



Neutral citation [2007] CAT 33

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1083/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

23 November 2007

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

O2 (UK) LIMITED
T-MOBILE (UK) LIMITED
VODAFONE LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED
BRITISH TELECOMMUNICATIONS PLC

Interveners

**RULING ON THE APPLICATION FOR PERMISSION
TO AMEND THE NOTICE OF APPEAL AND ADDUCE
FURTHER EVIDENCE**

APPEARANCES

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G (UK) Limited.

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

Miss Sarah Lee (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Miss Kelyn Bacon (instructed by S.J. Berwin) appeared on behalf of O2 (UK) Limited.

Mr. James Flynn QC and Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of Orange Personal Communications Services Limited.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of T-Mobile (UK) Limited.

Miss Elizabeth McKnight (Partner, Herbert Smith) appeared on behalf of Vodafone.

I BACKGROUND

1. At a Case Management Conference held on 6 November 2007, the Tribunal heard an application by the appellant (“H3G”) for permission to amend its Notice of Appeal and adduce further evidence. At the end of that hearing, the Tribunal gave its decision on that application, granting the application in respect of some of the proposed amendments and dismissing the application in respect of the remainder. This ruling sets out the reasons for the Tribunal’s decision.
2. The appeal by H3G concerns the statement made by the Office of Communications (“OFCOM”) entitled “Mobile Call Termination” which was published on 27 March 2007 (“the Decision”). In the Decision, OFCOM concluded as regards H3G that:
 - (a) a separate market exists for the provision by H3G of wholesale mobile voice call termination (“MCT”) in the UK to other communications providers;
 - (b) H3G has significant market power (“SMP”) in the market for termination of voice calls on its network;
 - (c) a charge control should be imposed on the supply of MCT by H3G and should apply for 4 years from 1 April 2007;
 - (d) the “target average charge” (“TAC”) of H3G under that charge control should be reduced to 5.9 ppm by the final year of the charge control, with the change to be implemented by an initial reduction to 8.5 ppm followed by three reductions each of equal (percentage) change across the next three years; and
 - (e) further conditions should be imposed requiring provision of voice call termination on fair and reasonable terms and conditions (including contract terms), prohibiting undue discrimination, and requiring transparency.
3. The appeal is brought pursuant to section 192(2) of the Communications Act 2003 (“the 2003 Act”). That subsection provides that a person affected by a decision to which

section 192 applies may appeal against it to the Tribunal. Section 192(1) lists a wide range of decisions to which the section applies, including all decisions by OFCOM under Part 2 of the 2003 Act other than those specified in Schedule 8 to the 2003 Act.

4. Sections 193 to 195 of the 2003 Act set out the procedure to be followed in appeals brought under section 192(2). Broadly speaking, that procedure requires the Tribunal to identify whether the appeal raises any “specified price control matters” as defined. If it does, then those matters are to be referred by the Tribunal to the Competition Commission for its determination. Matters raised by the appeal which are not price control matters are to be decided by the Tribunal. Once the Competition Commission has notified the Tribunal of its determination of the price control matters referred to it, the Tribunal must decide the appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the Competition Commission, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the Competition Commission’s determination would fall to be set aside on such an application.
5. The Notice of Appeal originally served is made up of Sections A – D in the main body of the Notice and an Appendix. Section A in the main body of the Notice is headed “Introduction and Context of this Appeal”. It contains a narrative background to the bringing of the appeal including what is referred to as the “proper context” in which the price control remedies should, according to H3G, be assessed. This section includes some uncontentious background information but also many assertions about H3G’s place in the market and about OFCOM’s failures to mandate change to certain aspects of how this market functions which, H3G asserts, hamper the competitive process and place H3G at a competitive disadvantage.
6. Section B is headed Summary of Grounds of Appeal. Paragraph 2.2 (without the footnotes) states as follows:

“Broadly, the main grounds of appeal are that (i) the relevant parts of the Decisions relating to a finding of SMP in H3G; (ii) the imposition of a “Target Average Charge (“TAC”) on the 2G/3G MNOs (5.1 ppm in the final years of the price controls); and (iii) the imposition of a price control on H3G for 4 years (with the TAC being reduced to 5.9 ppm in the final year of the price control) constitute an error of assessment and/or law because the Decisions:

- (a) contain an error of law as to what constitutes SMP within the meaning of section 78 of the 2003 Act; and/or
- (b) are unlawful and/or irrational in view of OFCOM's legal duties under sections 3 and 4 of the 2003 Act; and/or
- (c) contain an error of assessment as to the facts and/or analysis relied upon; and/or give insufficient reasons."

7. After three paragraphs summarising the grounds of appeal in relation to the finding of SMP, there is a sub-heading "Price Control Matters".

"2.6 The SMP/Price Control Decision constitutes an error of law and/or assessment as to the facts and/or analysis relied upon and/or the reasons given. It further tilts the playing field against the recent entrant and makes it more difficult to compete in the retail market. This is unnecessary and/or disproportionate. There are a number of reasons for this including: the price control imposed on the 2G/3G MNOs has a TAC that is not justified by the underlying costs model and is too high (both for mobile-to-mobile calls and fixed-to-mobile calls); and it generally ignores or fails to take sufficient account of the impact of the price controls in terms of payments by H3G to its competitors and the resulting distortion of competition and dynamic incentives. Any remedy should have mitigated or eliminated distortion to competitive conditions if at all possible (Appendix, Sections 4, 6, 10-12)

2.7 In addition or in the alternative, OFCOM errs in the SMP/Price Control Decision regarding its decision to impose a price control on H3G in that:

- (a) The price control is a disproportionate or inappropriate remedy (Appendix, Sections 3 and 4).

...."

8. Section B continues with a description of the relief sought and procedural issues.

9. Section C is devoted to setting out H3G's case on SMP. This was included in the body of the Notice of Appeal because it was accepted by H3G that this was a non price control matter which fell to be determined by the Tribunal.

10. Section D of the Notice of Appeal is a single paragraph as follows:

"12.1 For ease of reference to the CC, the grounds of appeal regarding the price control matters are set out in the accompanying Appendix, which H3G proposes be used as a preliminary "standalone" submission to the CC...."

11. The Appendix is headed "Price Control Matters" and sets out H3G's submissions in relation to the matters which it regarded as price control matters to be referred to the

Competition Commission. The first paragraph of the Appendix, headed “Introduction” states:

“1.1 Notwithstanding H3G’s view that OFCOM’s finding of SMP constitutes an error of assessment and/or law for the reasons given in the Notice of Appeal, even if the Tribunal considers that a finding of SMP is appropriate on H3G, the price controls imposed by OFCOM on all the MNOs are flawed for the reasons set out below. OFCOM has, inter alia, failed to comply with the requirement under the Framework Directive that it must carry out a principled economic assessment. The result is higher than justified MCT rates for the 2G/3G MNOs. Further there is an overall theme of inappropriate assumptions by OFCOM which means that H3G is disadvantaged compared to its MNO competitors, to the detriment of the competitive process at the retail level and investment incentives. Overall, OFCOM has not taken due or proper account of its statutory duties as to the effect of the price controls and has not furthered the interests of consumers.”

12. Section 3 of the Appendix is headed “The price control remedies are disproportionate/inappropriate” and describes the financial impact of the proposed price control on H3G’s business and the consequential adverse effect on competition. It also attacks OFCOM’s welfare analysis as flawed, alleging that OFCOM failed to demonstrate any net welfare benefits arising from regulating H3G’s termination charge over the period in question.
13. The remaining sections 4 – 12 of the Appendix set out in considerable detail H3G’s attack on the price control imposed by OFCOM. It is common ground that these matters are price control matters which will in due course be referred to the Competition Commission for determination.
14. On 4 October 2007, the Tribunal determined as a preliminary issue that the question of whether price control was a proportionate response to the finding of SMP was not a price control matter and so would be determined by the Tribunal rather than referred to the Competition Commission: see [2007] CAT 27. This meant that H3G had been mistaken regarding part of the assumption which had underpinned the division of the material in the Notice of Appeal between the main body of the Notice and the Appendix.
15. On 12 October 2007 H3G filed an application for permission to amend its Notice of Appeal and adduce further evidence. In that application H3G referred to the fact that the Notice of Appeal was drafted on the basis that the matters set out in the price

control appendix consisted of “price control matters” that should be referred to the Competition Commission. This included the question of whether or not the imposition of any price control on H3G was an appropriate and proportionate response to a finding of SMP. Now that the Tribunal had ruled that in fact this issue would be heard by Tribunal, H3G sought to amend its Notice of Appeal by the addition of a further section to the main body of the Notice and to adduce further evidence. This was necessary, according to H3G, so that H3G’s case on this point and supporting evidence were fully set out before the Tribunal.

16. The proposed amendments to the Notice of Appeal include the deletion of two paragraphs in the original Appendix to the Notice being matters on which H3G no longer relies. Apart from that, the amendment is in the form of a new section, “Section E”, to be added to the main body of the Notice of Appeal. The matters set out in the new Section are summarised in paragraph 13.2 which provides:

“13.2 OFCOM has erred in law and in fact in imposing price control on H3G, in that:

- 13.2.1 OFCOM has failed to apply or properly to apply the tests in sections 47 and 88 of the 2003 Act to the particular circumstances of H3G when deciding to impose a price control on H3G;
- 13.2.2 if and to the extent that OFCOM has purported to apply those tests to H3G, OFCOM has failed properly to assess the alleged costs and benefits resulting from the imposition of a price control on H3G;
- 13.2.3 OFCOM has erred in law and in fact in its approach to the question of proportionality; and/or
- 13.2.4 OFCOM has discriminated unduly against H3G, by comparison with the other MNOs.”

17. In addition to filing the request for permission to amend the Notice of Appeal, H3G lodged three witness statements. Two of these, that of Mr David Dyson dated 12 October 2007 and that of Dr Stephen Littlechild also dated 12 October are not connected to the contested parts of the proposed amendments to the Notice of Appeal. The third, which is the second witness statement of Mr Kevin Russell deals not only with parts of the case which are not related to the contested amendments but also with the on-net/off-net pricing issue discussed below. In so far as Mr Russell’s statement deals with that issue, the grant of permission to adduce it stands or falls with the passages in the pleading which it supports.

18. Rule 11 of the Tribunal’s Rules (S.I. 2003 No. 1372) is in the following terms:

“11(1) The appellant may amend the notice of appeal only with the permission of the Tribunal.

(2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.

(3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless—

(a) such ground is based on matters of law or fact which have come to light since the appeal was made; or

(b) it was not practicable to include such ground in the notice of appeal; or

(c) the circumstances are exceptional”

19. On 29 October 2007 OFCOM wrote to the Tribunal and the parties setting out its response to the H3G application. Some of the amendments proposed by H3G were not opposed by OFCOM and we grant permission to make those amendments without needing to refer to those any further in this ruling. But there are three passages in the proposed new Section E which OFCOM does oppose. These are:

(a) paragraphs 16.1 – 16.20 headed “OFCEM failed to apply the statutory test to H3G”;

(b) paragraphs 19.1 to 19.4 headed “OFCEM discriminated against H3G contrary to section 47(2)”; and

(c) references in section 17 of Section E which concern on-net/off-net pricing.

20. In relation to the first two contested parts of the proposed amendments, OFCOM argues that each of them constitutes a “new ground” within the meaning of Rule 11(3) and that none of the circumstances set out in paragraphs (a) to (c) of Rule 11(3) exists in this case. OFCOM concedes that if, as H3G contend, they do not constitute “new grounds”, then OFCOM cannot point to any prejudice to itself which should prevent the Tribunal from granting permission to amend under Rule 11(1).

21. In relation to the third category of amendments, that relating to on-net/off-net pricing, OFCOM accepts that this does not constitute a new ground within the meaning of Rule 11(3) but is rather an additional argument in support of an existing ground. OFCOM asks the Tribunal to exercise its discretion under Rule 11(1) to refuse this amendment on the grounds that to include it would cause substantial prejudice to OFCOM and to others.
22. On 1 November 2007, H3G wrote to OFCOM setting out its arguments in support of the amendments. H3G submits that none of the amendments it proposes amounts to a new ground within the meaning of Rule 11(3). In the alternative, H3G submits that if any of the proposed amendments is a new ground, then there are exceptional circumstances within the meaning of Rule 11(3)(c) and that the Tribunal should grant permission. T-Mobile (UK) Limited (“T-Mobile”) wrote on 5 November 2007 explaining why it supported OFCOM in its opposition to part of the amendments. At the case management conference on 6 November 2007 the other interveners indicated that they all supported OFCOM to a greater or lesser extent although British Telecommunications plc described itself as “neutral” provided that the amendments did not result in a delay to the hearing of the case. We have had regard to all the matters set out in this correspondence, as well as to the submissions made at the case management conference, in coming to our decision.
23. Both OFCOM and H3G referred the Tribunal to passages of the Tribunal’s judgment in *Floe Telecom Ltd v Office of Communications* [2004] CAT 7. At paragraph 50 of that judgment the Tribunal said:

“While the Tribunal fully accepts the general need to maintain discipline in the appeals before it, in our view that objective has to be balanced with the need to deal with cases justly and in particular to take account of the fact that not all appellants have access to specialised legal advice or extensive financial resources. In our view the Tribunal’s Rules should, in general, be interpreted against that background.”
24. The Tribunal accepts that the reference to the need to balance the need to maintain discipline with the need to deal with cases justly applies generally when considering applications to amend and not only in those cases where the original pleading was drafted without the benefit of specialised legal advice or extensive financial resources as happened in the *Floe* case itself.

(a) The allegation that OFCOM failed to apply the statutory test to H3G.

25. The question which the Tribunal must decide in relation to this passage – that is paragraphs 16.1 to 16.20 of the proposed amended Notice of Appeal – is whether, having regard to the grounds pleaded in the original Notice and to the matters now sought to be introduced, the new material raises a new ground or is part of the same grounds raised originally.

26. Miss Rose, on behalf of H3G, argued that no new ground was being raised here. The material in section 3 of the original Appendix to the Notice of Appeal had set out the facts and matters relied on by H3G without expressly pleading how it was alleged these matters fitted in to the statutory framework in accordance with which OFCOM conducted its analysis. The new Section E now sets out sections 47 and 88 of the 2003 Act and seeks to clarify how the matters pleaded tie in to the allegation that OFCOM “has not taken due or proper account of its statutory duties” and has failed to take account of material factors in assessing whether a price control is proportionate. As Miss Rose put it, what H3G has tried to do in the amendment is to clarify and to refine the issues that were originally in the Appendix. In particular, there was a mass of factual material in the Appendix which H3G has now sought to marshal into clearer legal avenues by reference both to the statutory provisions and to general principles such as proportionality and discrimination. She described the revisions therefore as an attempt at a clearer legal analysis of the arguments that were already being put in the original notice of appeal rather than as raising new grounds. The fact that the original section 3 of the Appendix did not differentiate between the two allegations now separated out into part 16 and 17 of Section E does not mean that one or other of those sections must be a new ground.

27. OFCOM submitted that this was a new ground because the material in these paragraphs in section 16 of the new Section E does not appear anywhere in the existing Appendix to the Notice of Appeal which H3G described as “its preliminary “standalone” submission to the [Competition Commission]”. The material that had been included in section 3 of the Appendix to the original Notice is now broadly reproduced as part of paragraphs 17.1 *et seq* of the new Section E and, insofar as Section E incorporates the material from section 3 of the Appendix, OFCOM does not object to it. But the ground

put forward in section 16 of the new Section E, OFCOM argues, is that OFCOM failed to address its mind to the particular circumstances of H3G in the market as contrasted with the circumstances of the other mobile network operators (“MNOs”) and this is a different argument from the argument in paragraphs 17.1 *et seq* that OFCOM erred in law and/or assessment when analysing those particular circumstances.

28. The Tribunal accepts H3G’s arguments on this point. It is unfortunate that the original pleading did not set out in more detail how the matters complained of demonstrated that OFCOM had failed to comply with its statutory functions. But the thrust of H3G’s case was clear: namely that OFCOM had failed properly to exercise its statutory functions because it failed to recognise that H3G should be treated differently from the other MNOs. The allegation is therefore that if OFCOM had properly appreciated the competitive position of H3G in the market, it would have exercised its statutory powers by not imposing a price control on H3G. The Tribunal does not regard the fact that H3G now seeks to characterise this failure both as a failure by OFCOM “to ask itself the necessary question” under sections 47 and 88 (see paragraph 16.2 of the proposed Section E) and also as an error by OFCOM its application of section 88(1)(a) and section 88(1)(b) of the Act (see paragraph 17.1 of Section E) as raising a new ground within the meaning of Rule 11(3). The Tribunal accepts H3G’s argument that looking at the content of section 3 of the original Appendix, taken as a whole, the two grounds were merged and that the paragraphs in sections 16 and 17 of the new Section E are simply a crisper and more helpful legal formulation of the substance of the arguments that have always been put.

(b) The allegation that OFCOM discriminated against H3G

29. The Tribunal similarly has concluded that it was apparent from the original pleading that H3G were arguing that OFCOM had failed to distinguish properly between H3G and the other MNOs in applying the statutory provisions. This was, as Miss Rose put it, the dominant theme of H3G’s submissions to OFCOM throughout the administrative process and in its original notice of appeal. She summarised their case as “that it is disproportionate for OFCOM to treat a new entrant into a saturated market in the same way as the four dominant established players, without considering separately the impact on the new entrant” and described discrimination (section 19 of the proposed amended notice of appeal, to which OFCOM objects) and proportionality (section 18 of the

proposed amended notice of appeal, to which no objection is made) as being “two sides of the same coin”, on the facts of this case.

30. We accept the point made by OFCOM that a plea can raise a new ground for the purposes of Rule 11(3) even if it relies essentially on the same factual material. As Mr Roth argued, a claim can be put forward in negligence and one can say that on the same facts, a claim in nuisance is also established. The claim in nuisance would be a new ground even though it relies on the same facts. But the point in relation to this application is that H3G had not clearly set out in its original pleading precisely how it alleged that the facts pleaded fitted in to the statutory framework. There is sufficient material in the original Appendix 3 to support H3G’s contention that the allegation that OFCOM discriminated against H3G by failing to recognise the important differences between H3G and the other MNOs has always been part of H3G’s case in this appeal.

Conclusions in relation to proposed amendments relating to the statutory test and to discrimination

31. Having concluded that these amendments do not amount to “new grounds” within the meaning of Rule 11(3), the Tribunal must exercise its discretion under Rule 11(1) as to whether to allow them or not. None of the other parties pointed to any reason why the Tribunal should refuse permission under Rule 11(1) and so we grant permission to include those passages in the amended Notice of Appeal.
32. In the light of the Tribunal’s findings, it is not necessary to consider whether there were exceptional circumstances in this case which would have justified the inclusion of these paragraphs if they had been new grounds.

(c) The on-net/off-net pricing issue

33. In the original section 3 of the Appendix to the Notice of Appeal, H3G argues that the overall effect of the price control imposed by OFCOM “is to tilt an already tilted playing field further against the recent entrant and to dampen competition on an ongoing basis at the retail level.” This is, broadly speaking, because the price control imposed by the Decision requires H3G to reduce the currently unregulated price that it charges the other MNOs for termination on the H3G network by an amount which is greater than the reductions imposed on the other MNOs in respect of the prices which

they can charge H3G for termination on their networks. The effect of the reductions in H3G's prices as compared with the other MNOs' prices is exaggerated by the "traffic imbalance" between H3G and the other MNOs, that is by the fact that the number of calls made by H3G customers to other MNO networks (for which H3G has to pay them an MCT charge) is far greater than the number of calls made by the other MNOs' customers to H3G customers (for which H3G receives from them an MCT charge). The traffic imbalance currently means that H3G is a net payer of MCT charges to the MNOs once the offsetting calculations have been made. The amount of the net payment will, according to H3G, be much greater if this price control is implemented.

34. The causes of this traffic imbalance and its relevance to the setting of the price control are important issues in this case. In section 3 of the original Appendix, H3G explains that the imbalance has been a persistent feature of H3G's traffic flows in the United Kingdom. H3G then summarises the reasons for this as being defects in the system operating in the United Kingdom for number portability. H3G's argument is that in entering and competing in a saturated market, H3G has to gain market share by acquiring customers from its competitors rather than in persuading people who do not already have a mobile phone to acquire one. Customers are reluctant to move to the H3G network if they cannot take their existing phone number with them. Although there are arrangements in place which oblige the existing networks to allow the customer to port their number to a different network, H3G asserts that those arrangements are unsatisfactory in a number of respects and constitute a barrier to customers switching networks.
35. In the proposed Section E of the amended Notice of Appeal, H3G seeks to introduce an additional reason for the traffic imbalance, namely the pricing differential between off-net and on-net calls in the tariffs of the other MNOs. Off-net calls (that is when a customer on one network calls a customer on another network) are, according to H3G, priced so that they are more expensive for customers than on-net calls (that is where a customer on one network calls a customer on the same network). The other MNOs, H3G wishes to argue, have large market shares and are therefore able to offer attractive retail packages which combine low on-net call charges with high off-net charges since many of their customers' calls will be made on-net. As a new entrant with a small

customer base, H3G is unable to match these since the majority of H3G's customers' calls will of necessity be made off-net to the other networks.

36. OFCOM strongly opposes the introduction of this new proposed explanation for H3G's traffic imbalance which, OFCOM submits, did not appear in the original Notice of Appeal. OFCOM points out that this argument was never advanced by H3G in its detailed responses to OFCOM's consultations prior to the issue of the Decision. Mr Roth on behalf of OFCOM took us to the consultation documents issued by OFCOM in June 2005, March 2006 and September 2006 and to the responses to those documents lodged by H3G. In those responses, H3G sets out at some length its case on the effects of the traffic imbalance and ascribes that imbalance to the fact that H3G is a new entrant and the problems with number portability. The relevance of any price differentials between off-net and on-net calls is not mentioned.
37. Further, OFCOM states that if H3G is now permitted to raise this issue, OFCOM will have to undertake substantial work both in gathering new information and then in assessing any effect on the price control determination. As Mr Roth explained at the hearing, the complexity of the tariff structures operated by the other MNOs means that it is not straightforward to discern how great the differential between off-net and on-net retail prices actually is. If this point were to be pursued, it would also be necessary for the Tribunal to consider how many customers have a pattern of use which results in any such differential materially affecting them and whether such customers are aware of that effect so as to be influenced by it in choosing which network to join.
38. Miss Rose conceded candidly at the hearing that this argument did not appear in the original notice of appeal and was not a point that H3G raised in the consultation stages of the OFCOM investigation. She nonetheless urged the Tribunal to allow H3G to introduce the point because:
 - (a) the issue of H3G's traffic imbalance has been something that H3G has consistently raised with OFCOM and argued that it is a relevant factor to be taken into account. The off-net/on-net pricing is a material cause of this and "OFCOM has long had notice of H3G's concerns";

- (b) to exclude the point increases the risk of the Tribunal coming to conclusions which are inconsistent with the conclusions of the Competition Commission in relation to the price control matters to be determined by it and/or with the Tribunal's deliberations in H3G's parallel appeal (Case no 1091/3/3/07 *Hutchison 3G UK Limited v Office of Communications*) against OFCOM's determinations resolving various bilateral disputes relating to call termination rates, the main issues in which are due to be heard in a combined hearing with the non price control matters in this case;
- (c) even though H3G did not raise the point during the OFCOM investigation, this is something that OFCOM should have been aware of when considering traffic imbalance issues, particularly since there was reference to the asymmetric prices for off-net and on-net calls possibly causing problems for H3G in earlier reports of the Director General of Telecommunications in 2001 and 2003;
- (d) there is no prejudice to OFCOM because they have not yet lodged their Defence in the proceedings and, insofar as the amendment would require OFCOM to undertake further market analysis and gather new material, this is the kind of analysis that OFCOM ought properly to have undertaken before adopting the Decision so that it is not prejudiced by having to carry out that analysis now.

39. The Tribunal considers that the balance between the need to ensure the efficient performance of the case management functions of this Tribunal with the need to deal justly with H3G clearly lies against allowing this additional argument to be raised. The existence of the traffic imbalance and the role of number portability arrangements in causing it are well trodden ground in this sector. It is striking that H3G has not thus far sought to rely on this on-net/off-net point if, as they now contend, it is such an important feature of the market. The Tribunal accepts OFCOM's submissions that there would need to be substantial further evidence gathering and analysis in order for the point to be properly explored. We do not accept the argument that no prejudice is caused to OFCOM because it ought to have explored this as part of its market analysis in accordance with section 88. The point was not made by H3G in its original Notice of

Appeal and although OFCOM has not yet pleaded its Defence to the appeal, the Tribunal is setting a strict timetable for the service of further pleadings leading up to a hearing in the New Year.

40. The Tribunal is not persuaded that excluding the point from H3G's case on the non price control matters creates a risk of the Tribunal coming to conclusions which are inconsistent either with the determination by the Competition Commission of the price control matters in this appeal or with the Tribunal's determination of the overlapping issues in H3G's Termination Rate Dispute appeal. The Tribunal does not consider that that is a factor which should influence the application of Rule 11 in this case.

Conclusion

41. The Tribunal therefore grants the appellant permission to amend its Notice of Appeal in the form of the draft amended Notice filed on 12 October 2007 except insofar as the amendments relate to the on-net/off-net pricing issue. Subsequent to the hearing, H3G has clarified which aspects of the proposed amendments should be disallowed in order to give effect to the Tribunal's decision. This has necessitated an amendment to the Order as initially made but none of the parties has raised any objection to that revision. The passages of the proposed amendment which are not permitted are:

- (a) paragraphs 17.22 to 17.26;

- (b) the references in paragraphs 17.30, 17.35 and 19.3 to on-net/off-net pricing.

42. None of the parties objects to H3G's application for permission to adduce the witness statements of Mr David Dyson and Dr Stephen Littlechild, and the Tribunal grants permission in respect of them. Permission to adduce the second witness statement of Mr Kevin Russell is granted subject to the removal of those sections in that statement which relate to the on-net/off-net pricing issue.

Vivien Rose

Andrew Bain

Adam Scott

Charles Dhanowa
Registrar

Date: 23 November 2007