  
18 the lucky one not to be regulated was because the *status quo ante* was one where they were  
19 not regulated before. We think that even if a literal reading of Ofcom’s guidance on the  
20 conduct of impact assessments were to suggest that the correct *status quo ante* was one in  
21 which four MNOs were regulated, and we do not think it is for the reasons Ofcom have  
22 elaborated, we think that would be quite a ridiculous way to approach the matter. One  
23 would be allowing the *status quo ante* to trump a basic principle of fairness which is that if  
24 people are in materially the same position now, because they are all now sufficiently  
25 significant so that their charges ought to be regulated, the mere fact that one of them was  
26 lucky enough not to be regulated before should not be used as the basis for distinguishing  
27 them now. We say that unless there are some particular reasons why the regulation of  
28 Hutchison 3G would be detrimental, the mere fact that there are small incremental benefits  
29 of regulating them is not enough to justify excluding them from regulation. So that is a  
30 point that we make in para.7 and 8.

31 In para.8 we move on to the second point that Dr. Littlechild made, which is that in his  
32 view, Ofcom should have paid more attention to the potential administrative costs to  
33 Hutchison 3G of complying with charge controls. During oral evidence he raised also the  
34 fact that he thinks that Ofcom ought to have thought about the costs of resulting litigation.

1 As to the costs merely of complying with regulation, having to keep records of one's  
2 weighted average charge, no one has suggested that is anything more than *de minimis*.  
3 As to the litigation costs, we think Dr. Littlechild is wrong simply in terms of causation. It  
4 was not the decision to regulate Hutchison 3G that gave rise to litigation costs, it was the  
5 taking of a regulatory decision on the subject at all because if Ofcom had been influenced  
6 by the thought that Hutchison would litigate and it allowed that to tip its judgment into not  
7 regulating Hutchison, I do not think it takes very long to work out that you would have had  
8 four appeals here and not just one.

9 THE CHAIRMAN: Well that thought had occurred to us as well.

10 MISS McKNIGHT: Excellent. I do not wish to sound sycophantic in suggesting also that  
11 perhaps Dr. Littlechild should have mentioned the benefits of this kind of litigation  
12 (Laughter) that we hope you will provide clarity of the law, and it will be of assistance for  
13 making better regulatory decisions in future. So we say that that is a completely immaterial  
14 consideration.

15 We look next at Dr. Littlechild's suggestion that the static welfare benefits of regulating  
16 Hutchison 3G might be offset by the potential reduction in incentives to efficiency on the  
17 part of mobile network operators. I must admit when we wrote this note we did not have  
18 the benefit of the transcript of Dr. Littlechild's evidence, but I am not sure it actually casts  
19 much light on this. As we understand the point, and we are not sure we have understood it,  
20 it appears the point is that if one sets a charge control one risks getting it wrong and either  
21 under remunerating those who are called upon to invest so that they do not invest enough, or  
22 over remunerating them so that they make wasteful investments, and that where you have  
23 different charge controls on different operators you might skew things as between them. But  
24 there is no suggestion that that really is a more material consideration here than in any case  
25 of setting a charge control. We say that Ofcom now, with the benefit of the CC's  
26 participation in previous inquiries, has a very well-developed 2G LRIC model. It now has a  
27 3G LRIC model, and there is no reason to think that this is a badly set charge control in  
28 principle. Now, we have an appeal about it, but this is not, in our view, a material  
29 consideration.

30 The same point seems to arise in respect of the next point that Dr. Littlechild raised - which  
31 I think he acknowledged was closely related - which was the question as to whether the  
32 welfare benefits of regulating Hutchison3G are offset by the potential effect of the charge  
33 control in distorting competition among mobile network operators. We say this appears to

1 be a concern - that the charge controls are set at the wrong level, which would not appear to  
2 a material concern, particularly as to whether one should set a charge control at all.

3 We then move on to a point which occupied far more time with the tribunal - as to whether  
4 the static welfare benefits of regulating Hutchison 3G are offset by potential detriments to  
5 dynamic competition. Now, this, it seems to us, is the crux of the case as put by Hutchison  
6 - that they would compete more effectively if they were free of a charge control.

7 Now, it seems to us that this is the only point which is peculiar to Hutchison 3G. All the  
8 previous points could be raised by any mobile network operator - that if you set the charge  
9 control wrongly, you do more damage than good, and so on. So, here, Hutchison has to  
10 demonstrate that there is a real prospect that if Ofcom's investigation had been conducted  
11 differently or more extensively, we would have got a different decision on this point. We  
12 say that nothing that Dr. Littlechild has said is really such as to suggest that that would be  
13 so. Dr. Littlechild's concern about asymmetric regulation, and whether Ofcom should look  
14 more seriously at asymmetric regulation -- All are addressed to situations where there is not  
15 effective competition in the market, and there is a genuine need to promote market entry for  
16 growth in order to achieve effective competition ----

17 THE CHAIRMAN: That is at the retail end.

18 MISS McKNIGHT: That is right. I think it is not suggested that we receive more competition in  
19 the short term in call termination, but that because one looks to the whole pot of revenues  
20 earned in the market to compete effectively, effectively giving what we would characterise  
21 as entry assistance to Hutchison 3G, would allow it to compete more aggressively in the  
22 retail. We would not just say 'effectively' because 'effectively' captures some sense of a  
23 competitively normal fashion.

24 We would point out that Dr. Littlechild referred to the academic articles by Peitz. The  
25 references are in my note at para. 15.1. I will not take you to them. However, the first article  
26 by Peitz considers a market with two operators - an incumbent operator and an entrant. In  
27 that situation one can readily see that promoting the entrant is likely to produce quite  
28 significant dynamic competition benefits. In the second article of Peitz that was cited, he  
29 specifically said, "Suppose that a strong and a weak operator ..." Again, that is not really  
30 what we see here.

31 The ERG draft paper to which so much attention has been drawn talks about allowing  
32 asymmetric regulation to encourage the growth of a new entrant where such promotion of  
33 competition is needed and justified. That is quoted with approval by Dr. Littlechild in his  
34 third witness statement at para. 6 (I have given you the citation).

1 Now, we would say that in the UK market no evidence has been adduced to suggest that we  
2 need to promote Hutchison 3G to produce better competition. We have had consistent  
3 findings since 2002 that there is effective competition in the retail market. That was really  
4 without taking account of Hutchison 3G. Now, we acknowledge that effective competition  
5 does not mean perfect competition. This seemed to be a point that Miss Rose sought to rely  
6 on. In re-examination of Dr. Littlechild she drew his attention to the fact that in the decision  
7 under review Ofcom had found that it did not necessarily expect the waterbed to operate  
8 perfectly so that every pound one earns on call termination above costs one does not  
9 necessarily plough the whole pound back into retail competition.

10 We acknowledge that means that the market is not perfectly price competitive, but, really,  
11 we do not think Hutchison's growth in the market is ever going to change that because in a  
12 market where one offers a range of different tariffs, differentiated products and services, one  
13 is not going to get perfect price competition. In fact, one would never recover the fixed and  
14 common cost of participating in the market if that was so. But, Ofcom is clearly satisfied -  
15 and we say properly satisfied - that there is effective and vigorous competition in the  
16 market, and there is no need positively to assist Hutchison to achieve some benefit in terms  
17 of dynamic competition.

18 We would add also that, of course, this is not just a four-person or five-person market.  
19 There are, we think, about fifteen participants in the retail market if one takes account of all  
20 the MVNOs. Clearly, their contribution to competition is somewhat different to introducing  
21 more network operators because they compete as to retail margin and product  
22 differentiation. But, they are essentially fixed with the network capabilities of the  
23 incumbents. But, the five incumbents now do compete to offer superior network facilities  
24 and wholesale terms to MVNO. So, we see competition at both the wholesale and retail  
25 levels of the call origination subscription markets. So, we say that it is a serious detriment in  
26 Hutchison 3G's case that they have not looked at the role of MVNOs with any seriousness.  
27 Taking these points together, they really have not created any expectation that had these  
28 matters been looked at differently or more thoroughly, a different conclusion would have  
29 been reached.

30 Hutchison also relies on other factors which it says are peculiar to its situation, which place  
31 it at a competitive disadvantage as a result of which asymmetric regulation of some other  
32 kind should have been taken more seriously.

33 One point I should make before moving on to this is that, of course, as Ofcom has said,  
34 Ofcom have proposed a system of asymmetric regulation and different charge controls, and

1 all the commentators and academics who talk about asymmetric regulation to achieve  
2 dynamic competition benefits all seem to contemplate differential charge controls rather  
3 than no charge control at all. So, even if Hutchison were right that it is at a disadvantage, it  
4 would not, in itself, suggest that there should be no charge control.

5 But, I would like to address now whether any of the matters to which Hutchison refers could  
6 be relevant to whether they should benefit from asymmetric regulation, or are in any sense  
7 made out as being serious concerns. In para. 16 of my note, I note that Hutchison relies on  
8 the facts to its smaller scale (clearly it is smaller - we accept that); its alleged traffic  
9 imbalance whereby it receives in aggregate fewer incoming minutes from other mobile  
10 networks than it delivers to other mobile networks; the alleged disadvantage arising from  
11 the number portability arrangements which it says contribute to the traffic imbalance; and  
12 the suggestion that it has no realistic commercial option but to target a narrow class of  
13 customers who essentially exacerbate these problems.

14 Ofcom has shown that it took account of these matters. The only question is whether, if it  
15 had looked at these matters again, or differently, it would have been likely to reach a  
16 different decision.

17 First of all, we would like to look at Hutchison's smaller scale matters. I am skipping to  
18 para. 21, but we will come back to this point about the level of charges that Hutchison might  
19 be expected to charge. First of all, we agree that it is wrong to characterise Hutchison as a  
20 completely new entrant. It is expected to grow t 12 percent plus in terms of subscriber  
21 numbers by the end of the present charge control period. Of course, if it were left  
22 unregulated one could expect it to get there faster because of the advantages it claims it  
23 would have in out-performing ----

24 THE CHAIRMAN: I thought that the point was that the market share predictions were based on  
25 it not being regulated. The point was taken, "Well, it's wrong to rely on that level of growth  
26 because actually this regulation may prevent it further".

27 MISS McKNIGHT: Yes, I do understand that. We will go on to show that we do not think that  
28 any of the reasons Hutchison have adduced should impair its ability, but I do agree that that  
29 is a proper way of characterising the case. First of all, we say that in terms of how  
30 effectively one can compete for new customers or to retain existing customers, it is not  
31 really aggregate traffic in and out that matters - it is the prospective life-time value of the  
32 particular customer or group of customers. So, one looks at a segment of customers who, **ex**  
33 **ante**, are indistinguishable as to their likely usage of the network. One says, "What retail  
34 price can I afford to offer them that will be profitable to me, having regard to the cost of

1 providing the caller origination they will use (the handset, and so on) and the prospect that  
2 they will bring in call termination revenues?" which we all accept are marked up above  
3 cost.

4 Mr. Dyson, in his witness statement, accepts that one looks at customer life-time economics.  
5 So, one can compete to gain incremental market share even if one starts off with a small  
6 market share. That is really not, in itself, a disadvantage. We refer to an illustration at  
7 Annexe 1, which is attached to this note. I am reluctant in the time available to take you  
8 through it, but I would like just to suggest that you look at it in your own time. What I  
9 would like to point out is that this is a simple illustration of why merely being a smaller  
10 network with smaller customers does not mean that one is likely to be unable to compete  
11 effectively in the retail market because even though one's customers make more off-net  
12 calls, that means that they are making fewer on-net calls, and so one is not in a situation of  
13 not earning call termination revenues on the bulk of the calls. That is a rather confusing way  
14 of putting, but on the transcript it might make sense.

15 The figures demonstrate that there are lots of reasons why these figures might not turn out  
16 to be what happens in real life. One could have a situation where the smaller network  
17 operator's customers make fewer calls. Here, customers are assumed to have an equal  
18 propensity to call, regardless of which is their network. The relative costs and prices might  
19 be different. This illustration is serving only to illustrate that merely being smaller does not  
20 automatically mean that one cannot compete effectively in the retail market. So, it is  
21 addressing the suggestion that because one is a smaller network operator, one's subscribers'  
22 calls are more likely to be off-net. It addresses that point and shows that it need not - we  
23 would say 'does not' - place Hutchison 3G at a competitive disadvantage.

24 We would like to go on to address some of the factual evidence. We have mentioned this in  
25 para. 26. We think it is essentially just a factual matter as to whether the mobile number  
26 portability arrangements do place Hutchison at a competitive disadvantage and account for  
27 what they say are the disappointing performance they have achieved.

28 We agree that not having heard cross-examination of factual witnesses you cannot resolve  
29 disputes of fact. But, what we would say is that Mr. Russell's evidence - which appears to  
30 be the evidence on which Hutchison rely - simply amounts to his assertion that as an  
31 experienced person, having familiarity with other international markets which may or may  
32 not be different, he is surprised at how badly Hutchison is doing, and thinks it must be  
33 something to do with mobile number portability.

1           Conversely, Mr. Tillotson and Mr. Barden de Lacroix specifically set out facts and figures  
2           about the opportunities available in the UK market to Hutchison, which it could have  
3           exploited without number portability being remotely relevant. We say that if you go through  
4           this evidence, one must accept that Hutchison have not made a case that there is any real  
5           prospect that Ofcom could have reached a different decision by looking at it differently. I  
6           do not want to take you through all that evidence. It is self-explanatory. It is a matter of  
7           evaluating how much of it amounts to primary fact.

8           However, there is one point I would like to mention: it is mentioned here under my (iv) on  
9           p.8 - Tillotson at para. 60. Miss Rose referred to this paragraph and said that Vodafone had  
10          more or less acknowledged that Hutchison suffered from some dreadful competitive  
11          disadvantage. Mr. Tillotson says that Hutchison 3G does suffer a disadvantage in that it  
12          competes only for 3G customers. When Hutchison launched, clearly it had some 3G  
13          network coverage, but it also entered into a roaming agreement with, then O2 so that where  
14          its 3G customers passed from areas of coverage into 2G coverage only they would not lose  
15          calls and they could still make and receive calls. However, Hutchison has chosen only to  
16          sell 3G handsets, which, of course, tend to appeal to customers who value mobile services  
17          very significantly, and want to use the very hi-tech services that 3G handsets can deliver.  
18          Now, those handsets cost more to buy, and so even with the subsidy that is available from  
19          MCT you cannot get them down to actually the same retail price as a 2G handset. However,  
20          our point is that, yes, it is a disadvantage; yes, it explains why Hutchison has not recruited  
21          as many subscribers as others, because it is not competing for customers who only want a  
22          2G handset. But, that is Hutchison's choice. We do not know the terms of their roaming  
23          agreement with O2 or, now, Orange. Perhaps they do not have permission to sell 2G  
24          handsets and have people using only the roaming partners' network. So, they have chosen to  
25          conclude an agreement that does not give them that facility.

26        **THE CHAIRMAN:** We cannot possibly come to any conclusion as to that.

27        **MISS McKNIGHT:** What we can point out is that either they could have written into their  
28          roaming agreement something to allow them to sell 2G-only, or they could have become an  
29          MVNO. There is active competition -- This is in the evidence. I am not adducing evidence  
30          myself. There is ample competition among the 2G/3G MNOs to recruit MVNOs to  
31          supplement the traffic across their networks. H3G, if they had wanted to participate to  
32          compete for totality of demand in the market, perhaps should have contemplated doing that.  
33          We wish to make this point because it sets Mr. Tillotson's comment in its context that  
34          Hutchison has chosen a business strategy which entailed competing only for the custom of

1 one segment of the market. Mr. Tillotson couples that with an observation - which again is  
2 in his witness statement - that it was particularly strange, if you were targeting customers  
3 who particularly value those hi-tech, novel technology, to sell those services through outlets  
4 such as SuperDrug. Presumably - I should not say 'presumably - it was chosen because it  
5 was part of the Hutchison Group, but that is not a primary fact. However, that is Mr.  
6 Tillotson's observation.

7 That completes the assessment of the factual evidence.

8 There is one more point I should make - that is that Hutchison 3G (UK) Ltd.'s accounts are  
9 exhibited. I mention this in para. 27. It is interesting there that Hutchison 3G obviously  
10 took a decision that it wanted to be the first 3G network to launch in the UK. Indeed, it was.  
11 But, we say that it clearly was a trade-off as to whether it is good to be first but to launch  
12 with inadequate technology, or to wait until the technology is better, but lose the first mover  
13 advantage. We point out here that in their own audited accounts in the directors' report that  
14 the directors actually say that they were seriously impaired in achieving proper customer  
15 growth when they first launched by the inadequacy of the first generation of 3G handsets  
16 that were available. So, again, we say that goes to commercial judgment.

17 The only point I would like to go back on is the one I mentioned I was passing over - about  
18 the likelihood that Hutchison would set its prices too high to be in the public interest, or, if  
19 it were unregulated. I am looking at para 20 of my note. We say that this is a very peculiar  
20 point. Hutchison 3G say that Ofcom have not demonstrated that absent regulation,  
21 Hutchison would set its charges high enough to be excessive to cause adverse effects to  
22 consumers. But, we wonder how Hutchison can make that point when their reason for  
23 bringing this appeal is that they want to be relieved of the price control obligation so that  
24 they can raise their charges to generate sufficient funds to enable them to discount their  
25 retail prices. If the traffic imbalance is as they suggest, and they receive few incoming calls  
26 than their customers make outgoing calls, they will have to mark up the unit charge of each  
27 incoming call quite substantially to provide any useful funds to discount the retail tariffs for  
28 call origination because they have a larger volume of originated calls. We say that that is in  
29 itself suggestive that they want to raise their prices sufficiently to create an adverse static  
30 welfare effect.

31 We also think that the debate that we have heard today about why Hutchison 3G might have  
32 raised its MCT charges to 16.6 pence per minute really misses the point. The fact that they  
33 did so merely to retaliate for something that was being done by someone else in the market  
34 really is not the point. The fact that they thought they could get away with it suggests that

1 they did have the ability and incentive to raise the price. We therefore think that it is  
2 perfectly permissible for Ofcom to have assumed that there was an ability and an incentive  
3 in Hutchison 3G to raise its prices above efficient levels if left unregulated. We entirely  
4 agree with Ofcom's point that Dr. Littlechild appeared to concede that too. Dr. Littlechild,  
5 of course, is not giving evidence on the law. He may not have known that in looking at how  
6 Hutchison is likely to set its charges, we should be disregarding the prospect of SMP  
7 regulation, whether formal regulation or informal undertakings. But, he clearly did accept  
8 that if left to its own devices and without the threat of regulation Hutchison probably would  
9 set its prices at a sufficiently high level to justify the counter-factual figures that went in to  
10 Ofcom's welfare model.

11 That completes my submissions, subject to any questions which you might wish to ask.

12 THE CHAIRMAN: I have one question - and, again, you do not necessarily need to give me the  
13 answer straightaway but it is something we would like the answer to: in para. 11 of Mr.  
14 Tillotson's evidence, when he gives a figure of 70 million active connections, the footnote  
15 to that referred to the Ofcom data tables. Those data tables give Quarter 1, Quarter 2,  
16 Quarter 3, and Quarter 4 of 2006 and Quarter 1 of 2007 of the 2G/3G MNOs. Now, they do  
17 not add up to 70 million, presumably because you have added in H3G and the MVNOs.  
18 But, we would like a clarification of where the 70 million figure comes from.

19 MISS McKNIGHT: We will certainly do that. I do not know the answer immediately. But, in my  
20 note I have actually drawn attention both to that evidence and to the evidence of Mr. Barden  
21 de Lacroix ----

22 THE CHAIRMAN: I think it is the same figure and based on the same tables maybe. But, the  
23 tables do not quite go exactly to pointing - at least to me - where the 70 million comes  
24 from.

25 Thank you, Miss McKnight.

26 MR. TURNER: Madam, I am happy to say I can adopt, again, the vast majority of the points  
27 made by my friends, Mr. Roth and Miss McKnight. Therefore, I am able to be more  
28 succinct. So far as the detailed note that was handed out by Hutchison 3G just before the  
29 short adjournment is concerned, we also must reserve our right to come back on that in  
30 writing.

31 For the purpose of these submissions, if I can warn the tribunal now to have four files  
32 floating around their persons: H3, K, C1 and C2.

33 THE CHAIRMAN: You are not going to refer to Bundle B?

1 MR. TURNER: Bundle B has been flogged to death, madam. Madam, the order of my  
2 submissions is that I will first make some preliminary remarks about this part of the case  
3 and the approach which the tribunal should adopt as that has been canvassed between the  
4 tribunal and my friends; secondly, address the s.88(1)(a) issue - relevant risk of excessive  
5 pricing with adverse consequences for end users; thirdly, the para. (b) issue - whether any  
6 price control is appropriate for the specified purposes.

7 Turning to the opening remarks, we say, very strongly, that Hutchison's case on this aspect,  
8 as on the SMP part of the case, must be confined to the notice of appeal. They should not be  
9 allowed to range freely over new territory. As an example, the point raised today about the  
10 failure to take into account the distortive effects of donor-led mobile number portability is a  
11 fresh point. If you compare it with the notice of appeal on mobile number portability  
12 (paras. 17.19 to 17.36) you will see that there are essentially two points raised there as  
13 recorded in one of the tribunal's previous judgments: the win-back point - the opportunity  
14 of the first network to win the customer back; and the dual handset behaviour point. It  
15 should not be open to Hutchison to introduce new points now. In particular they should also  
16 not be allowed to introduce, even indirectly, the on-net/off-net argument. Miss Rose said  
17 earlier that if Ofcom had addressed the causes of the traffic imbalance, then that would have  
18 taken it perhaps to the off-net/on-net problem. Thereby, indirectly, we come back to the  
19 same argument which has been excluded from the scope of this appeal. That is not, in my  
20 submission, an appropriate way to conduct these proceedings. This is not a formal technical  
21 point, as the tribunal is aware. Neither T-Mobile, nor the other parties on such issues, has  
22 adduced evidence, or come prepared to deal with them.

23 Secondly, Hutchison 3G have approached this part of the case very much as if it were an  
24 ordinary judicial review in the Administrative Court. They are making consistently  
25 strenuous attempts to persuade the tribunal that Ofcom failed to take relevant considerations  
26 into account. Ofcom should have investigated. It should have quantified. It should have  
27 measured all manner of things with a view to the price control decision being set aside and  
28 the matter remitted for a further lengthy investigation. If they can persuade you of that -  
29 that in some respect or other Ofcom did not do its job, then in this Snakes & Ladders game  
30 we all go down a very long snake to the beginning of the board and we start again.

31 Four key response have to be made to this. First: this is a case in which Ofcom has  
32 exercised, and had to exercise, regulatory judgment in relation to a collection of matters  
33 which are not susceptible to precise quantitative assessment, and which should not be the  
34 subject of endless inquiry. They were grouped under the five headings which are at para.

1 7.32 of the statement. The tribunal is aware of what those are: excessive prices, distortion of  
2 choice, and so on. No complaint was made about that classification, as I understand it. It is  
3 not appropriate for Hutchison and its advisers to comb this with the annexe's 430 page  
4 document to make rather extreme allegations about the lengths to which Ofcom should have  
5 gone. I give two examples. The first is actually in Bundle A and so I will not ask the  
6 tribunal to pick it up. At para. 215 of Hutchison's own skeleton, the allegation is that

7 "Ofcom ought properly to have identified the potential prices or profits it considered  
8 to be excessive and to have demonstrated with evidence, based on H3G's specific  
9 circumstances, how H3G was able to charge those prices and earn these profits".

10 Similarly, Dr. Littlechild, at p.13 of his third statement, under para. (c)(2) complains to the  
11 tribunal that he had "little reassurance that Ofcom actually looked at who potential entrants  
12 might be; what distinctive services they might provide; what market conditions and  
13 regulatory stance might encourage or discourage them".

14 Mr. Roth dealt with that in cross-examination (Transcript Day 4, p.11). We say that that  
15 sort of inquiry should put the tribunal on guard as to the kind of case that is being mounted.  
16 The second response is this: this is an appeal on the merits. It is not a judicial review. Even  
17 if this tribunal were to reach the conclusion that there was some stone - or should I say some  
18 pebble - left unturned by Ofcom, there is ample material available to you to make a decision  
19 that a price control on Hutchison of some description was warranted at this stage of its life,  
20 even if the level is a matter for further argument. I ask the tribunal to stand back from the  
21 detail and appreciate the essential points.

22 In terms of share of all minutes, Hutchison's share by the last quarter of 2006 - and this was  
23 not challenged, as Madam Chairman established in a question to Miss Rose - was  
24 approaching 10.5 percent; secondly, that they had national coverage for their service with  
25 their 2G roaming partners from the word 'Go'; thirdly, a point put to Dr. Littlechild -  
26 Hutchison is not a small new entrant; Hutchison is a huge, well-resourced company, highly  
27 experienced in this very market. Dr. Littlechild fairly accepted that this was a relevant  
28 factor. There is no need for it then to - to quote something picked up by Miss Rose - adapt  
29 to market conditions; fourthly, Hutchison is not the only unprofitable operator having to  
30 contend with a group of established profitable operators. The tribunal has heard the  
31 evidence on that.

32 Before leaving that point, I would also pick up on the remarks made by my friend, Miss  
33 McKnight about the *Napp* case and the scope of this tribunal's ability to go into the merits.  
34 If the tribunal would now therefore pick up Bundle H3 and look at the *Napp* decision at Tab

1 1, para. 80, at pp.19-20 of the Westlaw printout in my copy, you will see the paragraph  
2 confirming Miss McKnight's point concerning the approach that needs to be taken to the  
3 adduction of new evidence by the defendant, the competition authority or the regulator in  
4 this case in an appeal. The point being made by the tribunal there was that were it  
5 otherwise -- were the regulator, the authority able to adduce new evidence, that important  
6 procedural safeguards, given the context of that sort of case, would have been overridden.  
7 That cannot be right.

8 However, para. 83 is of particular importance given that it is an appeal on the merits. There,  
9 the tribunal point out that in the overall fairness of the appeal process one needs to allow  
10 defendants to respond to new points raised in the grounds of appeal where the notice of  
11 appeal raises points, as Mr. Roth has said, and it is established in the Competition Act  
12 jurisdiction - and **a fortiori** in this jurisdiction - that the parties are then able to engage with  
13 those issues and this tribunal then will adjudicate on them on the merits. Therefore it is open  
14 to you, assuming that you have the material, and are able to make a decision, to reach that  
15 decision.

16 The third, and related point, is that this appeal should not be a formalistic or sterile exercise  
17 in which either H3G raises points of conjecture in counsel's argument or throws out mere  
18 theoretical possibilities in an expert's opinions as a basis for overturning the price control  
19 decision.

20 This is - and I would emphasise - a full judicial appeal in which all of the parties, including  
21 H3G, have had a full opportunity to adduce solid factual evidence and economic evidence in  
22 support of the challenge. If Hutchison has not done that in circumstances in particular  
23 where the evidence lies in its own hands, you are entitled to reject its challenge on a  
24 particular point as unsubstantiated.

25 Finally, as an opening remark, I have mentioned the practical consequences of setting aside  
26 the Ofcom decision on remedy and remitting it for further investigation. This needs to be  
27 borne in mind if there is no good reason to think that the decision at the end of the day  
28 would be any different. Hutchison would have won a great commercial prize by achieving  
29 asymmetric regulation of an extreme kind in its favour by default, while the matter was  
30 subject to re-investigation, and adverse effects of the kind referred to in the MCT statement  
31 would follow from that. That should be a conclusion that the Tribunal in our submission  
32 should shrink from.

33 Madam, with those remarks I turn then to the two main issues. First, the para. (a) issue - the  
34 relevant risk of excessive pricing with adverse consequences.

1 THE CHAIRMAN: S.88(1).

2 MR. TURNER: S.88(1)(a). Hutchison, in our submission, plainly have both the ability and the  
3 incentive to charge excessive prices for termination, leading to the relevant risk. First - and  
4 I shall not repeat what Mr. Roth has said, as a matter of economic principle, Dr. Littlechild,  
5 of course, accepted that firms tend to maximise their profits, but in this particular market  
6 there are also special features. The tribunal will be aware that termination charges have - if  
7 I may use the colloquial expression - a double whammy effect. You raise your rival's costs  
8 if you have high termination charges, and at the same time you secure a subsidy which  
9 enables you to undercut, based on considerations not related to efficiency, your rivals in  
10 your retail offerings. This is a matter that is vividly described in the witness evidence of  
11 Mr. Barden of T-Mobile (Bundle C2, p.392, paras. 30, 31, 36, and 37). That is a feature of  
12 this particular market that the tribunal needs to be sensitised to.

13 Secondly - the point which was referred to by Mr. Roth - Dr. Littlechild's specific  
14 acceptance in his cross-examination of the point that under the system of regulation in place  
15 in this country and across Europe, firms such as H3G do have the ability and the incentive  
16 to increase termination charges.

17 Thirdly, the suggestion that H3G would voluntarily exercise price restraint and not exert its  
18 monopoly power so as to cause harm to end users in the absence of price control is  
19 misguided. Mr. Roth mentioned the point that the termination charges of H3G have not  
20 generally been (to quote Dr. Littlechild and the notes of appeal) held below the H3G rates of  
21 the other operators when one looks at the evidence correctly. In addition to Mr. Roth, the  
22 only point I would desire additionally to press is this: H3G has said repeatedly to you, "We  
23 are a pure 3G operator". Today, for example, Miss Rose, in her submissions, clarified that  
24 H3G has had both 2G and 3G termination. Both are unregulated. Both are at the same rate.  
25 That is the contractual blended rate referred to in the statement. We do not know the level  
26 of their underlying 3G rate. All one knows is that it is higher than the contractual blended  
27 rate, which is fairly compared with the contractual blended rates of the other operators in  
28 the statement.

29 Fourthly, on the question whether excessive pricing would result in adverse consequences  
30 for end users, one additional point is clear: whereas in 2004 H3G was not deemed to be of a  
31 sufficient size or scale for its high termination rates to be a matter of serious concern to  
32 others, it is now part of Hutchison's own case, as I put to Dr. Littlechild in cross-  
33 examination, that Hutchison has achieved a sufficient size and scale now for it to matter - to

1 BT, in particular, which is seeking to protect the interests of its customers. The references  
2 are: Day One, p.56, lines 25 to 33 (Miss Rose's submissions) and p.85, line 21 on that day.  
3 Fifthly, it is also clear that that point - that Hutchison was not of a sufficient size and scale  
4 to matter - was Ofcom's appreciation of the position as well in its decision. You were taken  
5 on numerous occasions to para. 2.39 of the statement. It is the last sentence which  
6 particularly counts. That sentence made clear that it is not simply that Hutchison is  
7 expected to grow at some future point to a size where it will matter. That sentence said that  
8 it matters now. The language was that 'Hutchison 3G's subscriber volumes have increased  
9 greatly' and, therefore, the previous conclusion - that they were too small to be a matter of  
10 concern - no longer applied. This was a matter of pure regulatory judgment and there is  
11 nothing wrong with it.

12 Sixthly, Miss Rose referred this morning to Hutchison's business plans - in particular by  
13 reference to para. 9.205 of the MCT statement. She said, "Well, if you look at those, you see  
14 that they were themselves forecasting termination charges which fall. Those business plans  
15 were in expectation of regulation. They do not say anything about the position in the  
16 absence of regulation and where all other operators are regulated.

17 That is all I desire to say about the first issue.

18 I turn then to the second issue - appropriateness, and s.88(1)(b). Hutchison's three main  
19 point are these: (1) that Ofcom proceeded from an erroneous assumption that asymmetric  
20 regulation was a detriment to be avoided; (2) that Ofcom wrongly treated the traffic  
21 imbalance as irrelevant; (3) that Ofcom failed to quantify the benefits of regulating H3G  
22 specifically and should have carried out a more detailed cost benefit analysis. I am not  
23 going to deal further with the third point. I will deal with the first two.

24 Taking first Ofcom's supposed erroneous assumption that asymmetric regulation is a  
25 detriment to be avoided, we say as follows: in general, the disadvantages of asymmetric  
26 regulation for the long-term interests of consumers in this kind of market are quite clear.  
27 They are accepted by Hutchison's own expert, Dr. Littlechild. You see that from para. 3(a)  
28 of his second statement, and the parts of his previous articles that were reproduced by Mr.  
29 Myers at para. 42 of his first report. Dr. Littlechild made the point that asymmetric  
30 approaches are not conducive to the competitive process; nor to improved efficiency in the  
31 mobile sector as a whole. He said that such policies are likely to be to the detriment of  
32 mobile customers in the future, and that these matters were taken into account in the MCT  
33 statement. The reference, as the tribunal probably now knows by heart, is 7.69.

1 What H3G is suggesting to you in this appeal boils down then to this: they suggest that  
2 there is a good reason why they should continue to be given a unique dispensation from  
3 price controls in any form at this stage of their existence over the next four years. The  
4 assertion which is made is essentially threefold, as we see it: (1) they are still a small new  
5 entrant; (2) they are facing some unavoidable market difficulty which impedes them from  
6 growing to scale; (3) that if they are given a unique dispensation from any price regulation,  
7 they will drive down industry costs to the benefit of everyone. You will recall Dr.

8 Littlechild's reference to the Hutchison We Pay tariff as a good example of the sort of  
9 healthy competition that Hutchison could inject into the marketplace.

10 The evidence, Madam Chairman, supporting each of those three steps is entirely lacking.  
11 Starting with Hutchison's small size, the most appropriate way to look at its market share  
12 from the perspective of economies of scale, in our submission, is to look at the share of  
13 minutes rather than the share of subscribers, where you see in the case of Hutchison there is  
14 a significant disparity. On that measure Hutchison already had almost 10.5 percent by the  
15 last quarter of 2006. Miss Rose confirmed yesterday that she does not quarrel with that  
16 number and Hutchison have given you no solid base for thinking that they need special  
17 treatment of any kind to grow to scale.

18 As to the existence of some unavoidable market difficulty which is standing in Hutchison's  
19 way, which has to be overcome with a complete dispensation from price controls, again the  
20 tribunal must ask itself: Have Hutchison given us any sound evidence to prove this  
21 whatsoever? There is no mileage in the suggestion that Hutchison somehow was incapable  
22 of attracting subscribers to the same extent as the other operators when it entered the  
23 market. You have seen from Dr. Walker's re-examination the point that in 2004, shortly  
24 after their entry, they secured 32 percent of all net additions - more than any other operator.  
25 The reference is the Merrill Lynch data in Bundle K, Tab 8, p.319.

26 The only market feature which is relied on in the notice of appeal is the traffic imbalance  
27 resulting from the mobile number portability system. We say that is a hopeless submission,  
28 and I shall not develop that further in view of the submissions already made on that by Mr.  
29 Roth.

30 What I would add is this: it was suggested to you today that Hutchison had only one  
31 possible entry strategy, and that this inevitably led to the traffic imbalance, and the traffic  
32 imbalance inevitably led to the disadvantages which Hutchison has suffered from. The facts  
33 in the evidence show that Hutchison has changed its strategy since entry more than once,  
34 and that its traffic imbalance (about which you have obviously heard very much) equally

1 has changed in its force and in its direction since the date when this appeal indeed was  
2 started. I will take you to three references, if I may. If you take up Bundle C2 and go to  
3 Mr. Barden's witness statement at p.407 -- These are matters of fact. These, of course, also  
4 were not challenged in cross-examination. But, at paras. 73, 74, and 75 you will see there  
5 his evidence about how H3G has adjusted its strategy since its original launch. If you look  
6 at p.73 you will see that 'it is increasing its focus on the lower spending consumers'. I shall  
7 not go into that in detail.

8 THE CHAIRMAN: Although you say it is not challenged, is this not part of the evidence which  
9 we said right at the outset we really cannot form a view as to what their commercial strategy  
10 is without more detailed evidence from them?

11 MR. TURNER: Madam, you said that you could not form a judgment - and I fully respect this -  
12 as to the causes of the problems that were suffered by H3G -- the reasons why they have not  
13 grown, and so forth. All I am seeking to do is to draw to your attention the factual evidence  
14 which exists - and the tribunal can draw such conclusions as it likes - that they have  
15 changed their strategy since entry, and that therefore the submission which was advanced to  
16 you earlier that there was this entry strategy forced upon them; they had the expensive  
17 handsets and the costs to meet, and so forth, which drove them in a particular direction ----

18 THE CHAIRMAN: I think our present view is that we have enough evidence to consider whether  
19 it is due to number portability. If we think it is not due to that and we think that the traffic  
20 imbalance is relevant, then it may well be that it needs to be investigated as to what the  
21 traffic imbalance is caused by. But, that is not something that has been sufficiently  
22 investigated before the Tribunal.

23 MR. TURNER: Well madam, in relation to that we say that the question of the traffic imbalance  
24 regardless of the view that the Tribunal comes to about the degree of investigation by  
25 Ofcom is irrelevant.

26 THE CHAIRMAN: Yes, I take that point. I am saying that if we decide that it is relevant and not  
27 caused by number portability and that we need to know what it is caused by then that will  
28 have to be investigated further, that is not something on which we have sufficient evidence;  
29 I think that was a point that we made right at the outset.

30 MR. TURNER: Yes, madam, I would also remind you that in your opening remarks you said that  
31 you did not have sufficient evidence from H3G on this matter.

32 THE CHAIRMAN: Yes, because it is discussing their commercial strategy, which the best  
33 evidence would be from H3G.

1 MR. TURNER: Madam, you have the point, and all I would add therefore is that this, being their  
2 appeal, if they are going to persuade you that there are factors which require a remittal and  
3 reconsideration, it is incumbent on them to produce the evidence for this Tribunal to reach  
4 that conclusion.

5 THE CHAIRMAN: Thank you.

6 MR. TURNER: Then in view of the time ----

7 THE CHAIRMAN: Are you leaving Mr. Barden's statement?

8 MR. TURNER: Madam, yes, in view of your comments.

9 THE CHAIRMAN: Can I just raise a couple of little queries to make sure this is right? In  
10 para.31 in the sentence about half way down: "Despite the commercial pressures on those  
11 other MNOs to match these offerings T-Mobile at least has taken the view that it was ..." I  
12 think it should be "not commercially viable".

13 MR. TURNER: Yes, I have in fact manuscript added "not" as well.

14 THE CHAIRMAN: And if you would just move forward to para.39 at the top of p.396: "Ofcom  
15 was correct to conclude that H3G does have significant blanket power."

16 MR. TURNER: Yes.

17 THE CHAIRMAN: That "not" has slipped from the paragraph above.

18 MR. TURNER: Obviously on the cut and paste facility it moved across, madam. Thank you very  
19 much for picking that up.

20 Madam, I would ask you on the second point that I mentioned then to pick up Mr. Russell's  
21 second witness statement, and perhaps the Tribunal has this point well in mind as well, but  
22 simply to remind the Tribunal in bundle C1, p.253. This is not evidence from other people  
23 about the merits or demerits of the commercial strategies or their changes. Paragraph 56,  
24 the point made by Mr. Russell that H3G's traffic imbalance has shifted over the course of  
25 2006 and 2007 and he attributing that to the removal of one of the tariffs. Paragraph 22  
26 (p.249) just so the Tribunal has this at the forefront of their mind, Mr. Russell points out  
27 very fairly that H3G has recently – and he says "likely only temporarily become a net  
28 recipient of the termination revenue" and he gives his own opinion as to why that has come  
29 about.

30 Madam, the final topic I wish very briefly to raise is the question of the suggestion that H3G  
31 will be the Maverick beating down industry costs if it is given a dispensation from any  
32 price controls and not otherwise. We say again that is profoundly misconceived. We have  
33 only two points. First, there is no reason why such an argument could not be mounted in  
34 many other areas of economic life by a new entrant, or a relatively new entrant, and should

1 all relatively recent entrants – even up to H3G’s market share of almost 10.5 per cent and  
2 growing – be exempted, for example, from corporation tax to enable them to compete  
3 against their established rivals? We say “plainly not.”

4 Secondly this: the concrete example that was given by Dr. Littlechild is H3G’s “We Pay”  
5 tariff, and without going to the details the Tribunal will recall that under that tariff H3G  
6 reimburses its subscribers cash for every call they receive – 5p for every minute. This does  
7 not, in our submission, show healthy or effective competition read in tooth and claw. On  
8 the contrary, that sort of competition is consistent with excessive termination rates being  
9 used as a weapon to distort retail competition being paid to receive a service. It sounds  
10 wonderful, so why is it not a good thing for consumers, or consumer welfare generally? It  
11 might be good for the H3G consumers, but if you consider for a moment that money is  
12 coming from somewhere, and it is coming from the other MNOs, and their customers, and  
13 the fixed networks and their customers who are subsidising H3G’s customers.

14 That is, in our submission, not fair and equitable, it is not in the long term interests of the  
15 market where sustainable competition should be on the merits. That was dealt with by Dr.  
16 Walker, at para.2.25.

17 Madam, the only other matters I was going to raise, and I do not want to trespass on the  
18 Tribunal’s time, Miss Rose raised various concessions raised by Dr. Walker, and if the  
19 Tribunal wishes I can rattle through those in a minute, otherwise I am happy to sit down  
20 unless there are any questions from the Tribunal.

21 THE CHAIRMAN: I think we have probably heard as much as we need to hear.

22 MR. TURNER: I am obliged, madam.

23 THE CHAIRMAN: Yes, Mr. Anderson?

24 MR. ANDERSON: Madam, BT has only a very small share of the market in submissions on  
25 remedy. As you will have appreciated from the small amount of time I asked for, it is not  
26 my ambition to grow that share today.

27 However, to make sure that I keep to my word on that, I have once again produced a short  
28 speaking note.

29 MR. SCOTT: Are you asking for any entry assistance contributions to your fees?

30 MR. ANDERSON: Well if you are offering, sir, it would be foolish to turn it down. But there are  
31 a few points of some importance to us as fixed operators, and as BT which I would like to  
32 make. The first couple of pages of the note you can turn over, they are really only a  
33 resource to save me taking you to any bundles, by just setting out some important passages  
34 of the legislation and of the Revised ERG Common Position.

1 I can come, I think, straight to my first point on p.3, and this is a point which responds, I  
2 think, more to H3G's skeleton argument than to submissions that were developed orally. It  
3 is that there is a difference between the threshold test and s.88(1)(a), and the concept of  
4 excessive pricing for the purposes of Article 82 *Attheraces* and so on. In our submission the  
5 regulatory test is both more flexible and less demanding. I can take very quickly a few  
6 points on that. We start, as did Ofcom, with the Access Directive, and it seems obvious  
7 that of course Article 13 does not require it to be established that pricing is or indeed will be  
8 excessive. It is enough if, on a forward looking basis, a market analysis indicates that the  
9 operator might sustain prices at an excessively high level to the detriment of end users, and  
10 it is perhaps not very surprising that the test is put in those terms given that it applies even  
11 to what the preamble itself to the Directive describes as relatively light price controls. You  
12 see that from the 20<sup>th</sup> recital which is set out at the top of p.2. The point is made:

13 "The regulatory intervention may be relatively light, such as an obligation that  
14 prices for carrier selection are reasonable ..."

15 Or much heavier such that prices must be cost oriented. So quite a wide range of price  
16 controls, so not very surprising that the threshold test in 88(1)(a) is not a very onerous one.  
17 We draw support also from the revised ERG Common Position, not because we say it is  
18 akin to a statute which you are bound to apply, but simply because it indicates how the  
19 European regulators think about the Article 13 test, and there are really two elements of  
20 that. The first I have given the reference to – 5.5.2. and that actually appears just at the top  
21 of p.3 of my submissions.

22 "... market power on individual termination markets..." say the regulators, "is likely to  
23 result in excessive pricing of the termination service which will lead in turn to allocative  
24 inefficiencies, and a distorted pricing structure."

25 The other reference which I should have inserted is to 5.2.2.2, and that is on p.2 at the  
26 bottom, where it said:

27 "Cost oriented prices are most appropriate in situations where market power at the  
28 upstream level allows the SMP undertaking to charge prices above costs and  
29 where it is unlikely that this market power will be constrained by competition  
30 within a reasonable period of time."

31 As I say, those are not statutory tests that have to be applied but they are indicative of the  
32 attitude of the regulators to the test in Article 13. They are indeed, we would say, entirely in  
33 harmony with Mr. Roth's formulation which you will also remember was also the  
34 formulation used in 7.1 of the statement itself – ability plus incentive.

1 Going on at “d” to s.88 itself, Mr. Turner made the point that Ofcom enjoys a degree of  
2 discretion, and of course it does, and we would add that this is underlined by the words of  
3 the statute, “it appears to them” it says in 88(1)(a) which you have at p.2: “except where it  
4 appears to them that there is a relevant risk of adverse effects arising from price distortion.”  
5 Well of course clauses like that do not confer unfettered discretion upon decision makers,  
6 but certainly they do recognise that a wide discretion is present.

7 THE CHAIRMAN: So what are you saying then with regard to this on the merits judicial review  
8 point? One might say when the Tribunal is hearing an appeal one should read the “it  
9 appears to them” as “it appears to the Tribunal” now that the Tribunal is seized with the  
10 matter, or are you saying that there is some other test that we have to give Ofcom a margin  
11 of appreciation or something?

12 MR. ANDERSON: No, there is still a full appeal. I could not say, as I could say perhaps in the  
13 Administrative Court that any view, which is not an *Wednesbury* unreasonable must be  
14 accepted by the court, I do not go that far, but I do say that it is a question of degree and that  
15 in applying the standard of full review that the Tribunal always in these circumstances  
16 applies. It should take note of the fact that Parliament did envisage Ofcom in this very  
17 specific situation having a measure of discretion, particularly if one contrasts what is said in  
18 88(3) or 88(1) with what is said elsewhere. I have given the example of s.100(a). That  
19 requires Ofcom to be satisfied that certain conditions are met. Well that is plainly very  
20 different from 88 where it only has to appear to them that there is a relevant risk, and then  
21 the relevant risk, when you look at the definition of that is to find in terms again of this  
22 word “might” which originates in Article 13 of the Directive.

23 Then my last point on this is my reference to adverse consequences for end users, which  
24 seems to be pretty central to the way the test is expressed, both in the Directive and in the  
25 statute. Indeed, in the statute the relevant risk is said to be of adverse effects arising from  
26 price distortion. It is almost as though if one can find the adverse effects, and if one can  
27 establish a causal link with price, then the price is *ipso facto* excessive. Whether one can be  
28 quite as certain as that I am not sure, but it is certainly another way of looking at it, and  
29 bearing in mind – as the Tribunal has pointed out and indeed the ERG pointed out in their  
30 Common Position – at the heart of all this framework is the welfare of consumers that is  
31 perhaps not surprising. In this case Ofcom found five adverse effects to consumers – a  
32 certain amount in s.7 of the statement.

33 I can go on, I think, over proportionality in the light of what has been said, of course  
34 imposed by s.47 not just by Article 8 of the Directive, and on to the obligation to quantify

1 the risk as H3G put it in argument, and we are now at para.3 of my note. An impact  
2 assessment is required, but I would echo those who have gone before in submitting that  
3 Ofcom was entitled to make an overall judgment of a qualitative nature, and indeed echo  
4 Mr. Myers this morning who adverted to a similar point.

5 In particular, there was not requirement on Ofcom to predict (still less accurately predict)  
6 the level of unconstrained H3G prices at any future date or dates.

7 It might be just worth looking back to p.2 of my note where I have set out 4.2 again of the  
8 revised ERG Common Position and we do commend this to the Tribunal. “The justification  
9 of regulatory measures ...” say the ERG “... will generally be based on a qualitative analysis  
10 taking into account economic theory and market experience. Where reliable data is readily  
11 available quantitative methods can be used to support the assessment. There is then a  
12 passage about how difficult it is to predict future market developments, the reasons why it is  
13 difficult, the reasons why perspective quantification is of a partial character, and of limited  
14 value and so hence quantitative analysis where at all feasible will best play a supportive  
15 role, and we made a similar point in our statement of intervention and we commend that to  
16 the Tribunal.

17 Just a last, more general point on this: how easy it is to satisfy the proportionality test will,  
18 in our submission, depend very heavily on the type of market you are looking at, and we are  
19 dealing here, of course, with the mobile call termination markets, you are looking at markets  
20 with 100 per cent market share and no realistic prospect of competitive entry. It seems to us  
21 that it is perhaps particularly problematic in markets such as those to impose cost oriented  
22 prices or fair and reasonable prices. Indeed, that is very much what the statement itself  
23 says, and we have given the references in the note.

24 The next point is Mr. Amos – I would not like him to be forgotten, and I do not suggest he  
25 has been forgotten. He responds of course to, among other things, the two witness  
26 statements of Mr. Russell, though I should add as a footnote that he does not respond to the  
27 bits marked as confidential because he had not seen them when he was producing his own  
28 statement.

29 We have set out here a number of the points that Mr. Amos makes, first on the assertion that  
30 H3G 3G rates were lower than the 3G rates of the other MNOs, and we say, of course, that  
31 is not the relevant comparison, but to the extent that it is, Mr. Russell himself described that  
32 as estimate, he did not say it was based on figures, and he did not see how he could have got  
33 all the figures and so that caution is entered by Mr. Amos.

1 What really matters in the real world, says Mr. Amos, is the fact that the actual out  
2 payments made by BT to H3G for termination were substantially higher than the payments  
3 made on the same basis to other MNOs. That is really the figure, certainly commercially  
4 that matters to us.

5 Then in relation to the changing in rates, the fact that H3G's rates did not change while  
6 everybody else's were going down as a consequence of price control, you asked, madam,  
7 whether the information in the table exhibited by Mr. Russell (C1.tab 5, p.261) was  
8 available in tabular form, and I do not think it is, but perhaps the closest we get is an exhibit  
9 to Mr. Amos (C2, tab 6. p.169) by all means have a quick look at it if you like. It is a  
10 carrier price list schedule. This is not identical to the table exhibited by Mr. Russell because  
11 the rates are broken down into daytime, evening and weekend categories, but this is as I  
12 understand it a document produced by BT on the basis of the OCCNs, and to the extent that  
13 is helpful I simply point out that it is there.

14 Paragraph 6: another point that has been raised which I could perhaps add something to –  
15 the question of the regulated termination rates of the fixed operators. It is common ground  
16 that they are low. Mr. Roth mentioned, I think this afternoon, a figure of 0.4p. I cannot  
17 specifically endorse that but it sounds about right as an average because of the evidence we  
18 have from Mr. Richardson in the TRD proceedings, and you see that I have explained there  
19 that he gives evidence that in August of last year those rates were between 0.0876p and  
20 1.017p. There are then some more figures referred to there, and at the end ----

21 THE CHAIRMAN: Is that dependent on the time of day and weekend?

22 MR. ANDERSON: Yes, I think that is right, these are rates – some for weekend, some for  
23 evening and some for day. I would imagine – I am not sure where Mr. Roth's 0.4p came  
24 from but I imagine it was a weighted average of those figures – it sounds about right.  
25 The points on inefficient use of spectrum and fixed services which were raised with Mr.  
26 Myers – raised not only by Cable and Wireless but, as Mr. Roth pointed out, in the  
27 statement itself.

28 Madam, I only have one other point, and I can deal with it very briefly. It is over the page  
29 at p.6 and it relates to the cost benchmarks – the old chestnut of the cost benchmarks –  
30 which were raised first of all on day 3 in relation to SMP and then they came around again  
31 today. We would entirely adopt what Mr. Roth said that the points are recycled and if they  
32 did not work first time it is difficult to see how they could work this time.

33 We have not yet had an opportunity to digest Mr. Roth's note, but we would make really  
34 one point on those, and it might just be worth turning them up in bundle B, tab 1, p.303,

1 annex 13. The point is this, Miss Rose very fairly accepted that part of the factual material  
2 relating to this point will be under consideration by the Competition Commission and we  
3 simply wanted to make the point that it is a little more than she was indicting, because of  
4 course, when Ofcom estimate the rate that will be charged by an efficient 3G operator, it  
5 was influenced by the use of a value for spectrum within the various scenarios that it used,  
6 and you see that on 303.

7 If you go back a page to 301 you find a different graph, this one headed “Zero 3G Spectrum  
8 Costs”, and on this one you see that the 3G benchmark ----

9 THE CHAIRMAN: What figure is that?

10 MR. ANDERSON: Sorry, this is A13.1, the figure at the top of p.301.

11 THE CHAIRMAN: Yes.

12 MR. ANDERSON: That is the work done with Zero 3G spectrum costs, and if you look at the  
13 paragraph under that Ofcom says: “The inclusion of 3G spectrum costs in the costs’ model  
14 is a complex issue”, indeed it is, it is going to entertain – or otherwise – the Competition  
15 Commission, and I simply leave with that note of caution.

16 Unless I can help you any further, those are my submissions.

17 MR. SCOTT: Just one small point, and it relates to the relationship between these proceedings  
18 and the next proceedings, and it is while you are on your feet and you have Amos before  
19 you.

20 MR. ANDERSON: Yes.

21 MR. SCOTT: Amos is C2,6, and I am on p.164, bundle H. It is paragraph 26, and it is really the  
22 point about the relationship between the existence of dispute resolution and what Amos  
23 says: “Not a commercially robust mechanism for controlling MCT rates”.

24 MR. ANDERSON: Yes.

25 MR. SCOTT: And it is whether you have any observations to help us on how we take that into  
26 account, given that disputes have now arisen.

27 MR. ANDERSON: Well we drew your attention to this firstly in the context of SMP, and we  
28 draw your attention to it in this context as well. I think the broad issue that he is addressing  
29 is whether or not it would have been proportionate to apply a fair and reasonable condition  
30 in circumstances where there would have been a dispute, and the sort of matters that he is  
31 pointing to here is the time that disputes take to resolve, the uncertainty that they cause, the  
32 difficulties that they pose in relation to billing and so on. I do not think he is really going  
33 any further than that. I do not think he is intending to make any suggestions here as to the

1 appropriate level at which the disputes will be resolved, and that is really a question for Mr.  
2 Reed tomorrow.

3 MR. SCOTT: Absolutely, thank you.

4 THE CHAIRMAN: Thank you very much, Mr. Anderson. Miss Bacon, you are going first, are  
5 you, for O2?

6 MISS BACON: I am. Madam, you will be pleased to know that no trees have been cut down to  
7 produce my submissions; I will not be handing up a note, I just want to focus on one point.  
8 That point is the traffic imbalance MNP point. I am aware that much has been said about  
9 this by others before me. We endorse the submissions of Mr. Roth, Mr. Turner and Miss  
10 McKnight, and we do not wish to repeat those. Instead, what I would like to do is to stand  
11 back, as it were, and look at the issue from a principle point of view, and make slightly  
12 different submissions.

13 The problem is that when I come to do this I feel slightly hampered because it is very  
14 difficult to pin down exactly what Hutchison's case on traffic imbalance and MNP is and at  
15 the risk of labouring an already laboured analogy it is rather like the gentleman's watch that  
16 miraculously disappears from one pocket and appears in another a few minutes later, and  
17 you never know exactly where it is going to end up.

18 I have identified, I think, four iterations of Hutchison's case on traffic imbalance and MNP,  
19 and no doubt Miss Rose in her reply will say there are actually five or six, but that is by the  
20 by. My four are: the first iteration of the case is that there is a traffic imbalance between  
21 Hutchison and the other four MNOs that is significantly or wholly caused by MNP. This  
22 finds its way into Russell 1, Littlechild 1, Hutchison's notice of appeal and their skeleton  
23 argument.

24 The result of the traffic imbalance, they say, is that there is a significant net out payment by  
25 Hutchison to the other operators, and this will be increased by the decision. Just to give you  
26 the references – and I am not going to ask you to turn them up – I think the best summary of  
27 the case on this is in Littlechild 1, paras. 51 – 53. What happened then is that this is  
28 addressed in the expert reports of Dr. Walker and Mr. Myers, and they say that essentially  
29 this is a fallacious argument. Again, perhaps the best reference for this is in Mr. Myers'  
30 first statement, paras 81 – 84. He makes essentially two points: first, that this whole idea of  
31 net payments made by Hutchison to the other MNOs is a mischaracterisation. Actually it  
32 would be more accurate to state, and I am reading from his statement, that Ofcom's decision  
33 involves a reduction in H3G's receipts for MCT. Then he goes on to say:

1 “This is, in any event, irrelevant however you characterise it because the  
2 profitability to an MNO of outgoing calls to other networks depends on its retail  
3 revenues. If an MNO has a customer who makes more calls than she receives that  
4 MNO may have to make more termination to other MNOs.”

5 Essentially the same argument is made by Dr. Walker in his expert report.

6 Then we have a response to that in Littlechild 2. In Littlechild 2 Dr. Littlechild accepts the  
7 criticisms that have been made by Mr. Myers, and he says, “I agree with these points with  
8 respect to the present price control as compared to the previous one. I accept that I did not  
9 explain myself sufficiently clearly on this issue”.

10 Now we get to iteration two of the argument. The second iteration of the argument is  
11 expressed in Littlechild 2. This is a very complex argument which I must confess I do not  
12 entirely understand. It is set out at paras.57 and 58 of Littlechild 2. He advances an  
13 argument that there is this imbalance between the marginal costs of providing termination  
14 and the actual charge control, and that leads to a position of market power on the MNOs and  
15 that market power allows those to control Hutchison. In any event, I do not actually have to  
16 understand it, because this is all abandoned in cross-examination.

17 We get to the cross-examination by Mr. Roth. I will just refer you to the relevant pages of  
18 transcript and I will not ask you to turn them up because I will read out the bits that I rely  
19 on. Mr. Roth put to Professor Littlechild that this is all about the level, and of course it is,  
20 because he is saying this is about the level of the charges and the difference between the  
21 charge control and the actual costs of providing the call termination service. Professor  
22 Littlechild candidly accepts that this all about the level, but what he says, “I accept that my  
23 arguments in Littlechild 2” – this is iteration number two – “are not relevant for the purpose  
24 of this hearing. However, I am drawing a distinction”. In the transcript he puts that  
25 distinction in two ways. The first way he puts it is at p.21 of the transcript, line 11:

26 “Q So, this whole concern goes to the level of the price controls ... A. I  
27 think, with respect, I would make a distinction there. What I am saying is that  
28 there is an argument associated with the level of the price control in relation to  
29 marginal cost and whether that mark-up is at the appropriate level, or not. I am  
30 saying that I now understand that may not be a relevant issue to raise here. But,  
31 there is another question as to what the total costs of termination charges are.”

32 That is the first way that he puts it.

33 At p.22 he makes a similar but slightly different point. He says at line 23:

1 “A. I think there are two elements to my thinking here. One is the concern about  
2 whether the level of the price control is appropriate, and whether it reflects an  
3 element of market power.”

4 Again, referring back to iteration two.

5 “That comes back to the CPP -v- RPP point, which I accept may not be appropriate  
6 for this tribunal. The other concern is a general concern that imposing constraints  
7 on entrants restricts their ability to compete ...”

8 So, as I understand it, by the end of his cross-examination we now have iteration three.

9 Iteration three is that the argument about traffic imbalance falls into two halves. One is that  
10 termination charges are expensive, we end up paying a lot, and the second is that they are a  
11 restriction on new entrants. Pausing there, in our submission, neither of those actually is an  
12 argument about traffic imbalance, it is simply an argument about the financial impact of the  
13 charge controls on Hutchison or the impact of regulation as opposed to no regulation. All  
14 that can be rolled up in the pot of the welfare test and cost benefits of regulating as opposed  
15 to not regulating as well as Ofcom’s consideration of the financial impact as we have seen  
16 in para.7.28. It accepts that there is a financial impact on Hutchison and it rejects the point.  
17 So this is not a point about the failure to take into account relevant considerations, which is  
18 what the traffic imbalance was essentially all about.

19 That is what we end up with yesterday. Pausing there again, a further point to make on that  
20 is that Mr. Roth puts that this was a question all about level, and Professor Littlechild  
21 accepted that this was about level. There is another reason why, in any event, this argument  
22 should be rejected and that is to do with the scheme of the regulatory framework. If you  
23 look at the scheme of the CRF and the way that it has been implemented in the  
24 Communications Act it is clear that what the regulator has intended to do is, first, to identify  
25 whether there is a competitive problem in a market, and then to impose a remedy in respect  
26 of that identified competitive problem. That is why you have the very careful process of  
27 finding SMP, considering the competitive problems and then ultimately imposing a relevant  
28 remedy.

29 Miss Rose this morning said that these were very stringent conditions and, with respect, we  
30 agree, they are very stringent conditions. One of the results of those conditions is that the  
31 remedy is market specific and it is linked to an *a priori* finding of insufficient competition  
32 on that market. In general terms, the scheme of the regulation is that you address the  
33 competitive problem in the market in which it arises.

1 in this case Hutchison says that a traffic imbalance arises because of the MNP system. In  
2 principle, therefore, if the MNP system does give rise to a competitive distortion, on which I  
3 am not going to say anything, the correct course is to deal with that specific distortion where  
4 it arises. That was also precisely Dr. Walker's evidence yesterday. He said you are  
5 confusing two things and two distortions and they are not necessarily linked. That is  
6 precisely our case. These are not two distortions that are linked. If there is a distortion  
7 arising out of MNP, whether that is correct or not, but if there is it is a competitive  
8 distortion in a different market.

9 So to try instead to compensate for what may or may not be a competitive problem in a  
10 different market, but seeking a subsidy in the call termination market, is, we say, confused  
11 as a matter of law as well as a matter of economics – two quite distinct issues.

12 It is for that further reason we say that Ofcom were quite entitled to leave out of account the  
13 traffic imbalance question in deciding whether or not to impose a charge control on H3G.  
14 So that is a further reason in addition to Mr. Roth's point, which I also entirely endorse, that  
15 this is all about level. That is the third iteration.

16 We now come to this morning. Perhaps, because of the problems with Professor  
17 Littlechild's evidence and the way in which he put it under cross-examination yesterday,  
18 Miss Rose this morning advanced a fourth case, and that is that she was not talking so much  
19 about traffic imbalance but the failure to take on board the specific distortion caused by the  
20 mobile number portability arrangements.

21 My first problem with that is that I am not actually sure what she is appealing. Leaving  
22 aside the point that this was not advanced in the notice of appeal, but just taking it at face  
23 value, I am not really sure whether she is saying this is an error in failing to deal with it in  
24 this statement, or whether Ofcom have committed an error in failing to progress matters in  
25 its consultation. If she is saying the former, that in this decision Ofcom should have taken  
26 account of mobile number portability arrangements, the answer is that it did, it found that on  
27 the market for calls to porting numbers the operators also had SMP. It was as a result of  
28 that that it then progressed to saying, "We are now going to consult which we could not do  
29 before because we did not raise this in time in the earlier consultations, but we are now  
30 going to consult on the remedy in that market".

31 The problem is for Miss Rose, as well as perhaps for Ofcom, is that O2 appealed. O2  
32 appealed and said – and I am afraid that this is not in the bundles because we feel a little bit  
33 ambushed by the point that was raised this morning – O2 appealed and said that the market  
34 for calls to ported numbers is not the same as the market for calls to non-porting numbers,

1 you cannot simply aggregate the two because they have different factual and economic  
2 circumstances. As a result of that you cannot simply assume that there is SMP in the  
3 market for calls to ported numbers. Where we arrive at is there is not any finding of SMP  
4 because that bit of the decision has been withdrawn. That is by way of explanation. This is  
5 the way that Ofcom approach the issue. It did approach this issue. It considered it. This is  
6 not a failure to take account. It was taken account of in the decision, and the fact is simply  
7 that that bit of the decision has now been withdrawn.

8 THE CHAIRMAN: I thought that the point that was being made this morning was that in the  
9 number portability consultation to which we were taken. Ofcom seemed to identify in year  
10 one a £20 to £30 million detriment or disadvantage which was entirely at H3G's expense  
11 because they are in the position that their MCT charge is higher than everybody else's.  
12 Although Ofcom took into account or may have taken into account, they regarded it as  
13 offset by the £1 billion advantage that they got from the welfare analysis in annex 19  
14 because they put in the 23.9p and the 14.5p, or whatever. They say if you knock out that  
15 welfare analysis for all the reasons that they have said and knock out various other things,  
16 then there still is this Ofcom document that says that there is this detriment of the £20 to  
17 £30 million that Hutchison suffers.

18 MISS BACON: I understand Miss Rose's cases to be in that respect that Ofcom should  
19 nevertheless have gone on and taken that into account in determining the charge controls for  
20 calls to non-ported numbers, because that is all that it could do. In this decision it can only  
21 impose a charge control on non-ported numbers, and that is all that it is purporting to do.  
22 The answer to that lies in the point that I make a few minutes ago, that this is dealing with  
23 two different markets. If Ofcom had said, "In order to rectify a problem in the market for  
24 calls to ported numbers, we are going to compensate by imposing a distortion or  
25 compensation in the market for calls to non-ported numbers, which we are doing at the  
26 moment", then I think that there would have been more than appellant to this decision. We  
27 would also have been here appealing against that, because of the distinction we say that  
28 must be drawn between the two different markets.

29 Whatever market is affected by the MNP issue, it is not the market for termination of calls  
30 to non-ported numbers. It may be the market for termination of calls to ported numbers if  
31 H3G's position in the recent Commercial Court case is correct, which we doubt, but if that  
32 is correct another market that may be affected is a putative market for the provision of  
33 mobile number portability services. It may also be more generally the retail market, and  
34 that is what I understand Dr. Walker's position to be.

1 Whatever market it is, and that has not actually been identified by H3G, it is not the market  
2 that we are dealing with here, and that is our basic submission, that it is to confuse two  
3 different problems on competition in two different markets. As a matter of the regulatory  
4 scheme, if Ofcom were to take that into account it would be acting outside the scheme of  
5 the directives and the 2003 Act.

6 THE CHAIRMAN: Because you say they can only take into account detriments that arise on the  
7 market that they are considering regulating?

8 MISS BACON: Because the scheme of the Act is for the remedy to be market specific addressing  
9 the distortion of competition on the specific market.

10 That is all I wanted to say.

11 THE CHAIRMAN: Thank you. Miss Demetriou, finally, for Orange?

12 MISS DEMETRIOU: Madam, now you understand why I wanted Miss Bacon to go before me.

13 The happy feature of going last is that I can gratefully adopt all the submissions of those  
14 who have gone before me, apart of course from those of Miss Rose, from which I distance  
15 myself!

16 I want to make three short additional points. The first relates to Mr. Turner's preliminary  
17 submission, and that is this: that H3G in this case has primarily mounted a judicial review  
18 challenge. It is true that under the Act it could have done more, but it has not done that.

19 What it has primarily done is mounted a challenge on the basis that Ofcom has failed to take  
20 account of certain relevant considerations. That is its basic case. That was made clear by  
21 Miss Rose in her initial opening on remedy, and the reference to the transcript is day 3,  
22 p.83, lines 13 to 28, and was repeatedly confirmed by Dr. Littlechild in cross-examination.  
23 Just to take one example from the transcript, day 4, p.16, lines 21 to 22.

24 This is not a case in which H3G is challenging the substantive merits by and large of  
25 Ofcom's decision. It could have done that, but it has not chosen to do it. In my submission,  
26 it is very important for the tribunal to recognise the limits and the constraints placed on  
27 H3G's case. That is that it must show that Ofcom failed, entirely failed, to take account of  
28 the considerations that it has mentioned and it is insufficient for it to show, or for it to  
29 attempt to demonstrate, that Ofcom has failed to either attribute adequate weight to those  
30 considerations or has wrongly assessed those considerations. If H3G wanted to do that then  
31 it had to adduce substantive evidence to rebut Ofcom's findings and it has not done that.

32 Just to take one example, that of traffic imbalance, what we say H3G's case – and I  
33 understand Miss Bacon's submissions, and Miss Bacon has helpfully gone through the  
34 different iterations of the case – comes down to is an allegation that Ofcom has not taken

1 account of traffic imbalance in deciding not to adopt this extreme form of asymmetric  
2 regulation. We see quite simply by reference to the decision itself, and the tribunal will  
3 recall para.9.211 of the Ofcom's statement where Ofcom rejected traffic imbalance as a  
4 reason for extreme asymmetric regulation on the basis, amongst other reasons, that it was an  
5 outcome of H3G's own freely chosen commercial strategy. In my submission, that is  
6 Ofcom taking account of the matter and that is a sufficient answer to Miss Rose's case.  
7 There is no failure here to take account of that consideration. Ofcom have taken account of  
8 it but it has rejected it. If Miss Rose does not like the reasons for that then they have to  
9 adduce evidence to show why there has been an error assessment, and we say they have not  
10 done that.

11 THE CHAIRMAN: If they had done that then it is open to this tribunal presumably to make a  
12 judgment on that issue.

13 MISS DEMETRIOU: If they have done that, madam, but we say that the entire basis on which  
14 their case has been put is a failure to take account of relevant considerations. We say that  
15 there has not, in effect, been a merits challenge in this case, and Dr. Littlechild repeatedly  
16 said that. He said, "I am not reaching any conclusion as to whether this should have been  
17 done, I am merely saying that it is something should have had regard to". That is the first  
18 general point.

19 The second point is very short and it relates to the ERG consultation on symmetry, a  
20 document on which Miss Rose relied very heavily. We just remind the tribunal simply of  
21 the obvious fact that this is a consultation document in respect of which responses have  
22 been invited. It does not necessarily in all respects reflect Ofcom's position, and it is  
23 certainly not the final position of the ERG.

24 THE CHAIRMAN: I thought that we had gone over that and that that was the purpose of the  
25 exchange that took place with the letter that Ofcom then produced saying that this had been  
26 adopted in plenary session.

27 MISS DEMETRIOU: Madam, it is a slightly different point I am making. I do not of course  
28 dispute that, it is a commonly adopted consultation document to which Ofcom has agreed.  
29 It does not necessarily reflect Ofcom's policy position in respect of the UK market in every  
30 respect.

31 THE CHAIRMAN: No, I can see that that is a different point.

32 MISS DEMETRIOU: It is a narrower point that I am making. Of course I do not take issue with  
33 the exchange of correspondence. The main point is that there has not yet been any common  
34 position. As Dr. Walker said yesterday, even if a common position is adopted in these

1 terms – ie accepting the extremely controversial proposition that being a late entrant to the  
2 market can justify asymmetric regulation in an extreme form, which is not clear anyway on  
3 the face of the document – even if a common position is adopted in those terms, it is by no  
4 means clear that the Commission will accept it. So this is not a document that would be  
5 binding on the European Commission. That is my second point.

6 The third point relates to the question of entry assistance, and it is really just to refer back to  
7 our statement of intervention, which the tribunal will find at bundle C2, tab 10, p.464. We  
8 make the point there and set out the table which shows that H3G has already received entry  
9 assistance in some respects because its 3G licence, which incidentally affords it the right to  
10 use a larger amount of spectrum than the 3G licences of the other MNOs, was acquired at a  
11 significantly lower price per megahertz than the licences obtained by the other MNOs. So  
12 we say that H3G has already benefited from that advantage, and that is something which  
13 Miss Rose has not addressed at all in her discussion on whether particular entry assistance  
14 or additional entry assistance is merited. We would ask the tribunal to look at that table.

15 Those, madam, are the three additional points I wanted to make.

16 THE CHAIRMAN: Thank you very much, Miss Demetriou.

17 Thank you everybody. Miss Rose, you are going to give your reply in writing. Is there  
18 something you wanted to say before I ----

19 MR. ROSE: No, I just simply wanted to raise the question of when you would want and beg you  
20 not to want it while this hearing is continuing.

21 THE CHAIRMAN: That also leads me to another point which is about the transcripts of these  
22 proceedings. Obviously we have been sitting long hours and people have been speaking  
23 very quickly in order to get their points across. I make no complaint about that, but we have  
24 to recognise the huge burden that this places on those who are battling to transcribe these  
25 proceedings, which is evidenced by the huge doorsteps of paper that are being handed  
26 round. Parties must therefore have realistic expectations, please, about when you can  
27 receive the transcripts, and I say that ongoing because we have another heavy day  
28 tomorrow, which I will come to. Most of the major players have juniors sitting next them  
29 who should be prepared to keep a note of what happens in case the transcript is not available  
30 quite as quickly as you might need it. Clearly some people have been keeping a note of the  
31 evidence and that is very helpful.

32 As regards the timing of the reply, of course I would expect that you would want to be able  
33 to see the transcript of today before you do that. We cannot really commence our  
34 deliberations until we have the full submissions to be made, but I hear your plea and I

1 understand it, and I will not make any order at the moment as to when you should produce  
2 the reply. Could you give an estimate of when you would be able to do so?

3 MISS ROSE: Madam, I would hope that we would be able to produce it by the end of next week,  
4 but I would ask not to be held to that with a rod of iron in a case there is a problem, but that  
5 is what we would be endeavouring to achieve.

6 THE CHAIRMAN: Yes. I am reminded that a number of parties have reserved the right to  
7 respond to the note that you handed up, and presumably you want to see those before you  
8 put your reply together.

9 MISS ROSE: Yes.

10 THE CHAIRMAN: Would those who have said that they want to reserve the right to put in a note  
11 be able to say by Monday morning whether they are going to put in a note and produce the  
12 note, if they are going to put it in?

13 MR. TURNER: Madam, you are saying “say and produce” by Monday, both?

14 THE CHAIRMAN: If you are going to produce it, then by Monday morning either produce it or  
15 say that you are not going to produce it. Is that being unreasonable? There are nods.

16 MR. TURNER: It feels a bit like University Challenge, but we would say Wednesday, madam,  
17 bearing in mind everything else that we are having to do at the same time.

18 THE CHAIRMAN: Why do we not say then Wednesday for those notes, and then, Miss Rose, if  
19 we give you until the following Wednesday to produce your reply, is that reasonable?

20 MISS ROSE: I am grateful, madam, we can do that.

21 THE CHAIRMAN: I bear in mind that there are other things going on in this case  
22 simultaneously, which we will come to in due course, so I take account of that as well.  
23 As proceedings tomorrow are tomorrow, we start in the morning with the opening  
24 submissions of the four appellants in the TRD cases and that, I think, according to the  
25 timetable, will take us through to three o'clock on Monday afternoon. I did ask whether the  
26 parties were able to divide up amongst themselves that time, but given the success of today I  
27 would like to set time limits for everybody over that period. Mr. Anderson, perhaps you can  
28 bring me up to date with where we are on that?

29 MR. ANDERSON: Madam, I will not need any time. Mr. Reed has put in, and I have seen, a  
30 powerful and indeed compelling bid for four hours. Whether that has been agreed by the  
31 other appellants I do not know. He was good enough to indicate that if it could be  
32 guaranteed that there would be no interventions he might be able to do it in three and a half,  
33 but his inclination was that it would not be wise to promise anything less than four.

1 THE CHAIRMAN: I equally think it is unwise to promise that there will not be any  
2 interventions.

3 MR. ANDERSON: Perhaps on that basis four hours, madam.

4 THE CHAIRMAN: So that is BT. The other appellants are Mr. Cook, the 1092 appellants.

5 SPEAKER FOR 1092 APPELLANTS: We have agreed that one and a half hours would be  
6 sufficient.

7 THE CHAIRMAN: T-Mobile?

8 MR. TURNER: We are two hours, madam.

9 THE CHAIRMAN: And H3G?

10 MISS ROSE: Madam, one hour.

11 THE CHAIRMAN: So how many hours have we then got? That is eight and a half hours of  
12 submission. If we start at 10 am with Mr. Reed taking four hours, that would take Mr. Reed  
13 through until 3 pm. Then we would have Cable & Wireless et all from 3 to 4.30. Then on  
14 Monday, if we start at ten, and have T-Mobile until 12, then H3G from 12 until one. We  
15 could actually start at 10.30 on Monday. Let us start at ten and hope to finish at lunchtime.  
16 Is everybody clear how much time they have and when that time is allotted to them? Does  
17 anybody have anything they want to say as regards that?

18 MR. ROTH: It is probably my confusion, madam, tomorrow it is BT and then the 1092  
19 appellants which is, I think, five and a half hours.

20 THE CHAIRMAN: Yes.

21 MR. ROTH: Are we starting tomorrow at ten or 10.30?

22 THE CHAIRMAN: At ten. So we start tomorrow at ten and have BT until 3 pm and then the  
23 1092 appellants taking us up to 4.30. On Monday we also start at ten and we have T-  
24 Mobile taking us from 10 until 12, and H3G from 12 to one. Then in the afternoon will be  
25 Ofcom.

26 Thank you very much everybody, we will adjourn now until ten o'clock tomorrow morning.

27 (Adjourned until 10 am on Friday, 1<sup>st</sup> February 2008)

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