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IN THE COMPETITION

Case No. 1083/3/3/07

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

6th November 2007

Before:
MISS VIVIEN ROSE
(Chairman)

PROFESSOR ANDREW BAIN OBE
MR. ADAM SCOTT TD

BETWEEN:

HUTCHISON 3G (UK) LIMITED
(“H3G”)
and

Applicant

OFFICE OF COMMUNICATIONS
(“OFCOM”)

Respondent

and

VODAFONE PLC
(“VODAFONE”)

T-MOBILE (UK) LIMITED
(“T-MOBILE”)

O2 (UK) LIMITED
(“O2”)

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED
(“ORANGE”)

BRITISH TELECOMMUNICATIONS PLC
(“BT”)

Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

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

Miss Kelyn Bacon (instructed by S.J. Berwin) appeared on behalf of 02(UK) Limited.

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

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

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

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

Mr. James Flynn QC and Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of the Intervener Orange.

1 THE CHAIRMAN: Good morning everybody. I am going to make some opening remarks on
2 two different matters. The first is the future conduct of this appeal together with the BT
3 appeal, together known as the “mobile call termination appeals” and also the “termination
4 rate dispute” appeals.

5 After today’s hearing the Tribunal will issue directions in both of these appeals, the BT and
6 H3G MCT appeals and in the termination rate dispute appeals. I would remind the parties
7 that this panel of the Tribunal has not yet made any order so far in the H3G MCT appeal.
8 We outlined a possible timetable for pleadings in our earlier letter but that was dependent
9 upon the question of the scope and contentiousness of any amendments to H3G’s notice of
10 appeal.

11 What we propose, clearly subject to submissions we receive today, but as indicated in our
12 recent letter the intention is to order as follows. On 11th and 12th December the Panel
13 appointed to hear the Orange appeal (case 1080) will hear, as a preliminary issue, ground 1
14 of the Orange appeal, that is the question whether a dispute within the meaning of s.185 of
15 the Communications Act 2003 existed at the time that BT purported to refer that dispute to
16 Ofcom for resolution. That Panel will also hear at that hearing the limitation point, that is
17 the question whether it was necessary for Orange to bring an appeal within two months of
18 Ofcom’s decision to accept jurisdiction, or whether it could have raised that jurisdictional
19 challenge as a point in challenging the final determination.

20 That hearing on the 11th and 12th December will not consider the question of the impact of
21 any ruling on ground 1 on any of the other termination rate dispute appeals, and that Panel
22 will issue a decision on those points following the hearing in December. But grounds 2
23 and 3 of the Orange appeal, and the other termination rate dispute appeals, will not be
24 stayed pending the hearing in December.

25 We intend then to hear the H3G non-price control matters and the overlapping issues in the
26 termination rate dispute appeals at a combined hearing in January or February of next year.
27 By that stage the Panel in the determination rate dispute appeals will have been
28 reconstituted so that its membership is the same as the Panel hearing the two MCT appeals.
29 That Panel will then hear and determine the H3G non-price control matters and the
30 termination rate dispute overlapping issues and that will then leave the remaining issues in
31 the termination rate dispute appeals, which are the separate issues not overlapping, which
32 will be heard at a later point by the same Panel as hears the combined hearing in January or
33 February. In the meantime this Panel will be formulating the questions to be sent to the
34 Competition Commission in the H3G price control matters and the BT mobile call

1 termination appeals, and we hope to send those questions to the Competition Commission
2 before the end of this year.

3 So far as the hearing date for the hearing of the main issues in the termination rate dispute
4 and the non-price control matters in the H3G appeal we have mentioned I think 28th
5 January to 5th February.

6 The second issue on which I wish to make some preliminary remarks is in relation to the
7 application before us today, namely, the application to amend H3G's notice of appeal.

8 Rule 11 of our Rules which govern amendment of pleadings as you know provides that a
9 notice of appeal can be amended only with the permission of the Tribunal and that
10 amendments can be allowed subject to such terms as the Tribunal sees fit, and that
11 according to Rule 11(3) the Tribunal shall not grant permission to add a new ground
12 unless, and the relevant criterion today is that there are exceptional circumstances present.

13 There are two particular areas of contention as we understand it from the correspondence
14 which we have seen between the parties. The first is the consequences of the off-net/on-net
15 price differential operated by the 2G, 3G MNOs. Clearly, the consequences of that price
16 differential are in dispute, but the Tribunal does not envisage at present that either the fact
17 of differential pricing or the economic rationale for that pricing from the perspective of the
18 2G, 3G MNOs is either contentious or relevant and in this regard therefore we are not at
19 present convinced that the expert evidence, which H3G is seeking to adduce is useful, or
20 that any counter evidence to be adduced by the other parties would be either useful or
21 desirable.

22 The second point is in relation to the statutory test. H3G's proposed new section E focuses
23 more on the wording of section 88 than has the existing notice of appeal. We understand
24 that H3G argue that it was implicit in their existing notice of appeal that their arguments
25 could be characterised as a submission that Ofcom had failed properly to apply sections 47
26 and 88 of the 2003 Act. For example, one could say that the point about the welfare
27 economics, to which we understand Professor Littlechild's evidence goes, put another way
28 could be argued that Ofcom has miscalculated the economic benefit to be derived from
29 regulation contrary to, or as a misapplication of, s.88(1)(b)(iii).

30 Beyond that, however, we are at present unclear as to how the other arguments in the
31 existing notice of appeal fit into the framework of s.47 and s.88, or how the arguments in
32 the proposed section E of the proposed amended notice of appeal fit in with the challenge
33 to the statutory test because that statutory test involves quite a number of different steps,
34 only some of which it appears that H3G is arguing that Ofcom got wrong. It may be

1 helpful therefore at some point in their submissions if H3G were to take us through the
2 notice of appeal perhaps clarifying how it fits in with the statutory framework, or their
3 challenge to the statutory framework, and how the new proposed grounds fit in with the
4 notice of appeal as currently drafted.

5 That concludes my preliminary remarks, I will now therefore ask Miss Rose to address us
6 for H3G. I would just point out that I am going to leave my microphone on in order to help
7 those putting together the transcript, but you should also put your microphones on when
8 you are speaking.

9 MISS ROSE: Madam, I am very grateful for those indications. Can I just immediately respond
10 to a couple of points? As regards the proposed timetable, what you have suggested broadly
11 fits in with what we had envisaged as a workable way forward. One thought that occurred
12 to us was whether it might be sensible to reserve some time in the December hearing
13 specifically to deal with any disputes arising out of the scope of questions to be referred to
14 the Competition Commission? It seems to us that that might be an issue that could be
15 combined with the Orange preliminary issue – not because there is any connection between
16 them, but just simply because the timing fits with the proposal of making the reference
17 before the end of the year.

18 The second point is that you mentioned two areas of dispute on-net/off-net and sections 47
19 and 88; of course, there is also the point about discrimination, although that could, of
20 course, be regarded merely as a subset of s.47, but it has been treated by Ofcom in its
21 objection as a separate, free-standing objection.

22 Can I now come to the application for leave to amend? Madam, of course the starting
23 point is rule 11, which we have at p.363 of the handbook. I am sorry, I am told you may
24 have a different edition, but I have the 12th edition. The starting point, of course, is that
25 there is a distinction drawn in rule 11 between amendments which do not add a new ground
26 for contesting the decision and amendments which do. The restrictive approach in rule
27 11(3) applies only to amendments which add a new ground for contesting the decision.

28 The meaning of that formula was considered by the Competition Appeal Tribunal in the
29 *Floe Telecom* case. I do have a bundle of authorities, if we can just hand that up. We also
30 have a chronology, which is going to be more relevant to the question of timetabling, if we
31 can hand that up at the same time? [*Documents handed to the Tribunal*]

32 I am sure you are very familiar with the principles set out here but the relevant paragraphs
33 are 28 to 37 and 49 to 57. If we turn to para.28 which is on p.9 of the transcript the first
34 point that is made is that in the High Court and most Tribunals permission would be given

1 to make the amendment that was sought. There is set out at para.29 the general approach
2 that is taken under the CPR, and the principle that amendments in general ought to be
3 allowed so that the real dispute between the parties can be adjudicated upon provided that
4 any prejudice to the other party or parties caused by the amendment can be compensated
5 for in costs.

6 That is relevant because we submit that that is the principle that applies also in this
7 Tribunal when dealing with amendments that do not raise a new ground. So there is a
8 general discretion under rule 11(1) to allow amendments subject to such terms as the
9 Tribunal thinks fit, and we submit that it is appropriate for that general discretion to be
10 exercised in accordance with the normal principles of the common law.

11 The next point, which is explored by the Tribunal in the *Floe* case is that in fact the more
12 restrictive approach at rule 11(3) appears to be derived from the rules of procedure for the
13 Court of First Instance, and reflects a continental European approach to pleadings. There is
14 a fascinating explanation at para.32 of the difference between a legal argument and a new
15 ground “le moyen nouveau” set out there – a rather technical concept which is, of course,
16 alien generally speaking to common lawyers.

17 Then the point is made at para.33 that rule 11 is not intended to introduce the technicalities
18 of continental-type pleadings but the basic thrust of rule 11 is to limit the possibilities of
19 amendment after an appeal has been introduced. That forms part of the case management
20 system of the Tribunal which is, in general, based on the philosophy that an appellant is
21 expected to set out his arguments on appeal as fully as possible in writing at an early stage
22 in accordance with para.2.4 of the guide to appeals. That principle forms part of the
23 Tribunal’s emphasis on written procedure which itself is directed to assisting the Tribunal
24 in deciding often complex cases expeditiously and efficiently, and pointed out also that
25 most appeals come before the Tribunal following an administrative procedure in which
26 many points can already have been canvassed, and we respectfully would agree with the
27 analysis set out there of the policy that is pursued by rule 11(3).

28 Then if we go to para.37, after some extracts from the Guide to Appeals is set out, it said:

29 “It is important that this approach is in general adhered to as regards the notice of
30 appeal not least so that the respondent authority may properly plead in its defence
31 to the notice of appeal and that the Tribunal itself may, at an early stage begin to
32 read into the case the basic framework of which is set by the notice of appeal and
33 defence.”

1 Of course one of the points that we make is, in fact, of course in this case Ofcom has not
2 yet pleaded its defence to the notice of appeal.

3 There is then a section of this Judgment which need not trouble us about whether Floe
4 would have been entitled to make the argument in its notice of appeal in any event, but if
5 we come on to para.49 (p.16) when the Tribunal considers the effect of rule 11. At para.50
6 it said:

7 “While the Tribunal fully accepts the general need to maintain discipline in the
8 appeals before it, in our view that objective has to be balanced with the need to
9 deal with cases justly and in particular to take account of the fact that not all
10 appellants have access to specialised legal advice or extensive financial resources.
11 In our view the Tribunal’s Rules should, in general, be interpreted against that
12 background.”

13 Just pausing there, that of course refers to the particular circumstances of Floe Telecom
14 that it had gone in to administration and it did have problems of having access to legal
15 advice, but the general principle that is set out at para.50 is that the strictness in 11(3) is to
16 be balanced with the need to deal with cases justly. There may be other factors to be put
17 into the balance other than the factor that was specific to Floe Telecom, namely, the fact
18 that it was in administration and had difficulties getting access to legal advice. We submit
19 that that approach adopted by the CAT as an approach of construction to Rule 11(3) is
20 again, with respect, entirely correct and, in particular, is compatible with the obligations of
21 this Tribunal under Article 6 of the European Convention on Human Rights. Of course, as
22 you will be very familiar with, you are under an obligation under s.6 to act compatibly with
23 Convention rights (s.6 Human Rights Act). You are also under an obligation under s.3 of
24 the Human Rights Act to construe primary and secondary legislation compatibly with
25 Convention rights as far as it is possible to do so.

26 The restrictions in 11(3) restrict an appellant’s right of access to court, because they restrict
27 the arguments that may be developed by an appellant after a notice of appeal has been
28 lodged. There is nothing wrong in principle with having such restrictions. However, what
29 the Strasbourg case law tells us is that any such restriction must be both in pursuit of a
30 legitimate aim and proportionate to the achievement of that aim. We submit that the
31 approach, therefore, of balancing the 11(3) restriction against the need to deal with cases
32 justly is, in fact, essential to be applied by the CAT in all cases.

33 We then come on to para. 54 (p.18). They say:

1 “Moreover, as Ofcom submits, the Primary Argument raises a point that is
2 fundamental to the regulatory system and the United Kingdom’s implementation
3 of the Authorisation Directive. We would feel distinctly uncomfortable in giving
4 the words ‘new ground’ in rule 11(3) a meaning which would preclude the
5 Tribunal from deciding a point of law of that kind, the determination of which is
6 in our view necessarily implicit in the existing ground of appeal.”

7 We submit that that reasoning does not go to the question of the exercise of discretion, in
8 other words, whether there are exceptional circumstances. That goes to the prior question
9 of whether there is a new ground at all, because what the Tribunal is saying there is that it
10 is uncomfortable in construing new grounds as including a fundamental point of law, that is
11 fundamental to the regulatory system and necessarily implicit in the appeal.

12 We submit that that is of relevance when we come on to consider s.47 and 48 because we
13 do submit the lawfulness of Ofcom’s implementation of the price controls in these cases
14 necessarily raises the question of whether Ofcom properly applied its statutory duties under
15 the 2003 Act, and it is impossible to avoid an analysis of those sections and of whether or
16 not Ofcom properly applied its mind to them, and properly applied the duties imposed on
17 it under those sections.

18 THE CHAIRMAN: Do you say that those are then disjunctive, that it is not a new ground if it is
19 either a fundamental point about the regulatory system, or it is necessarily implicit, or
20 would you accept that however fundamental a point is it is still going to be a new ground
21 unless it was necessarily implicit in the existing notice of appeal?

22 MISS ROSE: Well, in my submission, it is not entirely clear from para.54 what the Tribunal was
23 saying there, but some pointers as to the right solution, for example, the point made by
24 Ofcom at the last hearing, that a point that goes to jurisdiction cannot be waived, so a
25 jurisdictional point has to be taken. We submit there is an analogy there, that any Tribunal
26 that is considering the question of whether Ofcom has lawfully imposed a price control is
27 inevitably going to have to grapple with the question: has it properly discharged its duties
28 under s.47 and 48? That is the starting point of consideration of that question. If, in fact,
29 Ofcom had failed to discharge those duties, its decision would be a legal nullity, it would
30 be *ultra vires* and we would submit that the Tribunal should feel great discomfort in a
31 situation in which an appeal was to be decided on that false basis.

32 Can I come back to the application of the principles to our case in a moment, because I just
33 want to finish dealing with the authority and then I am going to consider the particular
34 grounds.

1 At para.57 (p.19) the Tribunal set out the factors that it had taken into account in the *Floe*
2 case in determining that the circumstances in that case were exceptional and therefore that
3 the amendments should be allowed. Of course, those factors are specific to the *Floe* case.
4 I will be submitting that all but one of them, namely, the access to legal advice, apply in
5 our case, but I will also be submitting that there are some separate, distinct, and highly
6 exceptional factors that apply to this case that were not alive in the *Floe* case.
7 That is the *Floe* case, and it is clear from that case, and from rule 11 itself, that it is
8 necessary for the Tribunal to distinguish between amendments which raise a new ground,
9 and amendments which do not raise a new ground.

10 MR. SCOTT: Miss Rose, just before you leave the *Floe* case. If we go back to para.34 for a
11 moment, one of the things which is characteristic of this particular matter is that it has been
12 the subject of a lengthy administrative procedure.

13 MISS ROSE: Yes.

14 MR. SCOTT: A procedure in which the parties have had many opportunities of raising points
15 with Ofcom. I take it that you are not suggesting that there was any substantive difference
16 in the application of s.47 and s.88 in Ofcom's reasoning between their proposed decision
17 and their actual decision?

18 MISS ROSE: Sir, I am not able to answer that question without sitting down and going through
19 both, and comparing them at this point.

20 MR. SCOTT: You will understand that in terms of the consideration of any timing and the
21 balance to be struck in a case like this where there has been an extensive administrative
22 procedure, one of the things to which we may have to have regard is how far you – not
23 'you' personally, but 'you' corporately – had earlier opportunities of expressing a view.

24 MISS ROSE: And it is certainly the case that the substance of the points that we are making are
25 points that we have been making throughout the process. Indeed, if one looks at the
26 elements of s.88, and we can look at it in a moment, it enumerates a whole range of factors
27 which are points that we have been making to Ofcom for many, many months, for example
28 about the distortion of competition in the market as a result of imposing price controls.
29 That has been a continuous feed, and whether or not we were saying to Ofcom "We rely on
30 s..88" we were making the substance of the point that what they were seeking to do would
31 have a distortive effect on the market, and of course the necessary implication of that
32 submission is that it would be *ultra vires* for them to impose a price control.

33 MR. SCOTT: Thank you.

1 MISS ROSE: So I make the submission that it is therefore essential for the Tribunal to make a
2 decision as to whether the particular amendments that we are seeking to make raise a new
3 ground in the sense of a new fundamental basis for challenge, rather than a new argument,
4 or new evidence of information in support of a ground that was already existing, in which
5 case the general discretion to give leave to amend would apply.

6 There are two aspects of H3G's proposed amendments which Ofcom contends constitute
7 new grounds. I hope you have a hearing bundle for today, if you turn to tab 21 of that
8 bundle (A), we can see Ofcom's objection to our proposed amendment, and there are two
9 headings. One is headed "Proposed new grounds of appeal", and two: "Other proposed
10 amendments". As you can see there are two matters that are raised that are said to
11 constitute new grounds. At the bottom of the first page Ofcom says:

12 "The question whether an amendment does in fact constitute a 'new ground' is a
13 matter of substance not form .."

14 We respectfully agree:

15 "Ofcom considers that this should not be determined simply by the phraseology
16 adopted by the party applying to amend. It is clearly necessary to distinguish
17 between new arguments or information raised in support of an existing ground of
18 appeal and a new ground."

19 Again, we agree. They then identify in the following paragraph at p.2 of this letter, the two
20 matters that they say constitute new grounds. They are para.13.2.1 and s.16 of the
21 proposed amendments, and para. 13.2.4 and s.19, which are essentially sections 47 and 88,
22 and the discrimination argument.

23 THE CHAIRMAN: Is it correct, their assumption, that para.13.2 of section E is a summary of
24 the four later sets of arguments?

25 MISS ROSE: It is correct that 13.2 is the overall analysis that H3G is pursuing of the reasons
26 why it says that Ofcom has erred in law and in fact in imposing price control as a matter of
27 principle. So there is misapplication of the statutory tests, and then a failure properly to
28 assess the alleged costs and benefits, then errors in relation to the question of
29 proportionality and finally discrimination.

30 Now, there are different ways that those points can be put, for example, and I will be
31 developing this submission in a minute, that the discrimination point could be included
32 within the analysis of proportionality, it does not have to be hived out as a separate point –
33 the substance of it would apply because a discriminatory imposition of a price control is by
34 definition disproportionate. So whether you consider it as a new ground, or as a new

1 argument partly depends on a legal label that you attach to what are in essence the same
2 facts. Of course, all the facts that we now rely upon in relation to the discrimination
3 argument are facts that were relied on throughout and in our original notice of appeal in
4 relation to the question of proportionality and most obviously the argument that as a new
5 entrant into this market, with all the difficulties that we have encountered, with the
6 imbalance in the traffic on our network we submit that it is disproportionate and/or
7 discriminatory to treat us in the same way as the other mobile operators who are in a very
8 different situation and that has always been the substance of the argument that we have put
9 throughout the administrative process in fact. I will come back to that point as well in
10 more detail.

11 Before I leave Ofcom's objection you can also see that Ofcom's second objection, other
12 proposed amendments relate to the on-net/off-net pricing and that Ofcom is not suggesting
13 that the references we have made to on-net/off-net pricing constitute a new ground of
14 appeal. Ofcom, we submit, rightly accepts that is not a new ground of appeal, it is simply
15 new information and arguments which are being used by us to support our pre-existing
16 complaint that the traffic imbalance that we were suffering means that the imposition of
17 price control has a particularly severe and disproportionate impact upon H3G, which has
18 always been part of our appeal.

19 That brings me to sections 47 and 88, and it is just worth going back to the Act to remind
20 ourselves of what those sections say – we have them at tab 5 of the bundle. Section 47:

21 “OFCOM must not ...

22 (a) set a condition under section 45, or

23 (b) modify such a condition

24 unless they are satisfied that the condition or (as the case may be) the modification
25 satisfies the test in subsection (2).”

26 (2) The test is that the condition or modification is –

27 (a) objectively justifiable ...

28 (b) not such as to discriminate unduly ...

29 (c) proportionate to what the condition or modification is intended to
30 achieve; and

31 (d) in relation to what it is intended to achieve, transparent.

32 So this is no more than a statutory encoding of the basic principles of good regulation and,
33 in particular, those which are in play here, proportionality and non-discrimination.

34 Proportionality, of course, has always been the substance of our complaint. Indeed, the

1 whole of the hearing that we had on the preliminary issue concerned the question whether
2 the issue – was it proportionate to impose any price control at all on H3G – was a price
3 control matter that should go to the Competition Commission? Of course, it is necessarily
4 implicit in us asserting that it is disproportionate for Ofcom to impose price control upon
5 H3G that we are inserting that in doing so they are in breach of their duty under s.47.

6 You are looking perplexed, madam?

7 THE CHAIRMAN: No, it seems to me that to allege that they are in breach of s.47 could
8 encompass many different challenges to the decision. You could be arguing that it is
9 disproportionate, you could be arguing that it does not achieve transparency, but you are
10 not arguing all those aspects of s.47, you are arguing only some of them. To say simply
11 that it is a ground of appeal that they have failed to comply with s.47 does not seem to us to
12 be sufficiently focused to constitute a ground of appeal at all, it has to go on to say
13 “because what they said about this shows that they misapplied one of these subsections”.

14 MISS ROSE: Madam, I would respectfully agree if we had simply put in a document that said
15 “Ofcom is in breach of s.47 – full stop”, clearly that would not be sufficient for anybody to
16 know what our case was. But in fact, what we have done is the opposite. We have
17 originally put in a notice of appeal which sets out in great detail the arguments on which
18 we rely for saying that the imposition of a price control on H3G is disproportionate, but we
19 have not said specifically that that is a breach of s.47(2)(c). My submission is that the
20 argument that Ofcom have to make is that although our original notice of appeal sets out all
21 the arguments for why it is disproportionate to impose price control and does not say “and
22 this was a breach of s.47(2)(c)” that that precludes us from arguing that it is a breach of
23 s.47(2)(c) and that is the point, it is necessarily implicit in the substance of our arguments
24 that there is such a breach; that the complaint is not that we have made a bare legal plea
25 without any supporting arguments ----

26 THE CHAIRMAN: No, I understand.

27 MISS ROSE: -- it is the opposite.

28 THE CHAIRMAN: That is why I was not entirely satisfied that what Ofcom said in their letter
29 of 29th October in characterising your para.13.2.1 as referring to a ground that Ofcom had
30 failed to apply or properly to apply the test in s.47 and 88 of the 2003 Act was correct,
31 because I had read 13.2.1 as saying that they had done that because they had failed to
32 distinguish H3G from the other MNOs when deciding to impose a price control on H3G,
33 and that is the point that is being made in the subsequent paragraphs. The allegation is, I

1 understand it, that Ofcom looked at the industry as a whole and did not distinguish between
2 H3G and that is the point that is being summarised in 13.2.1 ----

3 MISS ROSE: Yes.

4 THE CHAIRMAN: -- as a particular instance of how allegedly they failed to apply the test,
5 rather than adducing as a ground the failure to apply the test in the abstract as it were.

6 MISS ROSE: Madam, I respectfully agree. We are not suggesting that there is a general
7 challenge, encompassing all the limbs of s.47 and all the limbs of s.48 which is contained
8 in 13.2. The basis on which we challenge the decision are set out in the following
9 paragraphs of the proposed amendment, and in particular, if you look at s.16, that is where
10 we have the heading "Ofcom failed to apply the statutory test to H3G", and that is the point
11 that you have just put to me. That, of course, is based on the distinction between the
12 situation of H3G and the other MNOs which has been the dominant theme of H3G's
13 submissions to Ofcom throughout the administrative process and in its original notice of
14 appeal. If our case was to be summarised in a sentence it would be this, that it is
15 disproportionate for Ofcom to treat a new entrant into a saturated market in the same way
16 as the four dominant established players, without considering separately the impact on the
17 new entrant.

18 MR. SCOTT: So what you are saying is the principle of treating unlike parties alike is the
19 principle upon which you are nailing this particular ----

20 MISS ROSE: That, of course, is the way we put our discrimination case, but it is also
21 fundamental to our proportionality case. I would not want to say that it is the whole of our
22 proportionality case, because you have seen that there are other elements in it as well, but it
23 is the dominant theme, and it has been the dominant theme throughout. If I can just show
24 you, for example, some of H3G's responses to the consultation papers. If you look at file
25 B ----

26 THE CHAIRMAN: Miss Rose, I do not want to take you out of the order in which you were
27 going to make your submissions.

28 MISS ROSE: No, it is only a short passage and I think it might help if I pick the point up while
29 everyone has it at the front of their minds. If you go to tab 29, this is H3G's response of
30 30th March 2006. Turning, for example, to p.3 of that document, under the heading
31 "Ofcom's approach to mobile call termination price controls is inappropriate":

32 "Even if a price control were the proportionate remedy in general, Ofcom's
33 analysis and current approach to setting a remedy is not proportionate, fails to
34 meet Ofcom's statutory duties..."

1 Now, you asked me the question, sir, whether we had raised that point. I do draw attention
2 to that, we made that general point.

3 “... and fails to meet Ofcom’s own objectives for setting a remedy in this market review.
4 Ofcom’s analysis in terms of the extent to which any price control should be technology
5 neutral and operator neutral is flawed.”

6 Then dealing with operator neutrality:

7 “Further, it is not correct to say ‘technology neutrality’ requires treating operators
8 in different circumstances the same as Ofcom does. Maintaining such a stance
9 would constitute an error of law and/or assessment. Doing so would also likely
10 violate Ofcom’s own cost recovery objective. Ofcom has not provided any
11 justification for so doing. In simple terms there is no neutrality in treating two
12 differently situated operators as if they were in the same circumstances when they
13 are not.”

14 There you can see the substance of what is now appearing as a discrimination argument,
15 this is from the executive summary, that point is elaborated in the body of that response to
16 consultation.

17 The same point was returned to again by H3G in its further response to consultation of 22nd
18 November 2006, which you have at tab 31. At p.29 of that document you can see the
19 heading: “Operator neutrality” and a number of arguments are developed under that
20 heading.

21 Now, if I can return to the question of sections 47 and 88, and if we go back to the statutory
22 material which we had at tab 5. We have looked at s.47 and seen that it is no more than a
23 codification of the general principles of good administration, including proportionality and
24 non-discrimination. If we then go to s.88, which of course we looked at in some detail
25 when we considered what was and was not a price control matter – that is at p. 81:

26 “Ofcom are not to set an SMP condition falling within section 87(9) ..” and that of course
27 includes a price control condition “.. except where:

28 “(a) it appears to them from the market analysis carried out for the purpose of
29 setting that condition that there is a relevant risk of adverse effects arising
30 from price distortion; and

31 (b) it also appears to them that the setting of the condition is appropriate for the
32 purposes of –

33 (i) promoting efficiency;

34 (ii) promoting sustainable competition; and

1 (iii) conferring the greatest possible benefits on the end-users of
2 public electronic communications services.”

3 Again, it has always been the argument of H3G that there is not evidence of a relevant risk
4 of adverse effects, and in particular there was no evidence that H3G was likely to set
5 excessive prices in the absence of a price control condition. That, of course, brings us right
6 back to the question that goes to the determination of SMP itself, namely, the effect of the
7 end to end connectivity obligation on BT, whether we would actually be able to require BT
8 to purchase our services at an excessive price, but also the factual question of whether
9 there was any risk of that.

10 Then “promoting sustainable competition” and “conferring the greatest possible benefits on
11 end-users”, again throughout it has been the submission of H3G and most certainly the
12 submission developed in the original notice of appeal that the setting of a price control
13 condition would distort competition in this market, particularly because of our position as a
14 new entrant to the market, traffic imbalance, the problem that we will face a very large
15 obligation to make net out payments to the other MNOs, that impeding our ability to
16 compete; also of course giving additional revenues to our competitors to compete more
17 aggressively with us, in turn having an adverse effect on the end-users of
18 telecommunication services, that has always been the argument that H3G have adopted,
19 and we submit that simply pinning it to its statutory foundation adds nothing to our case.
20 Then on what one might think is the “black letter” pleading point, whether in fact our
21 original notice of appeal was drawn widely enough to encompass sections 47 and 88? We
22 submit that it was, and if we turn up the original notice of appeal at tab 1 of this bundle,
23 and go to the appendix, where we dealt with what at that time we understood to be price
24 control matters to be referred to the Competition Commission, para. 1.1 of the appendix –
25 it rather helpfully has internal numbering in the rest of the notice of appeal, but it follows
26 after p.35. Paragraph 1.1 – this is right at the beginning of the appendix of what we then
27 considered to be the price control matters.

28 “Notwithstanding H3G’s view that Ofcom’s finding of SMP constitutes an error
29 of assessment and/or law for the reasons given in the notice of appeal, even if the
30 Tribunal considers that a finding of SMP is appropriate on H3G, the price controls
31 imposed by Ofcom on all the MNOs are flawed for the reasons set out below.
32 Ofcom has, *inter alia* failed to comply with the requirement under the Framework
33 Directive that it must carry out a principled economic assessment. The result is
34 higher than justified MCT rates for the 2G/3G MNOs. Further, there is an overall

1 theme of inappropriate assumptions by Ofcom which means that H3G is
2 disadvantaged compared to its MNO competitors ...”

3 There you see the fundamental argument about the disproportionate burden placed on H3G
4 having therefore impact on distortion of competition and so forth.

5 “... to the detriment of the competitive process at the retail level and investment
6 incentives. Overall, Ofcom has not taken due or proper account of its statutory
7 duties as to the effect of the price controls and has not furthered the interests of
8 consumers.”

9 Now, I accept that that paragraph does not expressly say “contrary to s.88 of the 2003 Act”,
10 but that is the principal statutory duty which Ofcom was obliged to take account of when
11 deciding whether to fix a price control on which we allege it has not taken account of, and
12 indeed, you can see that there is a reference there to the effect of the price controls and not
13 furthering the interests of consumers which, as the Tribunal knows, are two of the issues
14 specifically required to be considered by Ofcom under s.88. So we do submit that it is not
15 correct, contrary to what T-Mobile have submitted in their written submission, that our
16 original notice of appeal was limited to sections 3 and 4 of the 2003 Act. There was a
17 general plea specifically in relation to the price control matters of a failure by Ofcom
18 properly to apply its statutory duties when considering whether to fix the price control. So
19 we do say that that is not a new ground.

20 So far as discrimination is concerned, you have the points that I have made that
21 discrimination is not a ground that can be detached from the concept of proportionality,
22 particularly on the facts of this case. They are two sides of the same coin. One of the main
23 reasons why the price control is disproportionate is because it is discriminatory. We see
24 that kind of analysis – we have included in our bundle of authorities an interesting decision
25 of the European Court of Human Rights where you can see precisely that kind of analysis
26 of discriminatory conduct as disproportionate conduct. This is the case of *Asmonson v*
27 *Iceland*, which is at tab 4 of the authorities bundle. This is a case in which the applicant
28 had a right to a disability pension but there were changes in the legislation and, as a result
29 of those changes, his disability was re-assessed at a level which, under the new legislation
30 meant that he was wholly deprived of the disability pension that he had previously been
31 entitled to. He argued firstly that this was a disproportionate interference with his right to
32 peaceful enjoyment of his possessions under Article 1 of the First Protocol; and secondly,
33 that it was discriminatory, contrary to Article 14 of the Convention, read together with
34 Article 1 of the First Protocol.

1 We can see the analysis that the court adopted, it starts at para.39, p.11. First of all, there is
2 a general review by the court of the principles that apply under Article 1 of the First
3 Protocol, namely, that you have a right to the peaceful enjoyment of your property, that
4 there were three aspects to that and, in general, if the State is going to deprive you of your
5 property or control the use of your property it must show that it is doing so in pursuit of a
6 legitimate aim, and that the means that are adopted are proportionate for that aim with, of
7 course, a wide margin of appreciation afforded to the State, particularly in spheres such as
8 social security law. So that is the general legal framework within which the court was
9 operating.

10 We then come to paragraph 43 which says:

11 “However, the court is struck by the fact that the applicant belonged to a small
12 group of 54 disability pensioners, whose pensions, unlike those of any other
13 group, were discontinued altogether on 1st July 1997. The above-mentioned
14 legitimate concerns about the need to resolve the funds’ financial difficulties seem
15 hard to reconcile with the fact that after 1st July 1997 the vast majority of the
16 disability pensioners continued to receive disability benefits at the same level as
17 before the adoption of the new rules, whereas only a small minority of disability
18 pensioners had to bear the most drastic measure of all, namely, the total loss of
19 their pension entitlement. In the court’s view, although changes made to pension
20 entitlements may legitimately take into account the pension holder’s needs, the
21 above differential treatment in itself suggests that the impugned measure was
22 unjustified for the purposes of Article 14 of the Convention”

23 That is the provision that prohibits discrimination:

24 “... which consideration must carry great weight in the assessment of the
25 proportionality issue under Article 1 of Protocol 1. In other words, if the measure
26 is discriminatory, that carries great weight in considering whether it is a violation
27 of the substantive right to the enjoyment of property, discriminatory treatment is
28 very likely to be disproportionate treatment.”

29 They then say:

30 “The discriminatory character of the interference was compounded by the fact that
31 it affected the applicant in a particularly concrete and harsh manner, it totally
32 deprived him of the pension he had been receiving on a regular basis for 20
33 years.”

34 Then over the page at 45:

1 “Against this background the court finds that, as an individual, the applicant was
2 made to bear an excessive and disproportionate burden which, even having regard
3 to the wide margin of appreciation to be enjoyed by the State in the area of social
4 legislation it cannot be justified by the legitimate community interest relied on by
5 the authorities. It would have been otherwise had the applicant been obliged to
6 endure a reasonable and commensurate reduction rather than a total deprivation of
7 his entitlements.”

8 Then there is the finding of a violation of Article 1. The court then comes on, separately,
9 to consider Article 14 – there is a separate heading “discrimination”. But then, what the
10 court says, looking at para. 47:

11 “The court, having already taken those arguments into account in its examination
12 of the complaint under Article 1 of Protocol, finds no separate issue arises under
13 Article 14.”

14 MR. SCOTT: Miss Rose, just a point that relates to this case and to the plea that you are now
15 making on discrimination, and I confess that I do not immediately know where it comes in
16 your original notice, one of the things that you are saying is that the original MNOs, of
17 whom Hutchison as an undertaking was one, under the old framework got eight years of
18 uncontrolled pricing, whereas H3G have had only four. What we see here, as in the
19 *Icelandic* case, is a change in the framework, that Hutchison as an undertaking got the
20 advantage of the old framework for part of that period, and now Hutchison 3G are not
21 getting the advantage under the new framework.

22 Is part of what you are arguing here that this case causes us to look at the whole period
23 regardless of the fact that the SMP framework only came in part the way through the life of
24 the MNOs and, if so, where does that come in your original notice of appeal?

25 MISS ROSE: With respect, I do not think that is the burden of our discrimination argument.

26 Can I just show you the proposed amendment dealing with discrimination, at p.24 of tab
27 16. The substance of the argument is at para.19.3 where we say:

28 “For the reasons set out above, the characteristics of H3G relevant to assessing the
29 appropriateness of any price control were and are very different to the relevant
30 characteristics of other MNOs. By virtue of H3G’s late entry, its much smaller
31 market share ... the difficulties H3G faces as a result of the inadequate mobile
32 number portability process, substantial traffic imbalance, which favours the other
33 MNOs, and the ongoing on-net/off-net pricing strategy of the other MNOs, the

1 analysis justifying a price control for the other MNOs cannot be applied
2 automatically to H3G.”

3 In other words, it is precisely the same factors that we rely on in relation to proportionality
4 that we rely on in relation to discrimination. It is simply a different legal label.

5 THE CHAIRMAN: Well, it says: “For the reasons set out above ...” but then it goes on to give a
6 list of factors. Now, what we are concerned about is that “for the reasons set out above”
7 could refer to the whole of the preceding sections of both this amending proposed section
8 and the existing section, in early sections of which there is, by way of factual background,
9 matters pleaded such as, as Mr. Scott has said, this difference between eight years of no
10 regulation and being regulated four years earlier which, at the moment appear to be, as I
11 say, factual background, but it is not now clear whether those are now being relied on in
12 some way as a ground of appeal, as being part of the reasons set out above , or whether the
13 discrimination case is limited actually to the reasons set out below, i.e. in the following
14 sentences in this paragraph, and that is our concern, that by allowing amendments we do
15 not want to open up the case so that parts of the general pleading, which have not hitherto
16 been thought to contain substantive allegations, or points that need to be met, are now
17 going to be relied on, and you would say: “Oh well, but we said ‘for reasons set out above’
18 and that is set out above, so that is now a new ground of our appeal.”

19 MISS ROSE: Madam, I see the problem. Of course, this inevitably happens when you draft
20 different sections of documents at different times. This is referring to the new section E.
21 So the reasons set out above are the reasons that are set out in detail in the amended section
22 E that you have, and which I hope are summarised in the following sentence. That is the
23 reason why I make the submission that the discrimination point is just a different legal
24 label, attached to the same substantive argument that has always been the basic argument
25 for saying that the imposition of price control on H3G is disproportionate, relating to the
26 particular characteristics of H3G in this market, which of course has different impacts.
27 First, it means that it is unfair and discriminatory to treat us the same way as the other
28 MNOs. Secondly, it means that treating us the same way as the other MNOs is likely to
29 impede our ability to compete which will itself distort competition in the market and have
30 an adverse effect on the consumer.
31 So there are different ways that our different circumstances feed into the legal argument.
32 One is the adverse and unfair effects on us, but the other is the adverse effects on
33 competition and the end users.

1 THE CHAIRMAN: So this is effectively the same point as your first point about sections 47 and
2 88, in which you are saying we put in this mass of information and argument, and we are
3 now saying that that is actually an allegation that Ofcom was in breach of s.47 and s.88 in
4 those respects and also that they discriminated against us.

5 MISS ROSE: What we have tried to do – I am sorry if we have not succeeded – but what we
6 have tried to do in the amendment is to clarify and to refine the issues that were originally
7 in the appendix, and in particular there was a mass of factual material in the appendix
8 which we have now sought to marshal into clearer legal avenues by reference both to the
9 statutory provisions and to general principles such as proportionality and discrimination. It
10 is an attempt to clear a legal analysis of the arguments that were already being put in the
11 original notice of appeal. That is why we submit there are no new grounds.

12 THE CHAIRMAN: What do you say is the point that you draw from the *Asmonson* case?

13 MISS ROSE: The point that we draw from the *Asmonson* case, is that in that case there were two
14 separate legal complaints being made. One was a complaint of a disproportionate
15 interference with the right to property. The other was a separate complaint of
16 discrimination in relation to the enjoyment of the right to property. What the European
17 Court of Human Rights did was to analyse the discrimination as part of the first question
18 and to say “Because of the discriminatory treatment of this particular applicant, the
19 treatment must be regarded as disproportionate.” Then to say, having reached that
20 conclusion we do not need to conduct any separate analysis of the free-standing complaint
21 of discrimination, because we have already fed that analysis in in relation to proportionality
22 in relation to the interference with the property right. So we make the point that you
23 cannot really separate out discrimination from proportionality because unjustified
24 discriminatory treatment will be disproportionate by definition. It is certainly not being
25 suggested by Ofcom that we are not entitled to rely on all this material and these arguments
26 in support of our contention that it was disproportionate to impose price control and we say
27 that being so this is an empty objection. So that is the first point that I have to deal with
28 which is whether our s.47 and s.88 or discrimination are actually new grounds and we
29 submit that they are not.

30 If they are not new grounds, and if you are with me on that then you have a general
31 discretion as to whether to allow leave to amend, and we submit that there is no argument
32 that has been put forward by Ofcom to suggest that you should not give leave to amend.
33 The position is that Ofcom has not yet pleaded its defence, there is no prejudice to Ofcom
34 in allowing the amendments. On the other hand, there is plainly significant prejudice to us

1 if we are not able to put forward the legal arguments that support our case fully, and if the
2 real dispute cannot be adjudicated on.

3 MR. ROTH: Madam, if it helps and shortens matters, as Miss Rose has surmised, if it is not a
4 new ground then of course it comes under your general discretion and rule 11.1, and
5 Ofcom does not seek then to dissuade you from allowing the amendment, and that may
6 assist my friend.

7 THE CHAIRMAN: Thank you, Mr. Roth.

8 MISS ROSE: I am very grateful for that indication.

9 MR. ROTH: It is subject to one – the reference to on-net/off-net in 19.3, but I think that is
10 appreciated.

11 MISS ROSE: I am only dealing with the alleged new grounds at the moment. So that then
12 brings me to the second question which applies, which is if you disagree with my principal
13 submission that the s.47 and s.88 point and/or the discrimination point are not new
14 grounds. So if you form the view that they are new grounds I must then persuade you
15 nevertheless to grant leave to amend under Rule 11.3 on the basis that exceptional
16 circumstances apply.

17 THE CHAIRMAN: But what is the ground under s.47 and s.88?

18 MISS ROSE: The ground is that Ofcom failed properly to apply its statutory duties under s.47
19 and s.88 when imposing the price control on H3G, because it did not consider the
20 circumstances of H3G or analyse the impact on the market and on H3G of imposing those
21 price controls, that is the broad outline, as developed at s.16 of the amended notice of
22 appeal. If it is a new ground and if the discrimination point is a new ground we say the
23 circumstances are exceptional.

24 As this Tribunal knows, and as indeed I believe you have observed in the past, madam, this
25 is the first appeal to raise the process under s.193 of the 2003 Act, whereby price control
26 matters are to be referred to the Competition Commission. The question of precisely which
27 matters were price control matters to be referred and which were not to be determined by
28 this Tribunal was far from clear with respect, both from the primary and from the
29 secondary legislation. You heard extensive submissions on the question and reached a
30 conclusion. Now, ultimately that conclusion was not in accordance with the argument that
31 H3G put forward but I submit that the construction that H3G have adopted as to what were
32 relevant price control matters was an entirely reasonable one to adopt at the time it
33 submitted its notice of appeal, given the lack of any authority on the question and the
34 ambiguity in the statutory material. In that situation, when it was unclear what the scope

1 was, the approach that we adopted was fully to plead the SMP issues in the first part of our
2 appeal, and then to attach an appendix of matters to go to the Competition Commission set
3 out in outline.

4 That we submit, again, was entirely consistent with the approach that you canvassed at the
5 case management conference in July of this year where the proposal was that Ofcom
6 should fully plead its defence to the SMP non-price control matters, but set out its defence
7 in outline to the price control matters. The reason for that is that the Competition
8 Commission's processes are not adversarial processes which depend on the formulation by
9 parties of the precise legal and factual basis of their case, which is then adjudicated upon
10 by a Tribunal. The process of the Competition Commission is investigatory and permits
11 the Competition Commission to ask questions of parties and to consider what issues it
12 thinks are relevant for its determination.

13 In these particular circumstances, of course, had the Tribunal ruled in our favour, that these
14 were price control matters, there would have been no question about whether these
15 amendments could or could not have been allowed, because the whole matter would have
16 gone to the Competition Commission which would then itself have decided which issues it
17 wished to determine, and which were necessary for it to conduct its investigation.

18 In these particular circumstances, which we submit are exceptional, in the clearest possible
19 terms, both because this has never arisen before – it is the first time it has ever arisen – and
20 also because it is very unusual for a Tribunal to be faced with the situation where some of
21 the issues will be determined by itself in an adversarial process, others by another body in
22 an investigative process. We submit that it would be plainly contrary to the interests of
23 justice to prevent us from making the amendments.

24 It cannot be, we submit, right or just for the effect of your Ruling on the preliminary issue a
25 as to which body was going to hear our appeal to shut out the substance of arguments that
26 we wish to make. Indeed, at the last hearing, madam, you will recall that the submission
27 was made by many people that the CAT was just as well placed as the Competition
28 Commission to deal with the kinds of complicated economic and technical points that were
29 likely to arise in relation to the question of proportionality and that there would be no
30 disadvantage in the CAT dealing with it. Now in those circumstances we submit it would
31 plainly be unjust now for these parties to rely on the decision you have made on the
32 procedural point – which body is going to hear it – to seek to shut us out from making
33 substantive arguments which we could have made if the matter was referred to the
34 Competition Commission. That is the first point, and we do say that that fundamental point

1 in itself is sufficient to render these circumstances exceptional, and to make it appropriate
2 for leave to amend to be given.

3 MR. SCOTT: If I heard you correctly, what you said was: “It cannot be just to shut out the
4 substance of arguments”.

5 MISS ROSE: Yes, this is on the footing that they are new grounds which I do not accept.

6 MR. SCOTT: No, I understand that, but that is really the point, that there is a difference between
7 a substance of arguments and a new ground, and so there is a sense in which the premise
8 upon which you are proceeding when you then refer to the substance of arguments proves
9 to be a slight ----

10 MISS ROSE: I accept the terminological inexactitude, but it does not affect, with respect, the
11 substance of my argument. The point being that if this matter had been referred to the
12 Competition Commission as a price control matter we would not have been impeded from
13 raising these points.

14 THE CHAIRMAN: I think what is said against you is: “Well, yes, but you were obliged to say at
15 least in outline in your pleading all the points that you raised in the appeal”, and in fact, as
16 we know, there are going to be pleadings relating to the price control matters insofar as
17 necessary to enable the Tribunal to draft the questions. Now, you drew our attention earlier
18 to part of para.1 of the appendix, is that the part of the pleading on which you hang now the
19 new section E in terms of what there was in the original pleading to point up the points that
20 you would have made at a subsequent stage, or are there other parts of the original notice
21 of appeal which you say presaged what you are now proposing?

22 MISS ROSE: Madam, we certainly do say that there were other parts of the notice of appeal that
23 presaged what we are now proposing. If we can go back to appendix 1, and look at it in
24 detail, if that is what you would like to do? Paragraph 3.1 there is the general plea that
25 “Ofcom has erred as a matter of law and/or assessment in setting the price controls”, and
26 that the tax generally, and in particular relative tax set for the combined 2G/3G MNOs
27 compared to H3G are disproportionate and/or inappropriate.”

28 THE CHAIRMAN: I meant just on the point which it has now been decided is a non-price
29 control matter, not on the more general pleadings in relation to what the price control
30 should be, what is generally accepted to be price control matters.

31 MISS ROSE: But madam, there is a general point there that it is disproportionate to impose a
32 TAC on H3G. Then at 3.2:

33 “... the effects of the price controls must be considered. H3G submits that the
34 overall effect is, at present, to tilt an already tilted playing field further against the

1 recent entrant and to dampen competition on an ongoing basis at the retail level.
2 An 'effects' based analysis against the regulatory background as referred to in
3 section 1 ... indicates that, as a whole, the price control remedies are
4 disproportionate/inappropriate.”

5 So again we rely on that.

6 We then have the section that says “The financial impact on H3G is significant”, and this
7 is really the disproportionate effect of price control on H3G arising out of the difference
8 between its circumstances and those of the other MNOs. We see there that ----

9 THE CHAIRMAN: Are we right to focus on the appendix in this instance?

10 MISS ROSE: Yes.

11 THE CHAIRMAN: You are not relying on anything in the main body of the notice of appeal?

12 MISS ROSE: No, madam, I am relying on the appendix which of course was the source of the
13 original plea on these points. So then we see the point that the effect of this is that we have
14 to make significant net payments to the other MNOs.

15 Then at 3.5 the traffic imbalance point. Then arguments about the reasons for the traffic
16 imbalance. Then the heading: “Consequential adverse effect on competition given H3G is
17 the ‘maverick’ competitor.”

18 “3.8 The wider effect of the above is significant and will be detrimental to the
19 level of competition in the UK mobile sector given H3G’s role as the maverick
20 competitor.”

21 Again identifying the difference between H3G and the other MNOs, and here the adverse
22 effects on competition rather than the adverse effects on H3G. So first we have the adverse
23 effects on H3G and then we have the adverse effects on competition.

24 Then we have summaries of the positive of H3G’s entry into the market on competition
25 and how that will be impeded by the imposition of price control on H3G.

26 THE CHAIRMAN: So in the original notice of appeal the grounds on which you were relying to
27 argue that price control of itself was a disproportionate remedy were as set out in para.1.1
28 and then in general in section 3.

29 MISS ROSE: Yes, we have the welfare analysis point.

30 THE CHAIRMAN: Right. And in 4 onwards, or just in section 3?

31 MISS ROSE: Section 4 is really dealing with the level of the price control.

32 THE CHAIRMAN: So the existing pleading in relation to this issue about the proportionality of
33 price control is in that introduction and then in section 3. Now, then if you are successful

1 in your application we are going to add on to the end of this appendix a new section 13, or
2 further paragraphs – 13 onwards.

3 MISS ROSE: This goes into the notice of appeal rather than the appendix. It has come out of the
4 appendix.

5 THE CHAIRMAN: But you have not, in your proposed amendments, crossed through the whole
6 of three, you have only I think crossed through 3, 16 and 17?

7 MISS ROSE: Yes, madam, because we are no longer pursuing those arguments, but all the other
8 arguments that were originally in s.3 of the appendix are now contained in substance in the
9 amendment.

10 THE CHAIRMAN: But they remain in the appendix because they are still relevant to the price
11 control matters?

12 MISS ROSE: Yes, this is the overlapping issues problem, but the Competition Commission will
13 have to grapple with the question whether the particular price controls were
14 disproportionate, and the differences between H3G and the other MNOs will also be
15 relevant to that issue.

16 THE CHAIRMAN: So the question to which we have to address ourselves is how much of what
17 is in the proposed new section to add on to the body of the grounds of appeal was
18 previously contained in s.3 of the annex?

19 MISS ROSE: Except that there is no opposition – apart from the on-net/off-net point there is no
20 opposition by Ofcom to any other amendment under 11.1, so in fact, with the exception of
21 the on-net/off-net point, the only question you have to consider is whether any other part of
22 the amendment raises a new ground in the sense reflected in *Floe*.

23 THE CHAIRMAN: Right, but in addressing that question does it raise a new ground? What we
24 are comparing is the proposed new section to go on to the body of appeal with the old
25 section 3 of the annex?

26 MISS ROSE: Yes. And you are assisted in that by Ofcom's analysis arguing that there are two
27 new grounds, the s.47 and s.88 point, and the discrimination point.

28 THE CHAIRMAN: Yes.

29 MISS ROSE: If you were minded to conclude that there were any other new grounds we would
30 want an opportunity to address you on that for obvious reasons.

31 THE CHAIRMAN: Yes, sorry. Do go on.

32 MISS ROSE: I was on the question of exceptional circumstances, and I had made the point that
33 the ruling that you made at the hearing of the preliminary issue had the effect that these
34 issues were going to be determined by this Tribunal, rather than the Competition

1 Commission. If they had been referred to the Competition Commission as we had
2 originally envisaged, the strict pleading rules would not have applied and we submit that is
3 an exceptional circumstance which could render it unfair and contrary to the interests of
4 justice to shut us out from making those arguments, because it would mean the effect of a
5 decision on the preliminary issue would be to shut us down.

6 The second point, which is related to that is the overlapping issues point, which again we
7 say is an exceptional circumstance, but because this is a s.193 appeal, and because of the
8 particular facts of this case, the substance of these points will have to be considered in any
9 event by the Competition Commission. Take, for example, the discrimination argument.
10 When the Competition Commission is considering whether the levels of price control set
11 for H3G and for the other MNOs are appropriate or proportionate it will also want to
12 consider whether they unduly discriminate, and that will involve consideration of precisely
13 the questions of the differences between our circumstances and the other MNOs that we
14 seek to rely on before you.

15 Of course, one of the points that this Tribunal was very alive to at the last hearing was the
16 undesirability of an inconsistent approach being taken by this Tribunal and by the
17 Competition Commission and we submit that it is also an exceptional circumstance that
18 applies to this case that you ought to allow amendments in order to prevent or lessen the
19 risk of an inconsistent approach being taken by this Tribunal and the Competition
20 Commission, and it would be highly undesirable in terms of good administration for this
21 Tribunal to shut out from its consideration matters which will inevitably be relevant and
22 which will be considered by the Competition Commission.

23 Again, we say that second circumstance is also sufficient on its own to constitute
24 exceptional circumstances requiring the allowing of the amendments.

25 The next general point that we make relates to the factors identified by the CAT in *Floe* at
26 para. 57 (tab 1 authorities' bundle, p.19). You already have my point, of course, the
27 circumstances enumerated here were those that applied in the *Floe* case. Of course, the
28 two crucial circumstances that I have already identified to you, neither of them apply in the
29 *Floe* case, but they do apply in this case.

30 A number of the other circumstances identified here in the *Floe* case do apply also in our
31 case. First, it is implicit in the case, as already pleaded that a Tribunal will have to address
32 the true meaning and scope of s.1 in any event. Again, we submit that "...it is implicit in
33 the case as already pleaded that the Tribunal will have to address the true meaning of s.88

1 in any event". So far as s.47 is concerned, it really does not add anything of substance to
2 the substantive complaints of disproportionality and discrimination.

3 Secondly,

4 "if the Tribunal were to deal with the First alternative argument while shutting its
5 eyes to the Primary Argument, having refused permission to amend, there would
6 be a real risk of the case being decided on a false basis, if the primary Argument
7 later turned out to be well-founded: that would be an affront to justice and waste
8 costs ..."

9 We say *a fortiori* in a situation such as this where issues are going to go to the Competition
10 Commission. Thirdly:

11 " the Primary Argument will have to be decided at some stage, as it is bound to be
12 raised in a further complaint to Ofcom if the Tribunal does not decide it now."

13 Again, we say *a fortiori* given the role of the Competition Commission.

14 "... it is in the public interest that a point as apparently fundamental as this is
15 decided at the earliest possible moment".

16 We agree, particularly with reference to the failure of Ofcom to apply s. 88 to the
17 circumstances of H3G.

18 "... the point does not appear to involve a fresh investigation or disputed facts."

19 Again, we say that is correct in this case also that the facts have already been pleaded on
20 these points, they have simply been reorganised in legal terms.

21 There is then the point about Floe being in administration, which of course does not apply
22 here.

23 Then: "... the point has been raised at an early stage in the appeal, prior to the defence",
24 does apply here. "Ofcom has not relied on a submission that the Primary Argument is
25 frivolous or has no reasonable prospects of success", again applies here.

26 So we say that everything that applied in *Floe* (apart from the point about it being in
27 administration) applies here, but in addition we have the two very powerful arguments that
28 I have made to you about the implications of the price control matters and s.193.

29 So madam, that is essentially why we submit, even if we are wrong about those two issues
30 being new grounds, that permission to amend should be granted under rule 11(3).

31 That brings me to the on-net/off-net pricing point.

32 THE CHAIRMAN: Well I think that might be a convenient moment, Miss Rose, for us to
33 adjourn. We will reconvene at 2 o'clock. Thank you.

34 (Adjourned for a short time)

1 THE CHAIRMAN: Yes, Miss Rose?

2 MISS ROSE: Madam, Ofcom usefully clarified just before the short adjournment that, subject to
3 the rule 11(3) point they do not have any objection to the amendments relating to s.47 and
4 s.88 and to discrimination, and we submit that that in itself is significant, because as you
5 have seen Ofcom are taking an objection to the on-net/off-net point, which is not a new
6 ground, on the grounds that it will mean new work and investigation for Ofcom. Madam,
7 you can therefore infer from that, that Ofcom are not disputing that the issues relating to
8 s.47 and s.88 and discrimination are not significantly new factual points, will not result in
9 any significant investigation or work being needed by Ofcom, they are simply crisper and,
10 we would submit, more helpful legal formulations of the substance of the arguments that
11 have always been put. There is no reason why they should have any impact in particular
12 upon the time estimate for the hearing of these issues, it is simply an indication of the way
13 in which we intend to put our case legally.

14 That, of course, goes back to the question of what would be the effect if we were not
15 allowed to make those amendments? How would we be arguing our appeal? Because we
16 would still be arguing the substance of the points, but how could we put forward our appeal
17 properly without referencing to s.47 and s.88? It would be in a strange legal vacuum, and I
18 submit wholly unsatisfactory from our perspective, and also from the perspective of the
19 Tribunal, because fundamental to the Tribunal's consideration of the legality of its decision
20 is whether or not Ofcom has properly fulfilled its statutory duties. The starting point has
21 always got to be: "This is a statutory body, these are its statutory duties, this is what it did,
22 did it fulfil them properly?"

23 So to say we cannot amend to link in the substance of our complaints to the statutory duties
24 we submit must be misconceived.

25 Similarly, of course, with the discrimination point, we will still be making the same points
26 and couching them as proportionality points, but if in fact the better legal analysis – we say
27 it probably does not make any difference, but if it does make any difference, and they are
28 better characterised as discrimination points, who benefits from the Tribunal being
29 precluded from considering that matter? We say it is simply adverse to the interest of
30 justice.

31 That brings me to the question of the on-net/off-net issue. If we go back to Ofcom's
32 objections at tab 21. This is under the heading: "Other proposed amendments", so here
33 Ofcom are not suggesting that this is a regulation 11(3) point. You will note that at the
34 beginning of this paragraph it said:

1 “Subject only to the question of the resulting costs, Ofcom would not wish to
2 oppose amendments which do not give rise to prejudice or require significant
3 further factual investigation.”

4 And you have the point that I make, that you can therefore infer from the lack of opposition
5 to the other amendments, save for the 11(3) point, that Ofcom does not consider that they
6 are points that “... give rise to prejudice or require significant further factual
7 investigation.” Instead, what we have here is an objection being taken to our amendment
8 in relation to on-net/off-net, which is accepted by Ofcom, is simply a supplemental
9 argument supported by further evidence, going to support one of the existing grounds of
10 appeal; the existing ground of appeal being the failure by Ofcom properly to evaluate the
11 costs and benefits and the effects of the imposition of price control on H3G.

12 Indeed, not only does this go to one of the existing grounds, but it is actually an
13 amplification of one of the existing arguments relied on in support of that ground, because
14 in the original notice of appeal the argument that was made was that there is a particularly
15 severe effect, both on H3G and on competition, because of the imbalance in traffic on
16 H3G’s network, that customers of H3G make a lot more calls than they receive. The effect
17 of this is that H3G, as a result of these price controls, will be paying out far more money to
18 the MNOs than it receives. What H3G has done is to try to analyse the reasons for the
19 traffic imbalance, and the reason that was identified in the original notice of appeal was the
20 difficulty of porting a number, that it takes several days to take your existing Vodafone or
21 Orange number to a new H3G contract and, as a result of that, people signing up with a
22 new network may tend to buy a second phone with a second number and use it to make
23 outgoing calls, using their own phone to receive incoming calls.

24 The other point that we make is the differential in on-net/off-net pricing, and the point here
25 is that the major networks are able to give advantageous deals to their customers when they
26 are phoning other people on their own networks, but it is more expensive for them to phone
27 people outside their own network.

28 The difficulty for a new entrant with a new market share to compete effectively with that
29 strategy leads to the adverse effects that are set out particularly in the second witness
30 statement of Kevin Russell.

31 MR. SCOTT: I suppose the question in my mind is how far this on-net/off-net point is going to
32 be taken. My recollection is that BT had an on-net/off-net point that at the moment as the
33 market stands, there is a profound differential on some networks – not on all networks –
34 between on-net/off-net and the way this market has been defined differentiates the mobile

1 termination of calls that are off-net from calls that are on-net. In other words, as I
2 understand it, as we have been told before where BT is regulated, BT is expected to charge
3 itself the same wholesale termination rate that it is charging to other operators. Whereas,
4 mobile operators are not subject to that discipline, and therefore their retail on-net calls can
5 be priced at a much, much lower level than other calls.

6 MISS ROSE: Yes.

7 MR. SCOTT: I suppose the question that arises from that is just how far would you be wanting
8 to take the on-net/off-net point and in due course for BT does that have an impact on the
9 way they will want to address the matter?

10 MISS ROSE: The best way of answering that is probably by referring you to the amended notice
11 of appeal where you can see how we put it. Just looking at the way it is put you can see
12 that this is part of the argument relating to traffic imbalance, it is at p.13, tab 16, where we
13 make the basic point at para.17.18 that we originate more mobile traffic than we terminate.
14 The imbalance has been a persistent feature of the traffic flows in the UK. So the first
15 point is simply the fact of the existence of traffic imbalance.

16 THE CHAIRMAN: Perhaps this is a good time to say, subparagraph (a) "Traffic imbalance".

17 MISS ROSE: Yes.

18 THE CHAIRMAN: And then there is subparagraph (a) on-net/off-net pricing, and (b) MNP.

19 MISS ROSE: Yes, I agree this could be clearer.

20 THE CHAIRMAN: Is there a (b) to which traffic imbalance is the (a)?

21 MISS ROSE: Yes, I think it is "welfare analysis". This is somewhat unfortunate and it might be
22 better if the on-net/off-net and MNP were (i) and (ii). Perhaps no one will oppose that
23 amendment, but I dare say T-Mobile will think of a reason. (Laughter) Then (b) can be
24 welfare analysis.

25 THE CHAIRMAN: (b) is welfare analysis, right. These all tie in to the arguments on 88(1)(b),
26 is that right, which is your underlined italics heading just above 17.

27 MISS ROSE: Yes, "Promoting efficiency", "promoting sustainable competition but conferring
28 the greatest possible benefits on end users." You already have my point that that of course
29 has always been the substance of our argument, that the imposition distorts competition
30 and is not beneficial to end users.

31 So traffic imbalance at 17.18. Then at 17.19 there is the point that the result of the traffic
32 imbalance is the price control imposed by Ofcom and H3G reduces our revenue very
33 significantly.

1 Then there is a reference to the first witness statement. Then at 17.21 we refer to a
2 statement by OfTel to the effect that traffic imbalances are likely in relation to new entrants
3 in the market. Then we say:

4 “It is clear that this envisaged the circumstances and market structure which now
5 exists and its impact on H3G. There are a number of factors that combine to
6 produce this effect.”

7 Then we have on-net/off-net pricing, and we explain why we are vulnerable to that as a
8 new entrant with a small subscriber base, and at 17.24:

9 “These large price differentials, which reduce customers’ incentives to call other
10 mobile subscribers on other networks (by increasing the cost of so doing), do not
11 appear to be justified ...”

12 And also at 17.25 “... make switching to other networks unattractive for consumers. This
13 particularly disadvantages a smaller network ...”

14 Then at 17.26 down to 17.28, we explain that our

15 “... commercial position will continue to be threatened while the 2G/3G MNOs
16 carry out this strategy of differentiated retail prices given the high wholesale MCT
17 rates. In the absence of a price control on H3G, and subject to the bargaining
18 power of BT and other counterparties, a flexibility regarding setting MCT rates at
19 least offers some scope for mitigation against the effects of the strategies
20 employed by the other MNOs.”

21 Any price control below the level at which H3G set its MCT rates in April 2007
22 would have a strongly detrimental impact on H3G’s finances and will constrain or
23 eliminate H3G’s ability to grow to scale.

24 In large part in order to address its losses resulting from price control, H3G has
25 ...”

26 and this is redacted, but it is in the nature of reduction of costs.

27 “This will have (and indeed already is having) a substantial adverse effect on
28 H3G’s competitiveness in the market.”

29 So the on-net/off-net pricing combined with the imposition of the price control on H3G
30 adversely affects H3G;s ability to compete.

31 We then have the MNP point, which is the same as it was in the original notice of appeal.

32 So this is a new argument in support of an existing ground of appeal and therefore not
33 within 11(3). The objection that Ofcom take to it we can see, if we go back to tab 21, the
34 second paragraph at p.3:

1 “The arguments (and evidence) now sought to be introduced re on-net/off-net
2 pricing do not feature in the current notice of appeal.”

3 We do not dispute that.

4 “Moreover, this argument was never advanced by H3G in its detailed responses to
5 Ofcom’s consultations prior to the issue of the Decisions.”

6 That is also correct, and the reason for that is that our analysis on this point has been
7 developing. Then they say they raise entirely new matters. That is not actually correct.
8 These are matters that have been raised on a number of occasions in the past and if you
9 look at our response to Ofcom’s letter we identify occasions where the issue of on-net/off-
10 net pricing has been raised. It is true that we did not raise it in this process before, but it
11 does not follow from that that it is an entirely new matter.

12 If you go to our response (tab 22) at p.6 we say: “With respect to b), the proposed
13 amendment does not raise a new matter.” We make the point that it is further particulars of
14 an existing plea, and then we say: “H3G observes that this is something which Ofcom
15 should have been aware of when considering traffic imbalance issues.” We refer to the
16 comment by the Director General of Telecommunications in 2003 and, as you can see from
17 that quote, that is directly on point.

18 Then:

19 “Ofcom stated:

20 ‘Ofcom believes that the reason why the prices for off-net mobile to mobile
21 calls are high and static is because of the interaction between the operators
22 when setting retail prices and call termination charges on mobile networks.
23 Ofcom believes that the current structure of low on-net and high off-net
24 mobile to mobile prices is likely to be inefficient’.”

25 Then further quotes from annex 6 and, in particular, references to the ability of a small
26 operator to compete with a large operator which may be limited by the on-net/off-net
27 pricing strategy.

28 Then Ofcom say that “... if these are now permitted to be introduced by amendment for
29 Ofcom to counter them properly it will require substantial work both in gathering new
30 information and then assessment of any effect on the price control determination would
31 obviously have implication for any revised timetable (see below).”

32 Now, we do not accept that this is really such a substantial issue. Madam, I heard what you
33 said at the outset about what the relevant issues are and, indeed, the relevant issues are,

1 first, does a differential exist between on-net and off-net pricing, which is a simple
2 question of fact.

3 Secondly, if it does exist what are its consequences for H3G and how does the imposition
4 of price control on H3G affect those consequences, and accordingly H3G's ability to
5 compete; those are the issues.

6 We are not alleging abuse of a dominant position against the MNOs through the use of on-
7 net/off-net pricing, so even though I accept there is material in here and in particular the
8 Hoernig paper which touches on those points, I would respectfully agree, madam, that is
9 not the issue for this Tribunal to determine. I should say that the Hoernig paper is not
10 expert evidence which we commissioned, it is simply a published paper which we annexed
11 to our notice of appeal, and it is the sort of material that one might well expect the
12 Competition Commission to be taking into account as part of its investigation.

13 THE CHAIRMAN: But do you really need the Hoernig paper to make good the points that you
14 want to make?

15 MISS ROSE: Not at this stage, madam. No, not the Hoernig paper! (Laughter)

16 THE CHAIRMAN: It just seems to have raised ----

17 MISS ROSE: Yes, it seems to have caused distress.

18 THE CHAIRMAN: Consternation.

19 MISS ROSE: It does, and one feels their pain (Laughter). I can offer an olive branch to Ofcom
20 and T-Mobile on that question, but in my submission when one analyses an issue like that
21 plainly within the four corners of the original grounds we submit that there is not
22 significant prejudice to anybody. Ofcom still has not pleaded its defence, it is in a position
23 to consider its position in the round. It is obviously an important matter, and I make the
24 same point about overlapping issues again, that in any event this is an issue which the
25 Competition Commission will have to consider in due course, risk of inconsistent
26 determinations and approach, highly undesirable, much better for this Tribunal to consider
27 it.

28 MR. SCOTT: Just staying with this on-net/off-net point and the factual matrix that it introduces,
29 would I be correct in characterising H3G's position that it wishes to sell to its retail
30 customers minutes which are network independent. I think you are getting some
31 instructions.

32 MISS ROSE: Yes. Our position is we have no choice, because our subscriber base is relatively
33 so small that we are not in a position to make an attractive on-net/off-net differential offer.

1 MR. SCOTT: That was my understanding, I am glad to have it confirmed. It has the
2 implication, when we come to considering remedies, that the pattern of charges which H3G
3 agreed absent any price control makes it very difficult for other players to match the offer
4 that H3G are themselves suggesting is a good, competitive offer. We may have to come
5 back to that implication later on.

6 MISS ROSE: I would much rather not comment on that.

7 MR. SCOTT: No, no, I am not expecting you to.

8 MISS ROSE: I hear what you say.

9 MR. SCOTT: But what I am saying is that this on-net/off-net argument goes quite a long way to
10 looking at what characterises the way you are seeing the market, and the implications of
11 the way you are seeing the wholesale market for other people's retail offerings.

12 MISS ROSE: Sir, I make no comment, but I can see ----

13 MR. SCOTT: No, no, I am not expecting you to, but do you see why this opens quite a can of
14 works, that Ofcom may be concerned that they then need to address.

15 MISS ROSE: Sir, in my submission they do need to address it because the duty on them was
16 only to introduce price control if they were satisfied that this was the best possible solution
17 for end users of these services, and that means they do really have to investigate
18 everything.

19 MR. SCOTT: But you have not, in your appeal, challenged the market definition?

20 MISS ROSE: No.

21 MR. SCOTT: And so in not challenging the market definition you have accepted a market
22 definition which essentially reflects the on-net/off-net distinction, so that is an interesting
23 feature compared to the characterisation of your own pricing. These are points to which
24 we will return but they relate to what we are going to have to go into if we do on-net/off-
25 net.

26 (The Tribunal confer)

27 MISS ROSE: The final point to make about this is that the on-net/off issue has in any event been
28 raised by us in our termination rate dispute appeal. I do not know if you have the bundles
29 that we had for 31st October hearing.

30 THE CHAIRMAN: This is a point which cuts both ways, does it not, Miss Rose? You could say
31 you are going to be able to rely on it in relation to that appeal?

32 MISS ROSE: Yes, but madam, it only cuts one way because it would be, with respect, bizarre if
33 the Tribunal were, in relation to the termination rate dispute appeals, to make a finding in
34 H3G's favour that Ofcom had erred in failing to appreciate the effect on H3G of the on-

1 net/off-net differential but then to rule that you were precluded from considering that
2 question in relation to the question whether it was proportionate to impose a price control
3 on H3G. That would lead to an internally inconsistent decision by this Tribunal.

4 Just for the Tribunal's reference, it is para. 9.3 of that notice of appeal.

5 Ultimately, the complaint that Ofcom make is that the further work may have implications
6 for a revised timetable. The only people who will be prejudiced by that are us, so it hardly
7 seems to be a reason for refusing the amendment, not that I accepted it is correct, but if it
8 were correct, the only people who were prejudiced would be us.

9 Can I now turn very briefly to the written submission of T-Mobile, which is the only
10 submission that we have received from any of the interveners, and if I can just very briefly
11 indicate our responses to this document? Do you have it, madam? It is a written
12 submission which we received yesterday evening from T-Mobile. I do not know if they
13 have any further copies. If you go to para.4 they say:

14 "It is incorrect to state, as H3G does, that the substance of these matters, the
15 proportionality issue will be considered by the Competition Commission. The
16 question of whether the imposition of any price control at all is proportionate is
17 separate and distinct from the question of whether if a price control is appropriate
18 what the form of the price control should be."

19 With respect, that does not deal with the point at all. Yes, the two issues are distinct but
20 the facts that will be relevant to their establishment will overlap and, in particular, the on-
21 net/off-net issue is relevant to both questions as is the sections 43 and 88, and
22 discrimination points.

23 Then specific amendments: sections 47 and 88, they characterise our case as being that
24 because we originally relied on sections 3 and 4, then that must include sections 47 and 88,
25 and they say it is inadequate to say that because we pleaded breach of some statutory
26 obligations there were other ones. Well, madam, with respect to T-Mobile that is a
27 mischaracterisation of the original notice of appeal. As you have seen para.1.1 of the
28 appendix in fact in the context specifically of the imposition the proportionality of the
29 imposition of a price control referred in general and unqualified terms to the breach by
30 Ofcom – the failure properly to apply its statutory powers in general, and we make the
31 point that there is no reason to limit that to sections 3 and 4.

32 They then say sections 47 and 88 are of fundamental importance, which begs the question
33 why H3G did not refer to them before? Well, it was an outline appeal that is going to go to

1 the Competition Commission, that is really not going to get anyone anywhere, because in
2 any application to amend the same point can be made – it is not helpful today.
3 Finally, the issue whether a ground is implicit they say is probably to be taken into account
4 in relation to exceptional circumstances, not in relation to the question whether it is new.
5 We say that is not quite right, if you look at para.54 of *Floe* it appears to be relevant at both
6 stages, but in any event at which ever stage it arises we say that the conclusion is the same.
7 Then on the on-net/off-net pricing question they say that our reliance on the Oftel
8 statements is irrelevant to the question whether we pleaded them – yes, that is right but it is
9 not irrelevant to the question of whether these are entirely new matters, or whether they
10 have been flagged up before as a problem.
11 Then they say we did not rely on the existing notice of appeal, that is true, that is why we
12 are applying to amend.
13 Then they say trouble you would have to take such factors into account, they say it is
14 circular – well in any event the Competition Commission will have to take these factors
15 into account, and then there is an evidential point, and you have my response in relation to
16 the technical academic paper which has caused consternation to T-Mobile.
17 So madam, those are the submissions made by T-Mobile which submit do not add anything
18 of substance to Ofcom.
19 Unless I can be of further assistance?

20 THE CHAIRMAN: Could you just explain a little how the two witness statements fit into the
21 different amendments?

22 MISS ROSE: Yes, if we turn them up – there are actually three witness statements. There is the
23 second statement of Kevin Russell. There is the statement of David Dyson and there is the
24 statement of Stephen Littlechild.

25 THE CHAIRMAN: Which of the contested amendments, if any, are those linked in with? Do
26 they stand and fall with particular amendments?

27 MISS ROSE: The Stephen Littlechild statement deals with the Ofcom's economic model – the
28 welfare model – and, as I understand it, Ofcom are not objecting to the admission of that
29 statement.

30 The David Dyson statement concerns the financial implications for H3G of the imposition
31 of this price control, and we submit therefore is fundamental to the appeal in its amended
32 and unamended forms.

33 THE CHAIRMAN: So you would be seeking permission to adduce that ----

34 MISS ROSE: Yes.

1 THE CHAIRMAN: -- even if you were entirely unsuccessful in relation to the amendment?

2 MISS ROSE: Yes, madam, because that goes to the adverse economic effects upon H3G of the
3 imposition of price control, which goes in general to the question of proportionality, and
4 also to the question of adverse effect on competition – obviously originally pleaded and I
5 reiterate the point that of course the appendix was originally an outline with the intention
6 being that evidence would be adduced before the Competition Commission. So we submit
7 no basis for objecting to the admission of that statement either.

8 Finally, the second statement of Kevin Russell deals with a number of matters. First, we
9 deal at B – in fact, you can see them summarised at para.9 of his statement. The first point
10 is that in the absence of price control our 3G rates have generally been lower than the 3G
11 rates of the other MNOs. Tab 17.

12 The first is that our 3G MCT rates have generally been lower than the 3G MCT rates of the
13 other MNOs. That goes to our argument that there was not any evidence of a risk of
14 excessive pricing on the part of H3G, which is not something that Ofcom have taken
15 objection to.

16 The second is that we have suffered a material net termination cost, we have been a net out
17 payer of MCT throughout the whole of the operation because of traffic imbalance, and that
18 is the basic point about traffic imbalance again part of the original notice of appeal.

19 The third is “... the market conditions H3G have faced since launch have had (and continue
20 to have) a significant impact on traffic imbalance”. That is the on-net/off-net point, which
21 you can see developed from para.32 onwards. So the inclusion of that part of the statement
22 does depend on the leave to amend in relation to the on-net/off-net.

23 THE CHAIRMAN: So just to be entirely clear, which paragraphs exactly – is it paras. 32 to ----

24 MISS ROSE: It is slightly difficult because some of these paragraphs deal partly with on-net/off-
25 net and partly with MNP, because what we are dealing with generally is the adverse market
26 conditions for H3G, which are essentially MNP and on-net/off-net which put us at a
27 disadvantage, which is exacerbated by this decision. So there is some entwinement of
28 those two issues, but it essentially goes from 32 to 44.

29 The next is that “... any attempt by H3G materially to compensate for a net termination cost
30 by reducing other costs or increasing outgoing call revenues has, and will in all likelihood
31 continue to make H3G less competitive.” That again goes to the fundamental point about
32 the adverse effect on competition, not affected by this appeal.

33 Then H3G continues to incur losses – again not part of the contested amendment. So
34 essentially it is only the section of Kevin Russell 2 dealing with on-net/off-net.

1 THE CHAIRMAN: And again the rest of Kevin Russell 2 you would be seeking leave to adduce
2 that ----

3 MISS ROSE: Yes.

4 THE CHAIRMAN: -- evidence regardless of your success or otherwise in this application?

5 MISS ROSE: Yes, in the event that leave to amend were refused on on-net/off-net I would need
6 some time to excise passages because of the entwinement.

7 Madam, those are H3G's submissions.

8 THE CHAIRMAN: Yes, Mr. Roth?

9 MR. ROTH: Thank you, madam. May I start on a conciliatory note. Miss Dinah Rose began by
10 suggesting that the time in December when the Orange preliminary issue, as you have
11 defined it at the outset, would be heard, that perhaps then also the Tribunal could consider
12 the questions for reference to the Competition Commission. We respectfully agree that
13 that is a sensible suggestion subject to one query – it is not a disagreement. If I understood
14 it correctly the Tribunal that may be hearing the Orange preliminary issue is the Panel that
15 is in the termination rate dispute appeal. I am not sure that that Panel would have
16 jurisdiction to decide what questions go to the Competition Commission, but if there was
17 some way of overcoming that, then using that time does seem a constructive idea.
18 May I respond to H3G's substantive submissions in this order: first, dealing with sections
19 16 and 19 of the proposed amended notice of appeal, that is the “new grounds” point.
20 Secondly the on-net/off-net pricing allegations; and thirdly, to say just a very brief word
21 about the human rights point and Article 6 of the Convention.

22 Madam, we have sought to look at this application to amend in a sensible and responsible
23 way having regard to our position as the Regulator, in terms of the Tribunal Rules and the
24 Judgment in the *Floe* case which Miss Rose has partly read to you, and you will note, I
25 hope, the degree to which Ofcom does not object to the application to amend – obviously
26 no time has been spent on that today, but there are substantial parts of the application,
27 including Professor Littlechild's evidence, to which no objection is taken.

28 So first sections 16 and 19, and I think, madam, it may be helpful to have open, if that
29 works with your bundles, the proposed amended notice of appeal and the Hutchison 3G
30 original notice of appeal. If one goes to the original notice of appeal of 23rd May of this
31 year, that is a full document, as you would expect from H3G. You will see at para.12.1
32 before the annex, at the end of the main notice of appeal, p.35 within the document,
33 para.12.1: “Grounds of appeal”, you note those words “... regarding price control matters.
34 For ease of reference to the CC the **grounds of appeal** ...” and I stress those words, “...

1 regarding the price control matters are set out in the accompanying appendix which H3G
2 proposes be used as its preliminary stand alone submission to the Competition
3 Commission.”

4 Then there is a commentary section on the LRIC test. Then comes the appendix and Miss
5 Rose has made clear what is relied on is para.1.1 and then particularly section 3 of the
6 appendix: “Price control remedies are disproportionate and inappropriate.” Now, there is
7 the proposed amended notice of appeal which has from the appendix deleted paras. 3.16
8 and 3.17, everything else remains unchanged, nothing inserted there, but then seeks to add
9 to the main body of the notice of appeal, section B starting at para.13. One sees in the new
10 section E, after the introduction and after setting out the Statute there is then s.16 (p.3):
11 “Ofcom failed to apply the statutory test to H3G. 16.2: “It is plain, however, from
12 Ofcom’s reasoning in section 728 of the SMP price control decision that Ofcom failed to
13 ask itself the necessary question whether, in the particular case of H3G sections 47 and 88
14 tests were satisfied so that it was lawful, proportionate and appropriate to impose a price
15 control on H3G. Then there is s.16, which goes on several pages.

16 Then one has s.17, p,8, which says: “The s.88 tests were not satisfied in the case of H3G”,
17 and it begins in 17.1: “Alternatively, if, contrary to the submission above, Ofcom applied
18 the statutory tests in s.88 of the 2003 Act to the particular circumstances of H3G it erred
19 for the following reasons ...” It erred in its application of 88(1)(a), it erred in its application
20 of 88(1)(b) and then that is developed in some detail.

21 We are not saying, as was attributed to us that the lack of mention of s.88 or 47 in the
22 original appendix 3 to the notice of appeal means that now the reference is made to 88 this
23 is a new ground. That is not our point because we are not objecting to s.17 and all that is
24 said here. The fact that the same arguments, and one sees in s17 – apart from the on-
25 net/off-net the traffic imbalance, one recognises the graph, it is the same graph, but it is
26 now put, as it were, under the head of the relevant subsections of s.88. That is not what
27 makes it a new ground; that is perhaps a refinement of the way the ground is put by
28 reference now to a statutory provision. That, we accept, therefore is, if you like a
29 reformulation or a crisper or more legal presentation of the existing ground.

30 THE CHAIRMAN: Which bit is the reformulation?

31 MR. ROTH: The first part of s.17 and the references to s.88(1)(a) and 88(1)(b) in s.17. That did
32 not appear, if you go back to s.3 of the appendix, to the original notice of appeal, this bit is
33 new, the beginning of s.17, but we are not objecting to it, because the essence of the
34 ground, namely, that the tests were not correctly applied on the fact that was there. What

1 we say is a new ground is the alternative ground now in s.16 saying “Ofcom did not ask
2 itself the necessary question at all.” They are two distinct grounds. They may arise out of
3 the same or similar facts, that may well be, but you can have, for example, a claim in
4 negligence and then one can say “Alternatively on those facts, we have a claim in
5 nuisance.” That does not make it the same ground of claim, just because the facts are
6 marshalled then to form a different ground. It is still a different ground even though the
7 underlying information may be the same, and that is why we say, as a matter of principle,
8 the s.16 point, namely that Ofcom did not address its mind to the question, is a different
9 ground from saying “We accept you addressed your mind to it, but for various reasons to
10 do with traffic imbalance, etc. etc., you got it wrong.”

11 Very much the same point arises when one goes on to s.19, a short section at the end
12 (p.24). Section 19: Ofcom discriminated against H3G contrary to s.47(2), by s.47(1) of the
13 2003 Act and so on, and it refers to the non-discrimination obligation. Perhaps it is worth
14 looking for a moment at s.47, Miss Rose took you to it in her submission – I think it is in
15 one of the tabs though I have it in a different form.

16 MR. SCOTT: Tab 5.

17 MR. ROTH: Thank you. Section 47(1):

18 Ofcom must not in exercising performance of any power under this chapter:

19 (a) set a condition under section 45, or

20 (b) modify such a condition

21 unless they are satisfied that the condition or (as the case may be) the modification
22 satisfies the test in subsection (2).”

23 (2) The test is that the condition or modification is –

24 (a) objectively justifiable ...

25 (b) not such as to discriminate unduly ...

26 (c) proportionate to what the condition or modification is intended to
27 achieve; and

28 (d) in relation to what it is intended to achieve, transparent.”

29 Well previously there was the allegation “disproportionate” – it did not refer, I think,
30 expressly in the appendix to s.47(2), but we do not object to that. We can of course now
31 put it in statutory clothing. But there is added to what was (c), there is the allegation that it
32 discriminated, and that is (b), and the very fact that they are put distinctly means, we say,
33 that it is a distinct ground of challenge. It is correctly put in para.19(2) a distinct obligation,
34 and when Miss Rose says that measures that are discriminatory are disproportionate in a

1 general sense, of course, that is right, but vice-versa does not apply. Measures may be
2 disproportionate on grounds quite different from discrimination and, indeed, they are
3 alleged to be so here on grounds that are separate from discrimination. So we say that as a
4 matter of principle this is a new ground. We take the new point, as I say, as a matter of
5 principle, because of the way the rules are structured and we say should be applied, and we
6 say may be important not just for this case but indeed for future cases where, as one sees
7 from *Floe* everybody goes back to the ruling of the Tribunal in the previous case. To say
8 that this is just a different legal label put on the same bundle of information really just
9 brings out the point. If you give it a different legal label – you said it is negligence, now
10 you say well it is also nuisance – that is what makes it a new ground. So that is why we
11 take the stance that these are, we say as a matter of principle, new grounds. We are not
12 seeking to suggest they will vastly enlarge the scope of this appeal, that is not the reason
13 that we make the point or indeed that they give rise to further disputed facts, we are not
14 suggesting that, but we say that the rules do quite clearly make a distinction between rule
15 11(1) and rule 11(3) with regard to new grounds; these are properly understood to be new
16 grounds and, if so, then we say we really do not come anywhere near two exceptional
17 circumstances within the terms of rule 11(3)(c), which is the only one on which H3G can
18 seek to rely. I make it clear if I am wrong on that, and if these are not new grounds, then
19 we do not object.

20 Can I just deal with the exceptional circumstances point – I think I can take it fairly
21 quickly. You have had the passage from *Floe* read to you. Miss Rose’s argument was that
22 it is exceptional because of this unusual split jurisdiction between this Tribunal and the
23 Competition Commission and that really is a rather special case.

24 With respect, that cannot be right, if one looks at the requirements for an appeal in this sort
25 of case in the Statute in s.192 of the Act, tab 5. This is an appeal within the terms of
26 s.192(5):

27 “The notice of appeal must set out:

28 (a) the provision under which the decision was taken; and

29 (b) the grounds of appeal.

30 (6) The grounds of appeal must be set out in sufficient detail to indicate:

31 (a) to what extent if any the appellant contends the decision appealed
32 against is based on error of fact, or was wrong in law or both.”

33 So the grounds of appeal have to be set out in detail, even though this is a case where part
34 of the appeal may lead to a reference to the Competition Commission. Of course the

1 reference to the Competition Commission is only of those matters which the Tribunal then
2 refers to the Competition Commission under s.193. The suggestion that if this was not
3 allowed as an amendment then it could all be raised before the Competition Commission
4 and so refusing leave to amend would be somewhat superfluous because H3G could then
5 go and make all these points to the Competition Commission is, with respect, wrong. The
6 Competition Commission will only deal with the matters referred and within the confines of
7 the grounds of appeal as allowed or determined by this Tribunal, and the Competition
8 Commission cannot enlarge the grounds of appeal. So that argument, that there are
9 exceptional circumstances, is just misconceived.

10 Reference was made then to the circumstances set out in para.57 of the *Floe* Judgment –
11 you will remember the paragraph with the various Roman numbers, (i) to (viii) and (i) to
12 (vii). We say it is not implicit in s.3 of the appendix to the original notice of appeal that
13 Ofcom applied the wrong test, or did not ask itself the right question. What is implicit in
14 the original notice of appeal is the ground now elaborated in s.17 of the amendment,
15 namely, that we got it wrong and did not apply the test correctly, and not that we did not
16 ask ourselves the right question.

17 THE CHAIRMAN: The question that is raised in para.16 of those paragraphs in the proposed
18 amendment is, as I recall it, that Ofcom treated the industry as a whole rather than applying
19 the test in relation to each individual MNO?

20 MR. ROTH: Well, with respect, madam, that is really a sort of summary of H3G's overall
21 complaint in general terms which applies as much to s.17 as it does to s.16. Section 16 is
22 that Ofcom did not ask itself the right question, and s.17 is assuming contrary to s.16 in the
23 alternative, if it applied the Act to H3G, and the circumstances of H3G, it did not do it in
24 the right way because it failed to have regard to all the special circumstances that apply to
25 H3G, and why H3G is different – the traffic imbalance, the financial impediment, and so
26 on.

27 So in a very general way, yes, with respect, you are absolutely right, but the actual
28 challenge is put in the alternative on two different grounds. We say that, following through
29 the *Floe* para.57 criteria, there is no risk of deciding this case on a false basis, or that these
30 matters would have to be returned to at a later date, nor unlike *Floe* is there any overriding
31 public interest in dealing with this first question. As Hutchison recognises, *Floe* was a very
32 far cry in its circumstances as an applicant before the Tribunal from H3G subsidiary of
33 Hutchison Whampoa, and this case is being sought to be run on a fairly tight timetable, not
34 least on the urging of H3G and something that, within reason, Ofcom has been happy to

1 support, and so that is relevant to criteria (vii) in the *Floe* criteria. That is why we say there
2 are no exceptional circumstances if these are, as we contend, new grounds of appeal.

3 Madam, that is all I was proposing to say on that aspect of the application.

4 I want to turn then, if I may, to on-net/off-net which, it is common ground, comes within
5 rule 11(1) so it is a question for the discretion of the Tribunal, unfettered by any restriction
6 in the Rules. We do object to this amendment most strongly, and I should make clear that
7 in practical terms we are much more concerned about this amendment than we are about the
8 other amendments that I have just been addressing, because if this is allowed it involves
9 some of the very same issues of concern that were raised by this Tribunal in *Floe* when
10 addressing rule 11(1). In a part of the *Floe* Judgment which – unless I missed it – I do not
11 think Miss Dinah Rose took you to. Perhaps it is worth looking at because they had an
12 11(1) application there too.

13 If you turn to the Judgment in *Floe* (tab 1, authorities' bundle) at para.60:

14 “The Second Alternative Argument is, however, in a different category in our
15 view. The issue of discrimination was originally raised in Floe’s complaint, but it
16 does not appear anywhere in the notice of appeal. It is a point which would
17 apparently require further factual investigation, possibly extensively. It
18 potentially affects third parties not before the Tribunal .”

19 I stress both of those points.

20 “If Floe’s activities are lawful, as a result of the Primary Argument, or the First
21 Alternative Argument, Floe does not need the Second Alternative Argument. On
22 the other hand, if Floe’s activities are unlawful, it is difficult to see how an uneven
23 enforcement of the law could aid Floe. We would not therefore be minded to give
24 permission to amend to raise the Second Alternative Argument, in the exercise of
25 our discretion under rule 11(1), without it being necessary to consider the
26 application of rule 11(3) in relation to the Second Alternative Argument.”

27 The passage I rely on is:

28 “... further factual investigation, possibly extensively. It potentially affects third
29 parties not before the Tribunal.”

30 and my I explain why both of those aspects apply, and also address the three points that
31 H3G made in their solicitor’s letter of 1st November effectively repeated by Miss Dinah
32 Rose today. The first of their points is that Ofcom had notice of this point, the on-net/off-
33 net point all along. The second, I think is that this is an issue in the termination rate dispute
34 appeals and so it is before the Tribunal anyway because they are heard together. I think the

1 third is that, well, Ofcom should have done this analysis anyway. Each of those three
2 points we submit are misconceived.

3 First, that Ofcom had notice of this point all along, and by “this point” I mean the on-
4 net/off-net pricing differential as a cause of traffic imbalance. There was, as Mr. Scott, if I
5 may say so, has so pertinently observed, an extensive consultation process leading to the
6 27th March statement, that is the subject of the appeal. May I hand up a very short
7 chronology of the consultation which may aid one when going to the documents.

8 MISS ROSE: Can I just say, without wishing to criticise Mr. Roth, we handed to all parties
9 before the beginning of the hearing today materials we were going to refer to. I am
10 surprised that this is being produced now after the lunch adjournment which would, of
11 course, have given me an opportunity to look at it. I did actually speak to Mr. Roth’s Junior
12 this morning and protest at the delivery of authorities to me only five minutes before the
13 hearing began and I am even more surprised that this document was not provided to me at
14 that stage.

15 MR. ROTH: Well, with great respect, this is taken from the index to Hutchison’s bundle B,
16 which has all these documents there with the dates. We have just copied it out on to one
17 piece of paper.

18 MISS ROSE: Madam, I do not understand why that is a reason for not giving it to me at the
19 outset of the hearing.

20 THE CHAIRMAN: Well, I think the point that you are making, Mr. Roth, is a fairly short point,
21 which is that there has been plenty of consultation in relation to this issue prior to the ---

22 MR. ROTH: Well I wanted to show you what Hutchison said and did not say. I am quite happy
23 if you put this away and we look at Hutchison’s index, the same dates are there, if you find
24 that more helpful – it is the second page of the index to bundle B, if that makes Miss Dinah
25 Rose more cheerful. If you go to the second page you will see at no.26 on the index,
26 “Wholesale mobile voice call termination Ofcom consultation document dated 7th June
27 2005”, that is our first document, and that is, as one sees, at tab 26. If you look at that, this
28 was the preliminary consultation, and section 4 of the preliminary consultation, which you
29 see starts at p.17 looks at the regulatory options if SMP persists.

30 “If structural change to remove the underlying cause of SMP Ofcom need to
31 decide what form regulation of markets with SMP needs to take to prevent abuse
32 of dominant positions.”

33 Then there are discussions of various possibilities including at 4.20 specifically the question
34 of regulation of H3G at 4.20 and 4.21. So the particular position of H3G was raised as a

1 matter to be considered. H3G responded to that, as you would expect, and that is the
2 document in the index at tab 27 – you may want to write down the date if you do not use
3 our piece of paper, it is 30th August 2005 – a full response from Hutchison. No suggestion
4 anywhere in it of any issue about on-net/off-net.

5 Nine months later Ofcom issues a more detailed consultation document, 30th March 2006,
6 tab 28, a much fuller document this time, and perhaps one can go straight into the response
7 by Hutchison at tab 29, that is on 26th May 2006. A still fuller response on this occasion,
8 including an extensive discussion of the remedies that might be imposed if, contrary to
9 Hutchison’s primary point there was SMP, and that starts at p.16 of Hutchison’s response in
10 section 3. Section 7 of the consultation document provides Ofcom’s current thinking on
11 remedies currently being proposed. This section of the response provides H3G’s views on
12 the principles which should be taken into account in choosing an appropriate proportionate
13 remedy for H3G’s call termination rates on the assumption that H3G is found to have SMP
14 in a relevant market. H3G has a number of criticisms with the current approach.

15 Then you see some bullet points set out and below the bullet points:

16 “The appropriate set of considerations which should inform the setting of any price control
17 if such a remedy is considered appropriate are set out in 3.4”, and that takes one on to s.3.4,
18 which is on p.30 and under the heading: “An appropriate approach to 3G voice call
19 termination price caps” a lot of considerations and elements which H3G submitted should
20 influence price control are set out, including even some foreign comparisons over the page,
21 and p.31 at the top about Italy, Austria and Sweden, and so on. There is not a hint of a
22 suggestion that on-net/off-net pricing differential is a relevant element to be considered.

23 Then on 13th September 2006, having considered all these responses, Ofcom published its
24 third and fullest document (tab 30). This is 134 pages, plus 21 annexes, including the draft
25 SMP conditions. On 22nd November Hutchison 3G submitted its response, tab 31. 100
26 pages including 10 annexes, and we see at p.24 of this Hutchison 3G document Ofcom’s
27 approach to remedies, raising various matters, including indeed – it is a long discussion –
28 the effect of mobile number portability, a point that has been pursued, of course, in the
29 appeal. That we get at p.41 where Hutchison 3G challenges Ofcom’s view that the MNP
30 arrangements are not relevant (p.41, s.5.3). Hutchison challenges that and says:

31 “This assumption of immateriality is not in fact true in the case of H3G. The
32 current MNP arrangements have a very significant effect on the effective charge
33 H3G achieves, including reducing the effective charge it receives ...”

1 and so on, and the reasons why are set out. The MNP point is taken; it is followed through
2 in the appeal, but the on-net/off-net point was never taken, never mentioned as being
3 relevant. In H3G's solicitor's letter at the end of last week they tried to suggest they did
4 raise it and all they refer to is s.7.3 of this document and annex 3. 7.3 is on p.51:

5 "Impact on H3G. In contrast and as indicated above H 3G's view is that it will
6 suffer a significant negative effect from any of Ofcom's proposed glide paths.
7 Whether Ofcom agrees with H3G or not regarding the ultimate outcome it should
8 recognise that H3G has for some time based its approach on the fact such
9 revenues were appropriate and reflective of efficiently incurred costs and strict
10 financial terms. H3G estimates that the negative impact of the four years of
11 proposed price control on H3G would be ..."

12 and then there are some confidential matters.

13 "It is not clear why H3G should be required to insulate the incumbent operators from the
14 financial effects of losing customers to a new competitor, but that appears to be the
15 practical effect of the glide paths proposed in the market review consultation."

16 So that is the challenge to the glide path.

17 "The reduction in revenue and impact on H3G's overall margin will naturally
18 have an adverse impact on H3G's wider financial and competitive (see below)
19 position. A key driver of these impacts is the asymmetry in traffic faced by H3G
20 between incoming and outgoing calls. This imbalance is a function of H3G's new
21 entrant status in the market. In particular it is a result of the strategies H3G has
22 had no choice but to follow in order to enter the saturated and competitive market,
23 and the adequate mobile number portability solution in the UK."

24 So the traffic imbalance point is taken and, indeed, is in the original notice of appeal, but it
25 is attributed to new entry in a saturated market and mobile number portability – nothing
26 there about on-net/off-net and it is, with respect, quite disingenuous to say the point is there
27 taken.

28 The other part of this document that is referred to is annex 3, and annex 3 is at p.62, and we
29 are looking at the non-confidential copy of annex 3: "H3G believes there are two principal
30 reasons why it has an imbalance between incoming and outgoing traffic. These are the
31 strategies ..." and they repeat the two points that you saw at para.7.3 The rest of that annex
32 is confidential but I am not breaking any confidence by telling you something that is not
33 there – there is no mention of on-net/off-net pricing differential.

1 So it is hardly surprising that Ofcom did not investigate the on-net/off-net point, or consider
2 it in the statement.

3 The point that H3G now seeks to make is that the differential in pricing, and Miss Dinah
4 Rose fairly explained it, charged by the other mobile network operators, as between on-
5 net/off-net calls, is a significant explanation of the traffic imbalance, and it is a strategy the
6 other operators can use to restrict the growth of H3G as a smaller entrant, and should have
7 been considered by Ofcom when deciding whether it is appropriate to impose price control
8 on H3G's mobile call termination charges. That is the point I am making.

9 If Ofcom now has to answer the allegation the position is this, and with the greatest respect,
10 madam, you said in your introduction at the outset of this CMC that it appears the facts are
11 not disputed and the consequences of the facts are not disputed. I regret to say the facts are
12 strongly disputed, and the consequences of the facts also are strongly disputed, for these
13 reasons. The first question is to what extent is there a price differential in the charges
14 actually being made to consumers as between on-net/off-net calls? Ofcom does not have
15 that information. H3G seeks to put in with this section of Mr. Russell's second witness
16 statement that Miss Dinah Rose just identified, a schedule prepared, I think, by a
17 consultancy called "Dual Pricing", which is attached to the application to amend at tab 21.
18 It is exhibit KSR 21 to Mr. Russell's statement. It is with the application to amend. (After
19 a pause) I am told it is only in the confidential version, is that right? I think it is just a list
20 of tariffs and of prices. Can I just ask for clarification, is this annex said to be confidential?

21 MISS ROSE: Yes.

22 MR. ROTH: Then I will not refer to any of the figures, but what you can see is that it lists all the
23 operators, it shows their plan name, their different tariffs and every operator knows they
24 have a range of tariffs that consumers are given, the monthly charge, the minutes
25 included ----

26 MISS ROSE: I am sorry, but we do not waive confidentiality on any part of the annex, including
27 the description of it that is currently being given by Mr. Roth.

28 THE CHAIRMAN: Well, Mr. Roth, you are making the point that it is not agreed that there is a
29 significant or, indeed, any differential between on-net/off-net pricing, which is the premise
30 on which the new section of H3G's ----

31 MR. ROTH: That is right; I can do it without reference to the annex.

32 THE CHAIRMAN: Yes, perhaps you could.

33 MR. ROTH: But the annex will be something we will have to address in the appeal, because it is
34 relied on for this point.

1 THE CHAIRMAN: Whether those figures, whatever they are, are right or not, is something one
2 would have to go into.

3 MR. ROTH: It is not important to my point. My point is this: as everyone here knows, if you get
4 a contract with a mobile network operator as a consumer, you have a range of tariff plans
5 on offer, and the various plans whether it is Vodafone or T-Mobile or Orange offer
6 frequently includes a bundle of minutes so that you can get 100 minutes a month, or 250
7 minutes a month depending on what you pay as your monthly subscription. Those minutes
8 are minutes included in your subscription, whether they are on-net/off-net, it makes no
9 difference. It is only if you go over your planned allowance that you are charged a
10 differential rate as between on-net/off-net. Therefore, what one has to establish is, first of
11 all, what is the proportion of consumers that are taking a pre-pay mobile phone (Pay-as-
12 you-go) where this does not apply or, as I suspect most people in this room have, post-pay –
13 a signed up subscription where you have a bundle of minutes, where the on-net/off-net
14 differential does not matter except for the excess – forgive me, if I can just try and finish
15 the point – to what extent are consumers exceeding their bundle (those who are on post
16 pay) because it is only for the pre-pay and the excess over the post pay that the differential
17 price actually gets charged.

18 MISS ROSE: I am sorry to keep getting to my feet, but I am very concerned by the way this
19 submission is being developed. Madam, as you know, our application for leave to amend
20 was served I think almost a month ago and Ofcom did not send us any objection to that
21 until 29th October. The argument that is now being developed by Mr. Roth, about disputes
22 as to the factual basis of the differential is not pre-figured at all in that letter from Ofcom,
23 and this is the first I have heard of it.

24 THE CHAIRMAN: Well I think they did say in that letter that there would be required
25 substantial further investigation.

26 MISS ROSE: Yes.

27 THE CHAIRMAN: I think Mr. Roth is now explaining what the nature of that investigation
28 would need to be.

29 MISS ROSE: But, madam, the difficulty for me is what is now being said is very specific
30 allegations about precisely the kind of model that you would have to establish in relation to
31 tariffs. I am in no position to respond to this, because I have had notice of it at all.

32 THE CHAIRMAN: I think the point is being made that it is not as simple as I may have
33 indicated at the outset, in that the existence of the differential pricing is not as clear cut as
34 was perhaps suggested at the outset of this hearing.

1 MISS ROSE: Madam, that is what he is suggesting now, but it has never been suggested to us
2 before, and I am therefore seriously handicapped in responding to what is now being said as
3 to whether what he says is correct or not.

4 THE CHAIRMAN: I think the point is whether or not what he says is correct, if we were going
5 to allow this amendment to be made, this is the debate that we would be having. If we were
6 to allow this amendment to be made, Mr. Roth would be entitled to develop these points in
7 his defence to your pleading and at the hearing of the matters, and I could not shut him out
8 from doing that on the basis that he did not raise it earlier in response to your application to
9 amend. So I think it is useful for us to have some idea of how contentious the allegations
10 made in the proposed amendments are going to be. I quite understand that you do not
11 accept what he is saying, but what we are looking at are the parameters of the issue which is
12 relevant to the question of whether it is appropriate under rule 11.1 to grant permission to
13 amend.

14 MISS ROSE: But the difficulty for us is that we have had no advanced notice as to what Ofcom
15 were going to say as to how contentious the amendment is and therefore we have no basis
16 of rebutting what he says.

17 THE CHAIRMAN: Well I take your point, Miss Rose.

18 MR. SCOTT: There is one point of principle, Miss Rose, that I think we have to be clear about.
19 One of the issues that has occurred in the whole field of telephony has been the ability of
20 the end user to understand the tariffs made available to them. I think that the public would
21 be entitled to take a very, very, very dim view of us trying to maintain confidentiality over
22 tariffs that are meant to be made available to the public. If we really believe in a
23 competitive market then an important part of the competitive market is making information
24 available to people. If you are going to seek, as indeed your predecessor, Mr. Green in
25 Hutchison 1 did, to maintain confidentiality over matters which the public with a little
26 assiduous application to the internet could discover, then I think you are going to find us
27 unreceptive.

28 MISS ROSE: Sir, I do not intend to make any comment or submission about what our attitude to
29 confidentiality would be at the main appeal hearing. My concern is we were bounced into a
30 situation once again with Mr. Roth referring to material that we had no advance notice he
31 was intending to refer to, which is contained in a confidential annex in circumstances where
32 I am not in a position to take instructions on the hoof as to whether we would or would not
33 able to waive confidentiality. But we are, with great respect, facing something of an

1 ambush here from Mr. Roth in that the arguments that are being developed are simply not
2 prefigured in Ofcom's letter of 29th October, and that does place me at a disadvantage.

3 MR. ROTH: I am sorry, we said in our letter:

4 "It was not advanced by H3G in its responses to the consultations, they raise
5 entirely new matters. If they are permitted to be introduced by amendment for
6 Ofcom to counter them properly will require substantial work both in gathering
7 new information and then assessment of any effect on the price control
8 determination."

9 We were not asked in response to "please explain what new information you want to
10 gather", I am now just explaining it, given the assumption we began that there will not be
11 contested facts. I am just elaborating by explanation of what we said there. We put them
12 on clear notice that it would involve a lot of extra work, and I am explaining what one
13 would need to look at. I did not appreciate it was confidential, and I am sorry I referred to
14 that, I still do not understand why but that is for another day. But the point is a point that
15 could be made in the abstract on the basis of how tariffs are charged.

16 The second question is what are the consequences of differential charging? Does it have an
17 effect on consumer behaviour? Consumers may choose only on the tariff rate on offer, or
18 they might perhaps be thinking about what happens to calls when I go over my tariff and
19 look at on-net/off-net pricing differentials. The question whether that does affect consumer
20 behaviour or not is an area into which we would have to inquire and which Ofcom did not
21 inquire into in the consultation because nobody raised it. Not only H3G did not raise it,
22 none of the other MNO's raised it, though H3G might fairly say "You would not expect
23 them to, would you?" But H3G did not raise it.

24 We did some market research for the statement. We would have to go back and reanalyse it
25 to try and now assist that. Academic literature may now drop out if Hoernig is no longer
26 put in play, there is quite a lot of academic literature, I am sure Professor Bain knows, on
27 on-net/off-net pricing.

28 Some of this additional information is in the hands not of Ofcom but of the MNOs, and
29 Ofcom did not gather it – I keep coming back to that – because it had not been raised in the
30 consultation. So it may well be, and they will no doubt address you in due course, that it is
31 some of the MNOs, the interveners who will seek to put in information on that, and not
32 Ofcom, and Ofcom will then have to consider what they put in. Only then can one really
33 assess whether or not on-net/off-net pricing differentials really are a significant factor in

1 creating traffic imbalance. All I can say at the moment is that Ofcom is very sceptical that
2 this is a cause of traffic imbalance.

3 Then one has to come to the question, suppose the allegation is right that this is a
4 significant cause of traffic imbalance, then the question is, as we said in our letter, what
5 should the effect of that be on the remedy? How should that play into the question before
6 the Tribunal which is the appropriateness of price control regarding mobile call termination
7 on H3G, and this is where the implication for third parties comes in, because on that on-
8 net/off-net price differential that H3G seeks to rely of course plays out in the retail market.
9 Price control regarding mobile call termination is in the wholesale market. The statement
10 cannot do anything about the on-net/off-net price control differential, and H3G recognises
11 that, it does not suggest it could. Its argument is that because it is a strategy curbing new
12 entrants, that is a reason not to impose price control on H3G so they should have more
13 money to spend in the retail market to counter it. But if it is a strategy curbing new
14 entrants, then it has an effect also on the mobile virtual network operators, that is to say,
15 Tesco, Virgin, BT Mobile – “virtual” because they do not have an infrastructure but they
16 are, as we all know, competing and seeking mobile customers, and they would also suffer
17 from this effect of that differential. So would it be right to not impose price control on H3G
18 who suffers from this, when nothing is being done to help the mobile virtual network
19 operators who may be said also to suffer from this and that is where the effect on third
20 parties come into which we have not yet considered, and that is why we say it involves a lot
21 of new factual investigation, never undertaken by Ofcom, and potential impact on other
22 third parties.

23 The other response made by H3G to our objection is that it is raised in H3G’s notice of
24 appeal in the termination rate dispute appeal, so it is before the Tribunal anyway, and
25 Ofcom are going to have to deal with it. Although the premise is correct, the conclusion is
26 not and is a fundamental misapprehension of the position. Could I ask you to look at the
27 paragraph which Miss Dinah Rose referred to in H3G’s notice of appeal in their termination
28 rate dispute appeal? Miss Dinah Rose referred you to the relevant paragraph, though it was
29 not read, it is 9.3 on p.24.

30 “Further or in the alternative, in so resolving the determinations Ofcom has failed
31 to consider whether adequately or at all the wider competitive impact of its
32 determinations in allowing the 2G, 3G MNOs and H3G to set whatever 3G mobile
33 call termination rates they choose. Indeed, Ofcom admits that it fails to
34 understand the relevance of the balance of payments experienced by H3G to the

1 resolution of the case. Rather than making such a failure, Ofcom should have
2 considered the following interrelated factors which are also raised in H3G's SMP
3 price control as being relevant to determining the SMP condition to apply to the
4 2G, 3G MNOs.

- 5 (a) relatively recent entrant with a much smaller market share at retail
6 level,
- 7 (b) mobile number portability system;
- 8 (c)”

9 the one relied on here:

10 “(c) the effect of the historic and current retailing pricing practices
11 employed by the 2G, 3G MNOs, namely appreciable on-net/off-net
12 price differentiation in particular ...”

13 and there are some details about the differentiation including reference to economics,
14 literature and a paper in the ... Journal of Economics.

15 So yes, it is raised by H3G in the termination rate dispute appeals, but Ofcom's answer to
16 that in the context of those appeals will be very simple. Whether the point is right or wrong
17 it is completely irrelevant to a dispute determination for the simple reason that those were
18 determinations by Ofcom of bilateral disputes, and this point was not raised by any of the
19 parties in the dispute, which dispute Ofcom was determining, and so it would have been
20 inappropriate for Ofcom to go off launching into an examination of on-net versus off-net
21 price differentials in the context of resolving a dispute on the submissions of the parties
22 before it. Otherwise, dispute resolution gets converted from a dispute resolving the parties'
23 submissions to Ofcom in a dispute, into a market review which renders, of course, the
24 statutory timetable of four months for dispute resolution completely impossible.

25 So although it is right that H3G has raised this in a mistaken argument in the termination
26 rate dispute appeal, we are not going to address the substance of the allegation in that
27 context at all. We are simply going to say that it is misconceived and irrelevant. But if the
28 amendment is allowed in this detailed way in the appeal against the market review then of
29 course we will have to do so. So that, with respect, is no answer.

30 The third response given is that this is such an obvious point that it was really implicit in
31 the argument and Ofcom should have considered it anyway even though H3G did not raise
32 it. Well, I have to say, if it is such an obvious point then why, among all the many other
33 matters that H3G did raise in its very detailed responses – three of them – in the
34 consultation process, why on earth did H3G not take it? And if it is so obvious why was it

1 not in the original notice of appeal? H3G seeks to rely on statements, which we saw quoted
2 in the letter from its solicitors, by Oftel in 2001 and then 2003, and all they say, when you
3 look at those quotations set out in the letter, is that this could become a concern, this might
4 be a concern. It might be developed. Indeed the 2003 matter – it is the Baker & McKenzie
5 letter of 1st November which is at tab 22 and the relevant page is p.7. There is a quote from
6 an Oftel review of February 2001 at A6.19, referring to the fact that there is a potentially
7 competitive off discrimination effect, it is likely the networks are now sufficiently similar
8 in size for this not to be a competition problem in practice. It may become a concern for
9 the entry of Hutchison – that is in 2001.

10 Then there is reference to annex 6 of the September 2001 statement, and the quote at A6.10
11 over the page: “As a result the ability of a small operator to compete with a large operator
12 may be limited by the large operator’s pricing strategy of charging much less for on-net
13 calls than off-net calls.”

14 So yes, everyone can see that it potentially could arise as a problem, but it was never raised
15 by any of the parties to the consultation in 2006 that this actually is a problem and so
16 Ofcom quite understandably did not investigate it. So to say that we should have implicitly
17 taken this into account in 2007 when in an extensive consultation process none of the
18 operators raised it because Oftel had mentioned this as a possibility more than five years’
19 previously there is a certain desperation in saying that therefore it is implicit in what
20 everyone was saying. That is why we say that in exercising your discretion under rule
21 11(1) and we accept this goes to the existing ground – I never sought to suggest otherwise –
22 you should refuse permission to make this amendment, and by “this amendment” I mean
23 paragraphs 17.22 to 17.28 of the amended notice of appeal, and if you are against me on
24 s.19, the price discrimination then just the reference in 19.3, which is the reason set out in
25 the above paragraph you remember to the ongoing on-net/off-net pricing strategies of the
26 other MNOs.

27 As regards the evidence, I am a little bit in the same position as Miss Dinah Rose, I think
28 that is right, the bit she identified in Mr. Russell’s second witness statement, which is also
29 the bit that appends that confidential exhibit, but I think we would also need to check, but
30 that does seem to be the right passage in those statements.

31 Finally, very quickly, the suggestion that any of these objections is somehow precluded by
32 Article 6 of the Convention we say that attempted reliance on Article 6 in this context is
33 really misconceived. The letter from Baker & McKenzie of 1st November, and the bundle
34 of authorities refers to the well known treatise by Lord Lester and David Pannick. I think

1 the reference given in the letter is to para.4.6.18, included in your bundle, but we would ask
2 you to look on, please, to the immediately following paragraph at 4.6.19 in the same book.
3 If I can hand that up and the other counsel have this. (same handed to the Tribunal)
4 “Restrictions on the right of access to a court have also been allowed in relation to
5 vexatious litigants ...” etc., and just after footnote 5, in the third line: “... reasonable time
6 limits in respect of proceedings and rules relating to service, and that is footnote 6. There
7 are cases cited in footnote 6, the most relevant appears to be, in the English context, the
8 decision of the Court of Appeal in *Anderton v Clwyd County Council* [2002] 3A.E. (813), I
9 think a very well known judgment – if I can just hand that up? (same handed to the
10 Tribunal). If I may say so, a very strong Court of Appeal – the Master of the Rolls, Lord
11 Justice Mummery and now Lady Hale, were assembled to hear five appeals heard together
12 because they all concerned the construction, application and provisions of the Civil Practice
13 Rules, Part 6 and 7 relating to the service of a claim form. In the first four appeals, reading
14 the headnote :

15 “The deemed service of the claimants contended that CPR 6.71, which established
16 the deemed day of service for documents served *inter alia* by first class post and
17 fax was incompatible, the right of access to the court under Article 6 of the
18 Convention insofar as it prevented a claimant from proving the defendant had
19 actually received the claim form before the deemed day of service.”

20 Pausing there, the point was this: under the CPR if you sent the document by first class
21 post there was a deemed day of service. That deemed day of service was just out of time on
22 the facts of the case. “But”, said the claimant, “I can show that the defendant had actually
23 received it within time and therefore this rule is very unjust because he got it within the
24 time and you are now shutting out my claim on the basis of a strict mechanistic application
25 of the rule.” That was rejected by the court – if you go on in the headnote to the next page
26 to the holding.

27 “The deemed day of service of a claim form under CPR 6.7 was not rebuttable by
28 evidence of actual receipt of the claim form by the defendant. The position was
29 not incompatible with Article 6 of the Convention. The aim of rule 6.7 was to
30 achieve procedural certainty in the interests of both the claimant and the
31 defendant. Certainty in the time of service of the claim form was an important
32 requirement for the efficient performance of the case management functions of the
33 court. It was legitimate to promote that aim by setting a deadline of four months
34 from issue for service of the claim form by one of the permitted methods and by

1 using the legal technique of deemed service to bolster the certainty. The
2 requirement for service of the claim form within four months of issue, the range of
3 permissible methods of service available, and the day of permissible service or
4 deemed service did not impair the very essence of the claimant's right of access to
5 the court to enforce his civil rights. Moreover, justice and proportionality required
6 there were firm procedural rules which should be observed, not that general rules
7 should be construed to create exceptions and excuses whenever those who could
8 easily have complied with the rules had slipped up and mistakenly failed to do
9 so."

10 The relevant paragraph in the Judgment, which I do not think I need then read, is I think
11 para.36 on p.825. I think the headnote summarises it accurately. So we say here on
12 particularly, I think this is relied on for Rule 11(3) of the Tribunal rules, one has the
13 exceptional circumstances in (a) and (b) you will recall which deal with the injustice of the
14 situation, but where we have a company like Hutchison which has a full two months in
15 which to make its case and plead its grounds of appeal, doing so after a very long period of
16 consultation where it has been able to refine its thinking to say after that the circumstances
17 of amendment are very carefully circumscribed is not denying them a right of access to the
18 caution, terms of Article 6 of the Convention, and we say that is not relevant in this case.
19 Madam, those are our submissions.

20 THE CHAIRMAN: If they had included the on-net/off-net point in the original notice of appeal,
21 Mr. Roth, then the work that you describe as being necessary would have had to have been
22 done, or would you have had some objection to them including that point in any event?

23 MR. ROTH: Could you give me just one moment? (After a pause) Yes, we could not then have
24 objected as we understand the provisions.

25 MR. SCOTT: Mr. Roth, you took us to the bundle of consultation documents and I remember
26 marking in tab 29, which is the Hutchison document of 26th May 2006, Hutchison's
27 concerns on p.3 about both technological neutrality and operator neutrality. They made
28 various points there about the nature of themselves as being special. Did you want to make
29 any observation about the scope of that in relation to s.19, though in fact they are now
30 adducing new grounds of differentiation which I cannot find in their submission on p.3, but
31 I just realised they were raising this issue of being treated differently at that point.

32 MR. ROTH: No, we accept that as regards discrimination that is something that was raised in
33 response to the consultation. We say that makes it all the more extraordinary that when
34 they came at the end of it to draft, obviously with expert advice, their notice of appeal it

1 was not there, and the fact that it was in their responses, but then not in the original notice
2 of appeal that is no answer to saying it is not now a new ground of appeal, but I have not
3 sought to suggest on the s.19 and s.16 point that that causes us real practical difficulty, and
4 you have just pointed out, sir, why that is one of the reasons it does not – even though it is
5 put in a slightly different way. It is the on-net/off-net that caused the difficulty, not this.

6 THE CHAIRMAN: Yes, Mr. Pickford, I think you are next. Bearing in mind the time I would
7 ask the interveners to ensure they do not repeat anything that has already been said, as we
8 really do have to conclude this this afternoon.

9 MR. PICKFORD: Indeed madam, I am grateful, and I can be very short indeed. I really just
10 have two main points to make. As a preliminary to the first of those, we adopt everything
11 Mr. Roth has said on behalf of Ofcom, which we wholeheartedly endorse.

12 The first additional point concerns what Miss Rose said in relation to exceptional
13 circumstances. H3G argue, as one of the exceptional circumstances, that the amendment
14 only arises because of the effect of the Tribunal's ruling on the preliminary issue, and on
15 what constitutes a price control matter and we say that is, of course, wrong, because if all
16 H3G had done was to merely lift s.3 and para.1.1 of its appendix and put it in its notice of
17 appeal then we would not be here at this moment debating their amendment. The
18 amendment only arises because H3G have of course gone well beyond that and have sought
19 to introduce new material and rely on new points. That is the first point.

20 The second concerns the implications of the inclusion of the on-net/off-net point. First, we
21 would like to confirm T-Mobile's position that we indeed support what Mr. Roth has said
22 in relation to wishing to put in factual evidence on the extent of any pricing differential.

23 We certainly would wish to do that and it certainly is not a point that is not contested.

24 The second issue concerns the implications of any differential to the extent that it exists.

25 Now, we are grateful for the withdrawal of the Hoernig paper that has been offered by Miss
26 Rose in the letter about sensibilities, but it does not necessarily entirely eliminate the need
27 for expert evidence, because what H3G allege is that Ofcom has breached s.88, and I do not
28 need to take the Tribunal there again, but s.88 concerns promotion of efficiency, sustainable
29 competition and conferring the greatest possible benefits on end users. At para.17.25 to
30 17.28 of their amended notice of appeal H3G seek to make a number of arguments in
31 support of the proposition that Ofcom has breached the requirements of s.88 by failing to
32 take into account what they say are the effects of the on-net/off-net pricing point, and we
33 may well wish to produce economic expert evidence on what we say the economic effects
34 of any differential that exist are in relation to that particular point. This is an entirely new

1 issue that has not been canvassed previously and we certainly cannot say at this stage that
2 we will not wish to address that with expert evidence as well as factual evidence, and it
3 would certainly be wrong to shut us out now from the opportunity to do so.

4 I said I was going to be short and unless there is anything further those are my submissions,
5 thank you.

6 THE CHAIRMAN: Thank you very much, Mr. Pickford. Do any of the other interveners wish
7 to say anything on this point?

8 MR. FLYNN: For Orange we do not wish to add anything but simply to say that we support
9 everything that Mr. Roth has said, and also agree with what Mr. Pickford said about the
10 possible scope for expert evidence if the on-net/off-net point is included; it is not straight
11 forward.

12 MISS LEE: Madam, can I just say that really BT sees itself as neutral in relation to the argument
13 between Ofcom and H3G on this point and does not take sides one way or another as to
14 whether or not the amendment should be allowed.

15 Our concerns though were in relation to timetabling and part of the basis for that neutrality
16 is that we do not understand the suggestion to be that even if the amendments are let in
17 there will be jeopardy either to the proposed hearing towards the end of January or
18 February, or towards sending off the reference to the Competition Commission in
19 December. For example, I understand T-Mobile's position to be that if they wished to
20 adduce further evidence and plead, and so on, they would require that Ofcom should have a
21 period of, say, three weeks, and then they should have three weeks in response. We do not
22 understand T-Mobile to be suggesting that it could not all be dealt with if the on-net/off-net
23 point goes in, in time for a hearing in January. That is all that I wished to say.

24 THE CHAIRMAN: It may affect the length of the hearing I think was the point made by T-
25 Mobile, so whether one was able to finish it within the time that we envisage in
26 January/February, may be the point rather than whether one can start it then, but we will
27 deal with timetabling in due course.

28 MR. ROTH: Just to make it clear, madam, I did not address you on timetabling because I do not
29 think we got there, but it certainly does affect the time required for us to put in a defence,
30 but we have not really got to that point yet, and general questions of length of hearing I
31 think perhaps might come later, but we do have some concerns about timing.

32 THE CHAIRMAN: Miss McKnight?

33 MISS MCKNIGHT: Thank you. We support what Ofcom has said, but I would like to say that
34 our principal concern is also about the on-net/off-net pricing issue. For our part, whilst we

1 have not seen the confidential annex setting out the pure pricing tariff table, we have seen
2 the one paragraph of Mr. Russell's proposed second witness statement where he describes
3 one or two of the tariffs and we will take issue factually with the relevance of what he is
4 saying in those paragraphs, and it might well be that Vodafone would wish to put in factual
5 evidence as to the extent of on-net pricing differentials and their effect on Hutchison 3G
6 and on the market.

7 In due course we will, of course, also want to address you on timetable, but I think because
8 it is so closely linked with this issue I would wish to say that if Ofcom require to conduct
9 fresh investigation of on-net/off-net pricing and its effects, we cannot foresee what they
10 will say in their defence on those issues because they were not addressed in their original
11 decision, so it is quite possible than rather merely needing the two weeks after receipt of
12 Ofcom's defence to do our own statement of intervention, we would need somewhat longer
13 to address what will be essentially new material contained in Ofcom's defence which does
14 not merely defend what was in their original decision.

15 THE CHAIRMAN: Thank you. Miss Bacon?

16 MISS BACON: For the record, we concur with the submissions of Mr. Roth, Mr. Pickford and
17 everyone else on this side of the room. Just three short points, two on the on-net/off-net
18 issue, and the third on the timetable.

19 On-net/off-net, we are considering our position as to whether we would want to put in
20 further evidence in the event that this point is allowed in. Obviously in that case we may
21 wish to put in further evidence both as to the extent of differential pricing and the economic
22 effect of that.

23 The second point is a more general one, given that we spent some hours today simply
24 discussing the question of whether the on-net/off-net issue should be included in
25 Hutchison's amended notice of appeal one can only extrapolate from that the substantial
26 time and expense for all of the MNOs to deal substantively with the issue in the hearing,
27 and issue which, as Mr. Roth pointed out, was never taken by Hutchison 3G in the lengthy
28 consultation procedure, or in its very lengthy and very full submissions in its notice of
29 appeal. That, in our submission, is a very good reason for objecting the application to
30 amend in this respect.

31 The third point is a timetable issue. On Mr. Pickford's proposed timetable for putting in
32 Ofcom's defence and our statement of intervention, I am not sure if it will be possible to
33 deal with the issue of the questions to go to the Competition Commission a the hearing on
34 December 11th and 12th, because as you will recall our submissions in our statements of

1 intervention were proposed to frame, to a certain extent, the questions that would be sent
2 off and if we are not putting those statements of intervention in until, say, the end of
3 December then the 11th/12th hearing will be too early to deal with the questions for the
4 Competition Commission.

5 THE CHAIRMAN: Thank you, that is everybody. Very briefly, Mr. Roth?

6 MR. ROTH: I am sorry, I have been asked to correct something that I said in answer to your
7 final question, which is could it have been included in the original notice of appeal? My
8 attention has been drawn to paragraphs 38 to 40 of the *Floe* Judgment on amendment. We
9 did not have to confront that in this case, of course, and that is something on which we
10 would like to reserve our position if it did arise on a market review after an extensive
11 consultation basis. If there were then an appeal and a new area was opened up on which
12 Ofcom had not included in the investigation to seek information, etc. whether we would
13 object to that or not, so if I could just put down a marker that we do not concede it could
14 necessarily have been in but we have not really considered that in detail.

15 THE CHAIRMAN: Yes, Miss Rose?

16 MISS ROSE: Madam, the first general point that I would like to make is that from all the
17 interveners and responses it is clear that there is no prejudice to anybody arising out of the
18 amendments relating to s.47 and s.88 on the discrimination point; nobody has any practical
19 concerns about them, or timetabling concerns at all. The point appears to be purely a
20 matter of technicality that has been taken by Ofcom, and in those circumstances applying
21 the approach of Sir Christopher Bellamy, and taking into account the interests of justice,
22 which he indicated were to be balanced when considering exceptional circumstances, we
23 submit that the balance is overwhelmingly in favour of allowing those two amendments.
24 Can I now come on to deal with the specific points made by Mr. Roth. On the question of
25 whether or not these were new grounds, it is always the case that we have argued
26 discrimination under the head of proportionality. You have my submissions on that point.
27 So far as the s.47 and s.88 points are concerned, as I understand it what is now being said
28 by Mr. Roth is that they do not object to us arguing that Ofcom reached the wrong
29 conclusion when it applied s.88, in other words, Ofcom erred in concluding that the s.88
30 tests were satisfied. What they object to is us raising the argument that Ofcom failed to
31 address the s.88 test in particular, in relation to the specific and special circumstances of
32 H3G.

33 THE CHAIRMAN: I think the point is that whatever is the difference between your paras.16 and
34 17, that it is 17 that reflects what used to be in part 3 of the appendix and not 16. I am still

1 not entirely clear what the difference between 16 and 17 is, but perhaps you are about to
2 explain?

3 MISS ROSE: I am, madam. Section 16 is what in public law circles we refer to as “a failure to
4 take into account relevant considerations.” It is a failure by Ofcom to consider the question
5 of whether the s.47 and s.88 tests were satisfied specifically in relation to H3G. We say
6 that the error is in considering the whole sector and not considering H3G’s special
7 circumstances. So that is the failure to take into account relevant considerations.

8 Section 17 is the plea that if they did take into account, which we deny, the application of
9 those tests to H3G, they reached the wrong conclusion because had they properly applied
10 those tests they ought to have concluded that those tests were not satisfied in relation to
11 H3G.

12 Now, we say both those points are included in our original notice of appeal.

13 THE CHAIRMAN: Well can you take us then to where the point that is made in para.16 was
14 made in the original notice of appeal?

15 MISS ROSE: Indeed, I can. If we turn up the annex again and the appendix – turning to p.6 of
16 the appendix, this comes at the end of a section dealing with the disproportionality of price
17 controls and you can see that before it we have the submissions in relation to the financial
18 impact on H3G, that is at p.3, and the consequential adverse effect on competition given
19 H3G as the maverick competitor. In other words, drawing attention to the special
20 circumstances of H3G. Then at para.3.12:

21 “Ofcom’s assessment of whether a price control is proportionate, and approach to
22 the detail of setting the price control does not take any of these effects into
23 account.”

24 So there, madam, you have the failing to take into account relevant considerations, which
25 has been expanded at s.16.

26 THE CHAIRMAN: But the content of what goes before that is now largely found in Part 17?

27 MISS ROSE: Yes, madam, because in the original notice of appeal which, with all due respect to
28 it, and to those who drafted it, is not perhaps as clearly drafted as the amended one. The
29 two grounds were merged, and what we have sought to do is to separate them out in the
30 interests of clarity because there are two separate complaints. The first is that Ofcom
31 failed properly to take its statutory duties into account, bearing in mind the special
32 circumstances of H3G. The second is that if it did take H3G’s special circumstances into
33 account it reached the wrong conclusion. Both of those points were originally taken but not
34 perhaps in the clearest way. I am being told to slow down ----

1 THE CHAIRMAN: No, no that is very clear.

2 MISS ROSE: I am aware of the time. So we do submit not new grounds, nobody is prejudiced,
3 overlapping issues and all the other exceptional circumstances we relied on and we say
4 leave to amend ought to be given on both of those points.

5 On the question of the overlapping issues and reference to the Competition Commission
6 madam, I would just like to remind the Tribunal of the remarks that were made at the
7 hearing on 26th July. We have the transcript of that hearing in the bundle at tab 4. If you
8 turn to p.9, these are some preliminary remarks made by you, madam:

9 “As a preliminary observation, the Tribunal considers that it is important to bear
10 in mind that the procedure before the Tribunal is essentially an adversarial one,
11 with the exchange of pleadings and the grounds of appeal, and the defence
12 effectively setting the bounds within which the case is conducted. In contrast, the
13 proceedings before the Competition Commission are generally not adversarial in
14 nature, but more investigatory, and there is no exchange of pleadings as such, and
15 the Commission receives submissions from parties in response to its request for
16 information. The Tribunal does not envisage that in this case it will be directing
17 the Commission to adopt a procedure which is markedly different from the way in
18 which the Commission usually carries out its investigations. Therefore, the
19 concerns raised in O2's letter about the scope of the submissions that they can
20 make in respect of price control matters being looked at by the Commission may,
21 in our judgment, be unjustified insofar as the pleadings in this case have only a
22 limited role to play once the references get to the Commission's procedure.”

23 Madam, we respectfully endorse the correctness of that approach, and that goes to all three
24 of the amendments that are contested here and it is clear now that the one the parties really
25 care about is the on-net/off-net pricing one, but madam, it is inevitable that this is a matter
26 that will have to be investigated by the Competition Commission, because one of the
27 matters that the Competition Commission will be considering is whether the price controls
28 that were actually applied to all the MNOs, including H3G, were proportionate and
29 appropriate, bearing in mind the particular circumstances of each of those players in the
30 market.

31 You cannot shut the Competition Commission out from considering the effects on
32 competition of on-net/off-net pricing and, in particular, the effects on H3G, once it is seized
33 of that issue. So madam, we do submit that there is a false logic by Ofcom to suggest that
34 this issue would not have to go to the Competition Commission and certainly this Tribunal

1 could not prevent the Competition Commission from deciding that it was relevant and
2 would need to be considered in the context of considering the proportionality of the price
3 controls that had actually been applied.

4 Also, of course, the Competition Commission will be considering the methodology used by
5 Ofcom to set the price controls, and that includes whether or not Ofcom complied with
6 s.88 when deciding whether price controls were necessary and, if so, what their levels
7 would be. That again raises questions about distortion of competition and inevitably raises
8 the on-net/off-net argument, which is not, of course, a new ground but simply an argument,
9 so we do submit that the overlap is there and that the risk I referred to before, of
10 inconsistent decision making is there inevitably, if this Tribunal does not consider that
11 question.

12 There has been some harsh criticism of H3G about its participation in the consultation
13 process, and it is right we did not raise the on-net/off-net issue specifically at that time. We
14 certainly raised traffic imbalance. We were not aware at that time for the exact reasons for
15 the traffic imbalance. It is very difficult for one party in a market to be in a position to
16 identify precisely what are the causes and effects of particular competitive disadvantages
17 that it is suffering. The point is this, it was Ofcom which was under the statutory duty in
18 s.88 to investigate this question.

19 If we go back to s.88 at tab 5, s.88(1) is a prohibition, it is expressed as a prohibition.
20 Ofcom are not to set an SMP condition falling within s.87(9) except where it appears to
21 them from the market analysis carried out for the purpose of setting that condition that there
22 is a relevant risk of adverse effect arising from price distortion, and it also appears to them
23 that the setting of the condition is appropriate for the purposes of promoting efficiency,
24 promoting sustainable competition and conferring the greatest possible benefits on the end
25 users.

26 That is a very high threshold which requires Ofcom to conduct an investigation, a full
27 market analysis and to reach its conclusion as to whether or not a price control is
28 appropriate for conferring the greatest possible benefits on end users. It does not say
29 Ofcom is to initiate a consultation process and only has to consider points that are put to it
30 by market players, and can ignore everything else in the market. It is Ofcom which drives
31 this process, it is Ofcom which has the duty to investigate. It is Ofcom which has only a
32 limited power to set a price control once it has conducted a full investigation.

33 The position, madam, is this. Ofcom has now conceded today that it did not investigate the
34 question of on-net/off-net pricing and its effect on H3G and the potential exacerbation of

1 those effects caused by a price control in conducting its investigation. Ofcom remarkably
2 has said it is sceptical that there is any effect on competition. We do not understand how if,
3 on its own admission, Ofcom has not investigated this question, it is in a position to express
4 that scepticism. It certainly concerns us.

5 MR. SCOTT: I am a little concerned about this concept of a high threshold. Ofcom, as with any
6 national regulatory authority, has limited resources and has a large number of these studies
7 to conduct. What it says is that it appears to them from the market analysis carried out for
8 the purpose of setting the condition.

9 MISS ROSE: Yes.

10 MR. SCOTT: So that what the section seems to envisage is that there is a market analysis. Now,
11 clearly that market analysis has its limitations, and I think that Mr. Roth would say that part
12 of the consultative process is a process in which people are able to assist Ofcom in knowing
13 how that market analysis should be conducted. What the Act does not appear to be saying
14 is that the market analysis is an exhaustive one, and so one needs to read (b) in the light of
15 (a) so it also appears to them. They are having to deal with their analysis on the basis of the
16 material that is available to them. Now, clearly they have a duty to do that with the sort of
17 diligence expected in the statutory way of a statutory body. But to suggest that there is a
18 peculiarly high threshold seems to me to be importing into the section something which is
19 not there.

20 MISS ROSE: Sir, with great respect, that is a question which goes to the merits of our argument.
21 Ofcom are free to put in their defence to our claim, and if they wish they may take that
22 point. There are a number of answers I could give to it but now is not the time.

23 MR. SCOTT: Yes.

24 MISS ROSE: That goes to the merits of our argument. What I am arguing is that we should not
25 be shut out from making the argument. Mr. Roth originally conceded that this was a point
26 that could have been included in our original notice of appeal, he now says he wishes to
27 reserve his position on that. We submit that it is quite clear that this is a point that could
28 have been included in our notice of appeal because it would always have been open to us to
29 say "Ofcom are in breach of their s.88 duty because they did not investigate this question
30 and therefore they failed to take into account a relevant consideration and had they done so
31 they would have had to conclude that the test in s.88 was not satisfied." That could always
32 have been a ground we could raise.

33 They might have defences to that but that does not go to the issue that is before the Tribunal
34 today.

1 MR. SCOTT: I accept that, I entirely understand that we have substantive argument to come.

2 MISS ROSE: Yes, that is right.

3 MR. SCOTT: I am merely saying ----

4 MISS ROSE: I appreciate that.

5 MR. SCOTT: -- that we should not leap to accept your premise before ----

6 MISS ROSE: I do not expect anyone to accept my premise God knows from bitter experience,
7 six people will tell me I am wrong every time I open my mouth, but the point remains: what
8 is the prejudice arising from the amendment? The answer is: none. We submit that there is
9 no proper basis for saying that this could not have been in the original notice of appeal.
10 Had it been, the consequences of which all these individuals complain would have
11 occurred. We say in any event they are going to have to address the substance of this issue
12 because it will inevitably form part of the reference to the Competition Commission. There
13 is serious disadvantage, not only to us, but to the whole process of shutting this issue out
14 which is conceded not to be a s.11(3) ground.

15 I do want to refer to para.60 of *Floe* on which Mr. Roth relies. The key points
16 here are that “If Floe’s activities are lawful as a result of the Primary Argument, or
17 the First Alternative Argument, Floe does not need the Second Alternative
18 Argument. On the other hand if Floe’s activities are unlawful, it is difficult to see
19 how an uneven enforcement of the law could aid Floe.”

20 The key point here was that the amendment that Floe were seeking was actually irrelevant
21 to the substance of the appeal, and therefore there was no prejudice to Floe in refusing the
22 amendment, and that in my submission is the key point under para.60.

23 The points on which Mr. Roth seeks to rely is that the issue of discrimination does not
24 appear in the notice of appeal and that it would require further factual investigation and
25 potentially affects third parties. But we submit that none of those would be a sufficient
26 reason for the High Court to refuse an application for leave to amend in circumstances
27 where refusing that application would cause significant prejudice to the party making the
28 application. It is the combination of those factors with the lack of prejudice to Floe which
29 is crucial here.

30 If you take the absolutely average situation in the High Court under the CPR where an
31 amendment is sought to be made, inevitably it is an amendment that was not in the original
32 pleading, or the amendment would not be sought, it will probably require further factual
33 investigation and it may affect third parties. But the approach that the court will take is to
34 say: is a fair trial still possible, notwithstanding the amendment? Is there irrevocable

1 prejudice or can it be dealt with by orders for costs, and there is no identified prejudice here
2 to anybody.

3 Now, there is the point that Mr. Ross sought to raise in relation to virtual network operators.
4 I am in real difficulty about that point because it was not pre-figured anywhere in Ofcom's
5 objection of 29th October. If you read that letter, you will see there is no reference at all to
6 any effect on third parties, still less any identification of the third parties concerned. The
7 only points that are made are that the point requires further factual investigation and
8 evidence and, in my submission, it is unfair for Mr. Roth now to seek to raise that point in
9 circumstances where I cannot deal with it, and there is perhaps a particular irony in Ofcom
10 dealing with the matter in that way when what they are seeking to do is to resist our
11 application for permission to amend.

12 I do wish to make the point that we have been at pains to ensure that Ofcom knew in
13 advance what our argument was going to be today. They know very well that their letter of
14 29th October went astray and we did not get it until 31st October when we were last before
15 you, madam, when we became aware that they had sent it. We do not blame them for that
16 but they know that we only got their letter that day. We replied to it substantively the
17 following day and that has been the attitude of H3G throughout these proceedings. Madam,
18 you will recall that when you gave us the opportunity to apply for permission to amend you
19 gave us six days in which to put in the application and any supporting evidence; we met
20 that deadline, and yet we are constantly faced with submissions made on every issue by
21 every other party here "Well, if that issue is raised it will take weeks and weeks and weeks
22 for us to respond to it."

23 MR. ROTH: I am sorry to interrupt, my friend misstated, we have the fax confirmation they
24 received it on the 29th.

25 THE CHAIRMAN: Well I do not wish to go into that, thank you.

26 MISS ROSE: Madam, I said the mistake was at our end, we do not blame Ofcom for that, they
27 are perfectly well aware that it was misplaced in my instructing solicitors' offices, and we
28 did not get it until the 31st, I do not blame them for that, it is just a fact. The point that I am
29 making is that we have sought throughout this to be transparent and prompt in our
30 responses and we do expect the same courtesy from other parties.

31 May I just have one moment to see if there are any other points I need to make? I feel there
32 may be. (After a pause) Yes, just purely on the point about the extent of the tariff
33 differentials, you will find if you look at Kevin Russell's second statement at para.34 that

1 he specifically addressed the question of pay-as-you-go, and the effective tariff differentials
2 on pay-as-you-go which is, of course, the majority of the market.

3 MR. SCOTT: Miss Rose, while you are on that area, I was short with you at a time when you
4 were under stress and feeling ambushed, and really you are not to blame for what has
5 happened heretofore in relation to confidentiality and H3G.

6 MISS ROSE: Can I just explain the situation on that? We commissioned that report from
7 consultants, and therefore we need their consent before we waive confidentiality. It is as
8 simple as that.

9 MR. SCOTT: I understand, but you will appreciate that in general terms if we are going to deal
10 with on-net/off-net matters where retail tariffs are concerned we will not look good if we
11 seek to keep from the public tariffs which should be available to them?

12 MISS ROSE: Sir, that message is heard and understood. On the TRD dispute appeals, Ofcom
13 accepts that the issue is raised, but they say: "We are not going to respond to it in substance
14 because we say it is irrelevant to the dispute". But again, with great respect, that misses the
15 point. Ofcom can seek to put in whatever defence they wish on the dispute appeal, but we
16 do not agree that the plea is irrelevant, and we will be pursuing that point on the appeal, and
17 ultimately Ofcom will have to take a tactical decision whether they wish to rest on a bare
18 legal argument or whether they think it would be prudent for them to back it up with some
19 factual material. Of course, that is a matter for them but of course we are handicapped here
20 as always because we do not know what their defence is to any of the points. It does not
21 detract from my basic point which is that the on-net/off-net issue is squarely raised, is going
22 to be raised by us in the TRD disputes, and will have to be dealt with.

23 Unless there are any further points, those are our submissions in reply.

24 THE CHAIRMAN: We will now rise for a short period at the end of which we will let you know
25 whether we are able to tell you what our decision is, even though we might not be able to
26 give the reasons for that decision, or whether we are not able to tell you what our decision
27 is. We will not, I hope, keep you terribly long, but clearly it would be advantageous to
28 everybody to know at the end of today where they stand, but thank you to everybody.

29 (Short break)

30 **DECISION**

31 THE CHAIRMAN: Thank you to everybody for your very helpful submissions. The decision of
32 the Tribunal is as follows: we give permission to amend to include s.16 of section E of the
33 new part of the notice of appeal. We also give permission to amend to include s.19, the
34 discrimination point of section E. We do not give permission to include the on-net/off-net

1 point, and that means that the pleading would be revised excluding paras. 17.22 to 17.28,
2 and the reference in para.19.3 to “on-net” and “off-net” .

3 We also give permission to adduce the statement from Professor Littlechild and that of Mr.
4 Dyson, and the second statement of Mr. Kevin Russell, which we order should be reserved
5 without the inclusion of the on-net/off-net material.

6 We also would ask H3G to serve a consolidated amended notice of appeal as soon as
7 practicable, but to retain the existing numbering because we do not want to hold up the
8 service of the defence pending the service of that consolidated notice of appeal. We will
9 order Ofcom to serve their defence by next Friday, 16th November, and statements of
10 intervention to be served by 27th November. The Panel will then draft questions to be sent
11 to the Competition Commission and circulate those to the parties in the hope that we will be
12 able to resolve any issues arising out of those questions by correspondence rather than
13 needing a further hearing, and we will deliver a short written Ruling setting out our reasons
14 for this decision shortly, and also an order in the usual manner.

15 Does anybody have any points? Yes, Mr. Roth?

16 MR. ROTH: Yes, madam, if I could just address you on timing. Perhaps the first question is the
17 length of the hearing in the light of your ruling in that on-net/off-net is not included. The
18 hearing of this matter, as you indicated at the start of today, will be the Hutchison appeal in
19 the MCT non-price control, together with the core overlapping issues from the termination
20 rate dispute appeals, including Orange ground 2, which is not part of the preliminary issue.

21 THE CHAIRMAN: Depending, of course, on the outcome of the preliminary issue in Orange.

22 MR. ROTH: Based on the experience of today where the interveners have said very little but
23 clearly will wish to say more at the hearing, we think, with respect, that seven days is not
24 going to be adequate and that a realistic estimate is nine to ten days – in other words, two
25 court weeks effectively – given not least that there will be expert evidence. Professor
26 Littlechild is in, BT has served expert evidence with its termination dispute appeal. We will
27 need to serve expert evidence in response to those – there may be others who would seek to
28 do so, I do not know – and also respond to some of the factual witness evidence served by
29 BT in the termination dispute appeal. Whether we will want to respond to Cable &
30 Wireless witnesses of fact we are not sure yet, and others may, as I have indicated, put in
31 evidence, so we do think that it is prudent to allow 10 days. It is, one need hardly say,
32 without exaggeration, an extremely important case being heard by this Tribunal. There are
33 few cases heard so far since the Tribunal was established that affect the financing of the
34 whole industry in this way, and no doubt why so many people have sought to intervene and

1 indeed I believe there is a further application to intervene that is pending before the
2 Tribunal in this case, whatever happens to that. So we do think it would be sensible to
3 programme 10 days. When that can be done, and I know others want to address you on
4 availability on those dates at the end of January.

5 On the timetable, we are in this situation now at Ofcom, we have the preliminary issue in
6 the Orange appeal in mid-December. We need to put in our defence to that which we are
7 working on actively at the moment, there has been no order for that yet, but we intend to
8 serve that by close of business on 16th November (Friday week). We have also to do the
9 outline defences to the price control issues in the H3G and BT appeals so that the matter
10 can go to the Competition Commission; that also seems to us something of a priority.

11 Then we have this appeal plus all the dispute, the core issues on all the dispute appeals,
12 which are five appeals, including Orange grounds 2 and 3, and BT, T-Mobile, H3G, and
13 what we call the “1092 appellants” – Cable & Wireless and others. That includes, as I say,
14 responding to the expert evidence we would have to serve with our defence, and really
15 madam, with the best will in the world, we will not be able to do that by the 16th November,
16 as well as doing these other defences. We just do not have the resources to manage that.

17 **THE CHAIRMAN:** Well, Mr. Roth, we have made it clear in the previous case management
18 conference that once these preliminary issues were resolved we would be setting a very
19 short time, in the expectation that you would have been preparing the defence in these
20 proceedings so that really all that should be needed now was to add in the parts that relate
21 to the amendments which we have today allowed.

22 Now, it is essential that we have the defence because the timing of that affects the timing of
23 the reference of the questions to the Competition Commission.

24 **MR. ROTH:** We could do the outline defences on the price control matters, which affect the
25 references to the Competition Commission. It is the non-price control, in other words, what
26 is being discussed today, plus with them the five dispute appeals and the core issues in them
27 which are all now being heard together and one defence; that is where we have the expert
28 evidence and the factual evidence that we have to meet and to say that we have to produce
29 expert evidence feeding into our drafting in this short timetable is extremely burdensome
30 with respect.

31 **THE CHAIRMAN:** Well we are not ordering that the defence in the termination rate dispute
32 cases should be served by next Friday. We are ordering that the defence on the H3G non-
33 price control matters, and in outline on the price control matters be served next Friday, and
34 on the BT appeal. In the termination rate dispute appeals we have not made any order in

1 relation to and we were not envisaging that we would set the Friday deadline for those
2 cases – you might not get considerably more time, but there could be some more time for
3 those, because those do not affect the formulation of the questions to the Competition
4 Commission.

5 MR. ROTH: Yes, I understand. I am sorry I had misunderstood you. I think it still means we
6 have the expert report in response to Professor Littlechild, which is in this appeal, and given
7 that they are being heard together because of overlapping issues, the core issues that are
8 common, we had envisaged that a certain part of the defence might be a core defence, and
9 then dealing with one is a hypothetical and the other is a factual, so that it can all be dealt
10 with in one breath; we would be looking at them altogether, and that was the way we had
11 been hoping to approach it so that we can look at all these arguments on the core issues
12 together and address them comprehensively, and not break it down, given that they are all
13 going to be heard together in one hearing.

14 THE CHAIRMAN: Well the termination rate dispute appeals' defences will also have to deal
15 with the separate issues which are not going to be heard on the January February date.

16 MR. ROTH: We were assuming that those might be held over.

17 THE CHAIRMAN: Yes. I think the Tribunal's view is that, although in an ideal world, one
18 might have consolidated the defences in all of them the priority is to get the defence in on
19 H3G and BT MCT appeals which were, of course, brought several months before the
20 termination rate dispute appeals, and that that is our priority, even if that means having to
21 separate those from the defences on the TRD appeals.

22 MR. ROTH: Yes, I understand. Could you give me just one moment to take instructions?

23 THE CHAIRMAN: Yes.

24 (The Tribunal confer)

25 THE CHAIRMAN: If it helps, Mr. Roth, you could have some more time to get in your expert
26 evidence in response to Mr. Littlechild, but we are very keen to have the defence in the
27 H3G and BT appeals by next Friday.

28 MR. ROTH: The position I am in is this: the defence to the price controls by next Friday is not a
29 problem, the outline defence to the H3G and BT price controls.

30 The defence to the non-price control, and although you say we could have more time for
31 the expert, but the expert's advice feeds into the drafting of the defence, it supports the
32 defence, and we also have to respond to Mr. Russell's second, with the bits now excluded,
33 and to Mr. Dyson's witness evidence. So there is quite a lot that we have to deal with, and
34 that is why we would ask, if we can, to have one more week until the 23rd for the non-price

1 control defence and then we can just do it. I do ask the Tribunal to bear in mind that
2 Ofcom's resources are not equivalent to those of the large City firms, some of whom are
3 here today or, indeed, to those of the OFT. We have a very limited number of lawyers and
4 economists who are working on this and also working, of course, as you know, on other
5 cases pending before the Tribunal, the same people are having to deal with those – the
6 Rapture case and so on, which is being heard in December – and there is just an enormous
7 strain on the resources we have got. We assume you also want the defence – or the other
8 Tribunal wants the defence of the Orange preliminary issues, because that is going to be
9 heard on 10th December or so. Being quite frank about it, that is our practical difficulty. It
10 is not that we do not want to assist as much as we can.

11 (The Tribunal confer)

12 THE CHAIRMAN: We would be prepared to revise the timetable to this extent, Mr. Roth, that
13 the defence on the price control matters, and the non-price control matters in the H3G and
14 BT appeals be served by 21st and the interveners then serve their statements of intervention
15 by the 30th November, and that gives us December then to sort out the questions. On the
16 basis that everybody has known what the issues are in this case for many months now, and
17 we have signalled a number of times during the proceedings our intention to set a tight
18 timetable once the timetable was set, so what the Tribunal is saying now should not come
19 as a surprise to anybody because you should not now be starting from standing in preparing
20 these documents. Mr Roth, does that help you?

21 MR. ROTH: Can I just clarify, does the expert in answer to Professor Littlechild also have to be
22 by 21st or can we have a few more days to finalise the report?

23 THE CHAIRMAN: How long would you want to finalise that?

24 MR. ROTH: Until the end of the Friday, 23rd?

25 (The Tribunal confer)

26 THE CHAIRMAN: So the proposed timetable now is: defence from Ofcom on H3G and BT
27 MCT appeals, on the non-price control matters and, in outline, on the price control matters
28 by 21st November, any evidence in reply to the statement of Professor Littlechild by 23rd
29 November. Statements of intervention by 30th November. Mr. Flynn?

30 MR. FLYNN: Madam, I hate to follow Mr. Roth and say I am afraid we just do not think this is
31 workable. Originally the timetable allowed for two weeks between Ofcom's defence and
32 evidence, and the interveners' statements of interventions with any evidence. It has gone
33 down from 11 days to 9 days to 7 days in the last five minutes when we are dealing with a
34 much expanded application. We are here today because Hutchison have wished to some

1 extent clarify, which we always said was necessary, but also to amplify their appeal, and
2 there are matters in there to which we will need to respond. The role of the interveners is
3 intended to be to supplement what Ofcom says, so although we can start now and, indeed,
4 have of course been thinking what we might want to say, our real role is to add and not to
5 repeat and not to serve however many we are, five further defences which is what we would
6 have to do if we do it from a standing start.

7 We also will need to provide our own factual or expert evidence to respond to. We may not
8 agree with everything Ofcom says, we may feel we need to supplement it and to provide
9 that in the space of a week from seeing the Ofcom statement and evidence, I am afraid, in
10 our submission is just not realistic, and we are not going to be able to do that. I think we
11 need at least the two weeks that the Tribunal originally envisaged and potentially –
12 depending on the nature of the expert evidence – we may need to apply for more. Now,
13 that particular timetable I still do not think that precludes the Tribunal achieving its
14 objective of getting out draft terms of reference for the Competition Commission before
15 Christmas is what I apprehend to be your overriding desire, if I can put it that way. But I
16 think one week from service of whatever Ofcom proposes by way of response to Professor
17 Littlechild, or indeed the other witness statements which have now just been admitted by
18 the Tribunal is simply not realistic and we would say is unfair on the interveners. I do
19 apply for a minimum period of two weeks for the service of our statement of intervention
20 and evidence.

21 THE CHAIRMAN: Does anybody else wish to make submissions?

22 MISS BACON: Just for the record, we agree exactly with Mr. Flynn's comments. We would
23 also be applying for the two weeks that was envisaged. We have, as with the other
24 interveners, of course started to prepare our work on our statements of intervention but at
25 the end of the day, as Mr. Flynn said, we are interveners, and our statements of intervention
26 will be responsive to a large degree on what is said by Ofcom, and a week or nine days is
27 simply not sufficient in that respect.

28 MISS McKNIGHT: We would also agree with what has been said.

29 MR. PICKFORD: We echo those remarks, surprisingly enough. (Laughter)

30 THE CHAIRMAN: A theme is emerging! Yes, Miss Rose?

31 MISS ROSE: If you would like to hear a dissenting voice, I would just make some basic points.
32 Notice of appeal was served in May of this year, very large chunks of it are in exactly the
33 same form as they always have been. You have, as you say, given repeated warnings to the
34 parties that the timetables would be short and that they should start working on it. The

1 application to amend was served on 12th October, that is four weeks ago. The expert
2 evidence was served four weeks ago; they have had it already for almost a month. Madam,
3 you heard me on the last occasion make the point about speedy trials, and the speed with
4 which parties can operate if it is really in their interest to do so.

5 Just one point about Ofcom, of course, ultimately Ofcom makes a choice about how much
6 resources to devote to an issue. Ofcom has chosen in this case not to go to external
7 solicitors, but to deal with the matter in-house, it does not always do that. Ofcom does and
8 can refer matters to external City solicitors; the fact that it has chosen not to do so in what it
9 now is saying to you is one of the most important cases ever heard by this Tribunal is, with
10 respect, a matter for Ofcom but should not be permitted to impede the proper and prompt
11 determination of the appeal.

12 (The Tribunal confer)

13 THE CHAIRMAN: Sorry to keep everybody so late, but I think it is important to get this sorted
14 out this afternoon, so we will rise for another short period and decide what to do.

15 (Short break)

16 THE CHAIRMAN: Although we were very reluctant to split the pleading between the price
17 control matters and the non-price control matters, we recognise that if we set too short a
18 time for the interventions that may be counter productive in precluding the interveners from
19 making sure that they do not duplicate material in the defence and in each others'
20 pleadings. Therefore, what we propose is as follows: that Ofcom plead to the price control
21 matters in the H3G appeal and in the BT appeal by next Friday, 16th November and by 30th
22 November they serve their complete pleading including the non-price control matters and
23 including the matters included in 16th November pleading so that we have a single,
24 composite document.

25 Similarly with the statements of intervention the pleading in relation to the price control
26 matters be served by 30th November and by 14th December the interveners serve again a
27 complete document superseding the one of 30th November but not containing anything
28 different in relation to the price control matters so that again we have a single pleading.

29 Does anybody wish to make any submissions in relation to that. Mr. Pickford?

30 MR. PICKFORD: Madam, could I just clarify that those statements of intervention will not
31 include, or are not expected to include our statements of intervention in respect of the TRD
32 appeals – for example, responses to BT's expert evidence that we have heard about but as
33 yet we have not even seen?

34 THE CHAIRMAN: It is nothing to do with the TRD appeals?

1 MR. PICKFORD: I just wanted to check that that was the case given that ultimately they will be
2 heard together.

3 THE CHAIRMAN: We are only dealing today with an order in relation to the H3G MCT appeal,
4 and the BT MCT appeal.

5 MR. PICKFORD: I am grateful, it was merely for avoidance of doubt, thank you.

6 THE CHAIRMAN: Has anybody else got anything they wish to raise? Mr. Flynn?

7 MR. FLYNN: Madam, the final point is the length of the hearing in January which Mr. Roth
8 mentioned. I think he said 10 days to deal with all matters I suppose except what you might
9 call the non-core matters in the termination rate disputes. Insofar as we can we rather agree
10 with that estimate. Whether it is a good idea to leave those matters to another hearing or
11 better to roll them up in a 10 or 12-day, or, I do not know how-long-a-hearing, is perhaps
12 for others to debate. Obviously the timetable for getting to the termination rates' dispute
13 hearing will be set separately, may I make a personal point which will find no favour with
14 the Tribunal whatsoever, but the week beginning 28th January, which you have so far set for
15 hearing these cases together is I am afraid not one that either I or Mr. Green for O2 would
16 be able to make because we are already in the House of Lords. So if the timetable led to a
17 reconsideration of the dates and putting off by a week or so that certainly from our
18 perspective would be a desirable outcome, but I cannot put it any higher than that.

19 THE CHAIRMAN: I think Mr. Flynn it is unlikely to have that effect. I think the current plan is
20 that we would have those days and if more time were needed it would go part heard and be
21 heard at a later stage although I should say that as far as the Tribunal's availability is
22 concerned it cannot be heard until a few weeks' later than that. It is always going to be
23 difficult to get a long period together. But there are other aspects of the diary which may
24 shift in a couple of weeks' time and we will revisit those dates in due course.

25 MR. FLYNN: Precisely, madam, I cannot say any more than that but I just do ask the Tribunal
26 to the extent that it does to bear availability in mind as well, if those turn out to be the dates
27 then those are the dates. Thank you very much.

28 THE CHAIRMAN: Yes, Miss Rose?

29 MISS ROSE: We would just like to raise two issues. First, just to clarify exactly what issues are
30 to be dealt with in the January hearing. As I understood it from the last hearing there was
31 general agreement that issues 3 to 9 on the T-Mobile schedule that was produced at the last
32 hearing were the ones that overlapped with the H3G and BT MCT appeals, and we would
33 envisage it is those issues which will be heard together with those two other appeals at the
34 end of January.

1 THE CHAIRMAN: Yes.

2 MISS ROSE: What I was not quite clear about is what the proposal is in relation to the second
3 Orange issue?

4 THE CHAIRMAN: The second Orange issue will also be heard at that time if it still arises,
5 because the second Orange issue so far as I recall is the question of whether Ofcom ought
6 to have declined jurisdiction over the Orange dispute because it was dealing with the matter
7 under its market review SMP powers, and therefore ought not to have taken on the dispute
8 resolution under s.185, and that interrelationship between the s.185 powers and the market
9 review powers seem to me to be connected with the overall question of what the test under
10 s.185 is, such that it is not appropriate to split that point out.

11 MISS ROSE: We would suggest that issues 10 to 16 should be split because T-Mobile
12 suggested ----

13 THE CHAIRMAN: Let me just stop you there, Miss Rose, because this is not the Panel ----

14 MISS ROSE: That is true.

15 THE CHAIRMAN: -- to make those submissions to.

16 MISS ROSE: That is a good point, madam, and I do take it.

17 THE CHAIRMAN: How we are going to formulate in January is a different question, and
18 whether it is done by saying what we will hear, or saying what we will not hear I am still
19 agnostic about but that is for another day.

20 MISS ROSE: The other point is that I would ask, madam, that the date should be finalised as
21 soon as possible. So far as we are concerned I did have another commitment in my diary
22 for 28th for that whole period which I have in fact now moved to accommodate this hearing.
23 I would be very grateful if we could have a firm listing for those dates because otherwise
24 we could find ourselves in difficulty if more dates are proposed.

25 THE CHAIRMAN: Yes, within the Tribunal there is one matter which has to be resolved before
26 we can finalise those.

27 MISS ROSE: Should I proceed on the basis that those are ----

28 THE CHAIRMAN: Yes, you should.

29 MISS ROSE: I am grateful, madam, it is just difficulties with other clients, I am grateful.

30 THE CHAIRMAN: Thank you very much.

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