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**IN THE COMPETITION**

Case Nos 1083/3/3/07

**APPEAL TRIBUNAL**

1085/3/3/07

Victoria House  
Bloomsbury Place  
London WC1A.2EB

21 April 2008

Before:

**MISS VIVIEN ROSE**

(Chairman)

**PROFESSOR ANDREW BAIN OBE**

**MR. ADAM SCOTT TD**

BETWEEN:

**HUTCHISON 3G (UK) LIMITED**

(“H3G”)

Appellant/Intervener

and

**OFFICE OF COMMUNICATIONS**

(“OFCOM”)

Respondent

And

**BRITISH TELECOMMUNICATIONS PLC**

(“BT”)

Appellant/Intervener

and

**OFFICE OF COMMUNICATIONS**

Respondent

With interventions by:

**O2 (UK) LIMITED (“O2”)**

**ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED (“ORANGE”)**

**T-MOBILE UK LIMITED (“T-MOBILE”)**

**VODAFONE LIMITED (“VODAFONE”)**

Interveners

Also present:

**COMPETITION COMMISSION**

—————  
**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G

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

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.

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

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of the Intervener Orange.

Mr. Tom Sharpe QC and Mr. David Caplan appeared on behalf of the Competition Commission

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1 THE CHAIRMAN: Good morning ladies and gentlemen. Thank you to everybody for your  
2 submissions. There are just a couple of points I want to raise by way of introduction for  
3 the parties. The first is directed at Ofcom and the interveners in particular, which is that we  
4 would welcome, as you go through the different parts of the material which are in  
5 contention, if you could particularly focus on which, if any, would require additional work  
6 on the part of Ofcom and the interveners in order to respond to that. I know this has been  
7 covered a little in the submissions, but it would be helpful if you could pinpoint that where  
8 appropriate.

9 As far as H3G's submissions are concerned, again we would welcome you being very clear  
10 about which parts of the existing amended appendix you rely on as justifying the particular  
11 aspects of the pleadings which are again in contention.

12 The third point is a more general one, which is what we intend to produce at the end of  
13 today's hearing. The first is that we will, of course, indicate which parts, if any, of the  
14 H3G supplementary material are not to be relied on. By the "supplementary material" we  
15 mean the supplemental submission of 7<sup>th</sup> March, which includes the schedule of evidence  
16 and the three witness statements of Mr. Ross or Mr. Dyson and Mr. Westby, and the tab 5  
17 costs information. Secondly, to indicate which parts, if any, of the outlying statement of  
18 intervention cannot be relied upon, or to which the other parties are not required to  
19 respond. We know, of course, that we are expecting the full statement of intervention by  
20 close of play today and it may well be possible for us, in the event that we decide that there  
21 are some aspects of it which should not be allowed, to point to those aspects in the full  
22 statement as well.

23 As far as the challenge that the parties have raised to some of the material that was  
24 canvassed by H3G in the plenary session on 9<sup>th</sup> April before the Competition Commission.  
25 We were not planning to make any order in relation to that on the assumption that if it  
26 becomes relevant the Competition Commission will be able to read across from our  
27 decisions on the first two points any repercussions for that material.

28 We are therefore not intending that the outcome of today's hearing will be a direction  
29 under our Rule 5 powers to the CC in the context of its investigation. So if the  
30 Competition Commission want us to give them a direction of any sort then they need to  
31 make that clear during the course of the day.

32 So that is all that we wanted to say by way of introduction. I think, Mr. Holmes, you are  
33 going first.

1 MR. HOLMES: Thank you, madam. I am grateful for those indications and I shall endeavour,  
2 in developing my submissions, to identify those aspects of the supplemental submissions  
3 which we consider would require additional work. I hope, madam, that you will have a  
4 skeleton argument which was prepared by Ofcom for today's hearing. Unfortunately it  
5 was only served on Friday afternoon. We were responding to submissions that we had  
6 only received on Thursday morning. We have today an additional version of the skeleton  
7 argument which simply adds cross-references for the Tribunal's convenience.

8 Madam, you will see from the first paragraph of our skeleton that we make three general  
9 submissions today. The first is that the supplemental submission contains new grounds  
10 and/or argument not to be found in H3G's amended notice of appeal. Second, that H3G's  
11 application to amend, which we anticipate being made in their submissions this afternoon,  
12 should be refused. Third, H3G's intervention as currently pursued in the BT appeal is  
13 inadmissible.

14 Turning to my first submission that the supplemental submissions raised new issues, by  
15 way of clarification I shall refer to the supplemental submissions as including not only the  
16 submissions of 7<sup>th</sup> March, but also the additional submissions and new material that were  
17 served by H3G on 14<sup>th</sup> March, and the new material served with H3G's submissions for  
18 today's CMC. We think that they stand or fall together.

19 THE CHAIRMAN: Also 14<sup>th</sup> March.

20 MR. HOLMES: Indeed, the WIK report, madam, and a letter explaining its significance.

21 THE CHAIRMAN: That is the 14<sup>th</sup> March material, and then the other material?

22 MR. HOLMES: A Morgan Stanley report which is served with the submissions for today's  
23 CMC.

24 THE CHAIRMAN: Yes.

25 MR. HOLMES: Madam, we say that there are four key features of H3G's case as it is pleaded in  
26 the amended notice of appeal. If the Tribunal will allow me, I shall take a little time with  
27 the amended notice of appeal and the accompanying appendix to illustrate the case as we  
28 see it to be as it is set out there. We know that H3G has relied in their submissions on  
29 various passages from the appendix, and we think that these need to be set in their proper  
30 context.

31 THE CHAIRMAN: Yes.

32 MR. HOLMES: So, if I may, I will take you, madam, to bundle A, the index for the case  
33 management conference on 25<sup>th</sup> February 2008, and that contains at tabs 1 and 2 H3G's  
34 notice of appeal, as amended, and the price control appendix.

1 The first key feature of H3G's case as we see it as it appears in the notice of appeal is that  
2 H3G was proposing quite different approaches in respect of mobile-to-mobile, or M2M  
3 MCT rates on the one hand, and fixed-to-mobile or M2M MCT rates on the other hand.  
4 This emerges very clearly from the relief summary in the notice of appeal which is at  
5 para.3.2 of tab 1. Madam, you will see there that at 3.2(a) Hutchison submits that the CC  
6 should determine:

7 "The level of mobile-to-mobile MCT rates so that the MCT rate paid and received  
8 by H3G to and from other MNOs equals zero pence per minutes or otherwise  
9 leads to a neutral net revenue position."

10 This is what is referred to as the "Net payment zero alternative approach to remedy". It is  
11 clearly there confined to mobile-to-mobile mobile call termination rates.

12 Madam, H3G advance an alternative case in relation to the level of M2M MCT rates,  
13 which is set out at 3.2(b). That alternative case is that the level of mobile-to-mobile MCT  
14 rates received by H3G and an appropriate glide path for the same should be determined by  
15 the CC in such a way that takes account of actual market circumstances, including the  
16 availability or otherwise of effective MNP.

17 So, madam, two cases in respect of mobile-to-mobile rates – on the one hand, an  
18 alternative approach to remedy, net payment zero; and on the other an approach which we  
19 have characterised as asymmetric regulation whereby H3G's rates would be adjusted to  
20 take account of actual market circumstances, including the availability or otherwise of  
21 effective MNP.

22 So that is the case in relation to mobile-to-mobile termination rates.

23 THE CHAIRMAN: As far as the rates set by other mobile network operators are concerned, is  
24 that affected by 3.2(b), or does 3.2(b) relate only to H3G's rate, the rate received by H3G?

25 MR. HOLMES: Madam, our reading of 3.2(b), and I can develop this when we turn to the  
26 approximate, is that Hutchison was seeking a different rate for itself by comparison with  
27 the other 2G/3G MNOs in respect of mobile-to-mobile MCT rates to reflect the actual  
28 market circumstances that it faced, and specific disadvantages which it identifies and  
29 expands upon in the appendix.

30 THE CHAIRMAN: Thank you.

31 MR. HOLMES: Then, madam, at 3.2(c) one comes to H3G's only remedy in respect of fixed-to-  
32 mobile MCT rates. H3G there contends that:

33 "... the level of the MCT rate paid by fixed operators to all UK MNOs ..."  
34 - that fixed-to-mobile termination rates –

1 “... [should be] based on long-run average cost, with separate controls for 2G and  
2 3G call termination; and/or

3 (ii) the level of the MCT rate for 2G call termination paid by fixed operators is  
4 at a rate based on long-run average cost, reduced so as to reflect the lower risk that  
5 attaches to the investment in 2G networks; and

6 (iii) the level of the MCT rate for 3G call termination paid by fixed operators is  
7 at a rate based on long-run average costs (combined with an appropriate glide path  
8 which takes account of actual market circumstances), increased so as to reflect the  
9 higher risk that attaches to the investment in 3G networks and the fact that H3G as  
10 a later entrant needs to recover efficiently incurred CARS costs.”

11 CARS costs, you will recall, madam, are “Customer acquisition retention and service  
12 costs”.

13 So there we see in relation to fixed-to-mobile call termination rates not the net payment  
14 zero remedy which was sought in the alternative in relation to mobile-to-mobile MCT  
15 rates, but instead a rate fixed by reference to long-run average costs, separate rates for 2G  
16 and 3G termination and an adjustment also to reflect H3G’s different market  
17 circumstances, including the need for it to recover efficiently incurred CARS costs, so a  
18 quite different package of remedies of fixed-to-mobile MCT rates by comparison with  
19 those sought in relation to mobile-to-mobile termination rates.

20 MR. SCOTT: Just pausing on long-run average costs, are we right in assuming that this is long-  
21 run average costs not long-run average incremental costs?

22 MR. HOLMES: Indeed. I am grateful for that intervention. Absolutely, Ofcom understood  
23 LRAC, and I think it is clear that LRAC was intended when we turn to the appendix, not to  
24 be LRAIC, long-run average incremental costs, but to be LRAC – in other words, an  
25 alternative method of depreciation taking basically fixed costs as Ofcom itself did in  
26 determining the level of charge controls.

27 MR. SCOTT: As the day develops I think we will be returning to the subject off and on.

28 MR. HOLMES: Indeed.

29 Madam, the first key feature then, different approaches to mobile-to-mobile and fixed-to-  
30 mobile MCT rates. I will not take you now, for reasons of time, to the appendix, but the  
31 same distinction is to be observed there, and just for the record I give you the references –  
32 para.1.2 of the appendix, 4.1, 4.2 and 4.7 of the appendix. I can take the Tribunal to those  
33 references if it would assist, but I am aware of the limits on time for today.

1 So the second key feature is Hutchison's case is that the net payment zero remedy sought  
2 in respect of mobile-to-mobile calls is supported by reference to a relatively narrow set of  
3 arguments focused almost exclusively on specific features of H3G's competitive position  
4 vis-à-vis the other 2G/3G MNOs.

5 Madam, to demonstrate this, I would like to take you, if I may, to para.4.5 of the appendix  
6 at tab 2 of bundle A, p.10 of the appendix. By way of context I should perhaps take you to  
7 p.9. You will see at the middle of p.9 there appears the heading "Alternative Approach to  
8 Remedy". This, madam, is the net payment zero option sought in respect of mobile-to-  
9 mobile calls. That emerges clearly from para.4.2.

10 At para.4.5 H3G sets out its reasons for preferring such a remedy, and those reasons  
11 commence at para.4.5(a) with a reference to the material net out-payments that H3G is  
12 obliged to make to the 2G/3G MNOs as a result of a traffic imbalance – the famous traffic  
13 imbalance. That point is further developed at para.4.5(d) over the page, p.11. You will see  
14 there that H3G returns to the material net out-payments to its competitors which are said to  
15 reduce the ability of H3G to play the role of a maverick competitor.

16 At 4.5(e) H3G builds on this submission by saying that Ofcom should have been reluctant  
17 to put in place a price control regime that worsened the competitive dynamics of the  
18 market, or at least should have scrutinised the decision to do so closely.

19 At 4.5(f) another disadvantage that H3G claims to suffer, this time as a result of the ported  
20 number arrangement. Madam, the point here anticipates the argument which H3G  
21 develops separately as a basis for asymmetric regulation in s.9 further on in the appendix –  
22 I will not take you to that now – but so far all specific features of H3G's circumstance.

23 There are a couple of broader arguments to be found at 4.5(b) and (c). You will see at  
24 4.5(b) that H3G commends the net payment approach as assisting in avoiding the risks of  
25 regulatory error as the difficulty of forecasting the various components which comprise a  
26 charge control and which Ofcom has always accepted as subject to uncertainty.

27 At 4.5(c) the same point is developed in relation to the set of ranges which Ofcom has  
28 advanced in light of that uncertainty. But again, the point is brought back by H3G to its  
29 own specific circumstance. H3G's point appears to be that if one looks at the range of  
30 possible costs scenarios that Ofcom considered on one of them at least the costs are only as  
31 great as H3G's estimates for its own potential net out payments to the operators at the end  
32 of the charge control, so this point as it appears to us is again a point which goes  
33 specifically to H3G's position.

1 MR. SCOTT: Just sticking with (c) what we see here appears to be an attempt to embrace the  
2 LRIC to reach a net wholesale payment zero – see the last line on p.10, rather than an  
3 attack on that approach.

4 MR. HOLMES: Indeed, sir, I am grateful for that. Just to reinforce the point, at para.4.6 one  
5 sees again a focus upon H3G’s specific circumstance. It is said that Ofcom could and  
6 should have given more weight to (1) an assessment of an appropriate remedy that  
7 reflected the special position of the new entrant, i.e. H3G; and (2) the actual impact on  
8 competition in relevant markets of increasingly symmetrical rates.

9 Now, that reference to increasingly symmetrical rates is a reference to the fact that H3G’s  
10 rates as a result of the charge control were to be brought increasingly into line with those of  
11 the 2G, 3G MNOs. So clearly then the second fundamental feature as we see it of H3G’s  
12 pleaded case, net payment zero, supported by reference to a relatively narrow set of  
13 arguments, focused exclusively – or almost exclusively on specific features of H3G’s  
14 competitive position.

15 Madam, the third fundamental feature of H3G’s case as pleaded in the amended notice of  
16 appeal is that in relation to fixed-to-mobile termination rates H3G seeks not one single rate  
17 but instead various rates differing as between 2G and 3G technologies, and as between  
18 H3G and the other MNOs. I do not think I need to take you to anything in particular in  
19 support of that proposition, we have already seen it very clearly from which the relief is  
20 pleaded at para.3.2(c) of the notice of appeal.

21 The fourth and final key feature of H3G’s case as pleaded is that H3G is not contending for  
22 fixed-to-mobile rates to go down across the board. On the contrary as regards its own  
23 MCT rates, H3G argued for an increase in Ofcom’s target average charges. One sees this  
24 very clearly at para.6.1 of the appendix. There, H3G sets out its case in the alternative to  
25 a net payment zero approach. There, H3G considers that Ofcom’s estimate for the  
26 appropriate cost benchmark for the provision of call termination on H3G’s 3G network is  
27 too low, not only because it is based on an inappropriate path of cost recovery, the long run  
28 average cost point developed in s.5, but also for the reasons set out in sections 8 to 10  
29 which follow.

30 To reinforce the point without taking you through each of the grounds that H3G advances  
31 as to why its own rate is too low I would simply draw your attention to the fact that in  
32 relation to CARS costs (Customer Acquisition Retention and Service costs) para.8.40 of  
33 the appendix, H3G indicates that the exclusion of CARS costs on the part of H3G is



1 significant. It included, H3G submits, that they would lead to an increase for it in the order  
2 of 5p per minute.

3 THE CHAIRMAN: Is that 5p per minute for costs or for its charge?

4 MR. HOLMES: As I understand H3G's submission they argue that allowance should have been  
5 made for its CARS costs, in other words these CARS costs should have been added in  
6 because it was a later entrant and an appropriate model would have allowed for the  
7 efficiently incurred costs of a late entrant to a saturated market. One sees that at para. 8.1  
8 on p.19 of the appendix. So Ofcom is criticised for making no allowance for H3G's CARS  
9 costs in setting a price cap for call termination.

10 "As a late entrant into a saturated market, H3G must incur significant levels of  
11 CARS' costs in order to attract subscribers to its network in competition with the  
12 established MNOs. Ofcom erred in relation to the treatment of CARS costs and  
13 breached its duties to promote competition."

14 Although the matter is not entirely clear, it appears, madam, that they were seeking to have  
15 CARS costs included and CARS costs on their estimate were in the order of 5p per minute.  
16 You will recall, madam, that Ofcom's charge control – the target average charge for the  
17 final year of the charge control for H3G is set at the level of 5.9p per minute. So this  
18 would suggest a very significant increase in the level of H3G's fixed to mobile MCT rates.

19 MR. SCOTT: And this then implies an economic approach to the total system, not a marginal  
20 approach?

21 MR. HOLMES: Indeed, sir, on that point one sees at para.8.11 of this section of the appendix, in  
22 relation to CARS costs that H3G specifically contents that CARS costs are a common cost  
23 as against Ofcom. So it can only be assuming that those common costs should be included  
24 as is required under the LRIC model, the model relied on by Ofcom now referred to by  
25 H3G as fully allocated costs, but not under the LRAIC model, or marginal cost model,  
26 which H3G now seek to base their case upon.

27 MR. SCOTT: Yes, but we are going to have to be difficult because LRIC can be used either in  
28 the total system sense, or in the much narrower sense of looking at the margin very  
29 specifically associated with incoming calls, and that is going to make ----

30 MR. HOLMES: Yes, but we would say that Ofcom's position has always been ----

31 MR. SCOTT: No, understood, and this appears to be taking the former view not the latter view.

32 MR. HOLMES: Indeed. So taking those four fundamental features, I should say briefly it is in  
33 the light of the fact that H3G MCT rates were, on its pleaded case, to go up but one must  
34 read the various references in the appendix to the advantages of lower MCT rates, and in

1 places H3G is explicit that it is only referring to lower 2G/3G MNO MCT rates for fixed-  
2 to-mobile, but in other places it omits that qualification, which it has been suggested  
3 against us indicates that H3G were always seeking lower MCT rates across the board. We  
4 say in relation to the passages we have already shown you that is simply unsustainable.  
5 Just to give you references, madam, H3G specifically qualifies its statement about lower  
6 MCT rates at paras. 2.6 of its notice of appeal and at para.1.1 of the appendix. In both of  
7 those places H3G makes clear that it is referring to lower MCT rates in respect of 2G/3G  
8 MNOs.

9 THE CHAIRMAN: But where is it in the appendix that it sets out how Ofcom would go about  
10 lowering the 2G/3G – is that because the separate MCT charge for 2G termination is to be  
11 reduced and the termination charge for 3G is to be increased.

12 MR. HOLMES: Madam, yes indeed. There may be several reasons but the one in particular  
13 which springs to mind is the application of the LRAC cost model contended for by H3G.  
14 Now, H3G's LRAC model involved replacing the method of cost depreciation adopted by  
15 Ofcom which, as I understand it, was constant across the period – or flatter in any event –  
16 with another model of depreciation which turned on the actual demand experienced for  
17 services in respect of the different technologies 2G and 3G. Now, the effect of their  
18 adjustment is that in relation to networks, or technologies, which are heavily utilised, the  
19 cost recovery will be greater during the periods of heavy utilisation, whereas in relation to  
20 technologies which are less heavily utilised the effect will be to reduce the amount of costs'  
21 recovery during the period where they are less intensively utilised.

22 I am so sorry, I am just taking instructions – I am afraid the complexities of LRAC have  
23 defeated me. (After a pause) I fear the complexity of this may be too great for me to  
24 answer the question fully now, but as I understand it, on the basis of what I have just been  
25 told, you see a much steeper decline in cost recovery as utilisation increases, so the effect is  
26 basically that because 2G networks are already heavily utilised, the amount of costs  
27 recovered now will be higher and therefore the charge per unit will be lower and the charge  
28 control will be fixed at a lower level. They will be allowed to recover less of their costs for  
29 now.

30 THE CHAIRMAN: So is it the case, and you may want to come back to this, that it is s.5, the  
31 path of cost recovery section of the appendix which, if accepted and implemented, would  
32 result in a lowering of the MCT rates of the 2G/3G MNOs?

33 MR. HOLMES: I would like to reserve my position, but that is certainly, as I understand it, one  
34 of the bases on which a reduction in the MCT rates of the 2G/3G MNOs is contended for.

1 Yes, madam, I am grateful for that. The other point that I wished to make in relation to the  
2 appendix is just to draw your attention to put the matter absolutely clear and beyond doubt,  
3 so the fact that the structure of the appendix clearly reflects the fact that H3G's MCT rates  
4 are expected to go up and those of the 2G/3G MNOs are expected to come down. We see  
5 that from the contrast between s.6, to which I have already taken you, sets out the case for  
6 H3G's MCT rates to be raised by reference to s.5 above and sections 8 to 10 below. If one  
7 then goes past s.10 to s.11, one sees a heading on p.33 of the appendix: "The 2G/3G  
8 MNOs' MCT Rates". This in other words is the move from H3G's case in relation to its  
9 own termination rates to its case in relation to the 2G/3G MNOs termination rates, and  
10 drawing on some of the material that they previously advanced they contend here that the  
11 target average charge imposed on the 2G/3G MNOs should be lower and set out there the  
12 reasons why.

13 Perhaps in terms of the substance of that I might answer that question more fully after I  
14 have had an opportunity to take instruction, but for now, and given the time, I would like to  
15 move on, if I may.

16 When one turns and looks at H3G's case as it appears in supplemental submission, one  
17 finds that there there is advanced a new approach – I am picking up here at para.13 of my  
18 skeleton, if I may. That new approach involves a single MCT rate for mobile-to-mobile  
19 and fixed-to-mobile calls alike, fixed at the same level of around 0.4ppm as one of BT's  
20 wholesale fixed call termination rates. So a common level for fixed and mobile-to-mobile  
21 termination rates, fixed at the level of BT's fixed termination rate. One sees that very  
22 clearly, I think we should probably now open H3G's supplemental submission which is in  
23 a separate bundle.

24 THE CHAIRMAN: Just to go back a moment, in their appendix what do you say they were  
25 saying should be the actual numbers set for fixed to mobile MCT?

26 MR. HOLMES: Madam, they do not propose specific rates and they have not done so until now,  
27 until their supplemental submission. They indicated asymmetric regulation with H3G's  
28 rates going up for various reasons, and the 2G/3G MNOs rates for fixed to mobile going  
29 down. Obviously in relation to net payment zero we say the only practicable method by  
30 which that could be implemented would be a rate of zero pence per minute.

31 THE CHAIRMAN: But that was only ever for mobile-to-mobile.

32 MR. HOLMES: That was only ever for mobile-to-mobile, indeed, madam.

33 THE CHAIRMAN: But as far as fixed-to-mobile, you say they did not in their appendix say  
34 what those rates should actually be, but that what they said about how they should be

1 arrived at indicated that the H3G rates should be higher and the 2G/3G MNOs should be  
2 lower.

3 MR. HOLMES: With the qualification that they say in terms that the H3G rates should be  
4 higher, and that the 2G/3G MNO rates should be lower. It is not merely that they rely on  
5 reasons which lead to that result, they are quite explicit in contending for higher rates for  
6 themselves and lower rates for everyone else.

7 THE CHAIRMAN: And that it should be a different rate for 2G and 3G?

8 MR. HOLMES: Yes, madam.

9 MR. SCOTT: We will be coming to this later when we have H3G, but the rate about which you  
10 are now talking seems to be associated with the word “pragmatic”, and if you think there is  
11 an underlying economic theory which has been introduced here, do let us know.

12 MR. HOLMES: Sir, it will be my submission that the new approach for which H3G contends is  
13 not some happy coincidence of rates as between fixed-to-mobile and mobile-to-mobile, it is  
14 not simply a pragmatic solution, it is based upon arguments of principle which are new  
15 arguments of principle and I will come to that point in a moment.

16 THE CHAIRMAN: I am sorry to keep interrupting, but another point which has not quite  
17 emerged from what I have seen is that can we assume that this 0.4 ppm rate is a general  
18 fixed network termination rate? It is sometimes referred to as that and sometimes referred  
19 to as a “CT” rate, but we have not seen, as far as I am aware anything that indicates what  
20 the other fixed networks’ charge each other or the mobile networks’ for termination?

21 MR. HOLMES: Madam, I believe that is correct. We can certainly supply you with that  
22 information if it will assist the Tribunal.

23 THE CHAIRMAN: Well it should be a non-contentious fact insofar as there is such a thing in  
24 this industry, but it would be useful, I think, for us to know the answer to that.

25 MR. HOLMES: Yes. So returning then to the supplemental submission, one sees the first  
26 flavour of the new approach at para. 1.2(c)(i)(a) on p.2. In the final sentence of the first  
27 incomplete paragraph at the top of p.2 H3G explains that its approach would require end-  
28 to-end rates being at or close to zero and F2M MCT rates being in order of magnitude  
29 lower than at present.

30 “Mr. Russell, on behalf of H3G suggests less than 0.4 ppm being one of BT’s wholesale  
31 charges for fixed call termination.”

32 Now there still a slightly qualified presentation of the new case, but if one turns to the  
33 proposed approach to remedy at p.13 of the supplemental submission, the position has  
34 somewhat hardened. One sees at para.3.1:

1                    “To the extent that the CC feels that it is able to recommend a precise remedy or  
2                    at least suggest one as guidance to Ofcom, H3G proposes that prices for M2M and  
3                    F2M calls should fall to the level of fixed call termination.”

4                    That is the remedy they now seek, that is their new approach. I am sorry, madam, do you  
5                    have that? It is on p.13, para.3.1: “... prices for M2M and F2M calls should fall to the  
6                    level of fixed call termination.” So it is quite clear what H3G now seeks, there is no real  
7                    dispute about that.

8                    MR. SCOTT: Just staying on that page, if you go to 3.2 this is the part at which we see the  
9                    reasons.

10                   MR. HOLMES: Yes, sir. These are only some of the reasons I should say, they are by no means  
11                   all of the reasons which H3G advances, but you will see that these are arguments of  
12                   principle in support of low or no MCT rates. I will enumerate the arguments in a little more  
13                   detail in a moment if I may.

14                   Although H3G refers to this new approach under the label of NPZ it bears little  
15                   resemblance, we say, to anything in H3G’s original pleaded case. It applies without  
16                   distinction to mobile-to-mobile and fixed-to-mobile calls. I am reading, madam, from  
17                   para.14 of my skeleton.

18                   It does not achieve net payment zero for mobile-to-mobile calls, but instead a rate  
19                   pragmatically close to zero which would still to net out payments from H3G to the 2G/3G  
20                   MNOs, albeit that we accept that those net out payments would be radically reduced.

21                   It applies neither LRAC nor asymmetric regulation in the case of fixed to mobile calls, and  
22                   it substantially decreases H3G’s MCT rate for fixed-to-mobile calls relative to the rates set  
23                   by Ofcom. So those all differ from the fundamental features which I draw your attention  
24                   to.

25                   Finally, there is a new and wholly novel fundamental feature added, which, apart from  
26                   anything, one cannot find any hint of it in the original notice of appeal. H3G now seeks to  
27                   align fixed and mobile termination rates. The point I make here is not a distinction  
28                   between fixed-to-mobile, and mobile-to-mobile but the distinction between mobile  
29                   termination rates and the rates paid to BT and other fixed network operators for termination  
30                   on their networks. There is now an explicit linkage made by H3G between those rates and  
31                   there is not a flavour of that to be found anywhere in the original notice of appeal, the  
32                   amended notice of appeal or the appendix.

33                   THE CHAIRMAN: There is a 0.4p figure, it is presumably arrived at looking at BT’s costs  
34                   rather than the MNOs’ costs?

1 MR. HOLMES: Yes, it is fixed by reference to BT's costs. Madam, to pick up the point made  
2 by Mr. Scott, the new approach is supported by a significant number of novel arguments  
3 that go well beyond those used to promote NPZ in respect of mobile-to-mobile MCT rates  
4 in the H3G notice of appeal. I enumerate various novel arguments which are sweeping in  
5 their generality. They are basically a broad range of policy arguments. I do not propose to  
6 go through them in any detail now, unless it will assist the Tribunal, but basically the new  
7 approach is commended on the basis that you would approximate them closely to marginal  
8 cost less the network externality – it would appear that is the network externality, it is not  
9 entirely clear – which now appears to replace LRAC as H3G's preferred costs' standard  
10 fixed-to-mobile calls. As we discussed earlier, we say that LRAC is quite different and  
11 distinct from the marginal cost model which is now proposed.

12 MR. SCOTT: Yes, I perhaps should, for H3G's benefit, explain what I meant earlier on. It  
13 seems to me that in raising the marginal cost point they are putting in a theoretical  
14 argument for taking what appears to be a radically different approach to how you do a  
15 calculated cost.

16 MR. HOLMES: Yes.

17 MR. SCOTT: What we are seeing in what we have been talking about – the reason why it seems  
18 pragmatic – is yes, it is placed against a policy background, but that policy background  
19 does not lead you to a calculation that takes you to 0.4. It leads you to using 0.4 as a proxy  
20 for where you might get were you to apply the alternative econometric approach for which  
21 they may be ---

22 MR. HOLMES: Yes, sir, these are basically arguments in support of very low MCT rates, they  
23 are not arguments for deriving a specific figure, and is helpfully clarified by a question  
24 from madam Chairman, the 0.4 ppm is not calculated by reference to the marginal costs of  
25 mobile operators at all, it is calculated on a quite separate and different basis.  
26 Secondly, it is said that the new approach will produce a result more consistent with  
27 efficiency than Ofcom's approach, which is now referred to by H3G as a "fully allocated  
28 cost approach" rather than an ED approach as it was previously described.  
29 Thirdly, it is said that the new approach would avoid unspecified competitive distortions in  
30 the mobile market, which Ofcom allegedly failed sufficiently to investigate. Now, pausing  
31 on this point, madam, this we say can only be a reference to on-net/off-net price  
32 discrimination. This is the plea that dare not speak its name ----

33 THE CHAIRMAN: Where are you reading from?

1 MR. HOLMES: Madam, one sees this at para.2.12 of 7<sup>th</sup> March submission. Madam, over the  
2 page at p.7, you will see that H3G identify the substantial net payments that have been  
3 made by H3G to other incumbent 2G/3G MNOs. Then H3G continues that it is argued that  
4 these payments arise as a result of underlying competitive distortions.

5 Pausing there, madam, you will recall that the case as put in the appendix was not that  
6 traffic imbalance was caused by underlying competitive distortions, it was that competitive  
7 distortions resulted from the traffic imbalance and the net out payments that were made by  
8 H3G, which limited its ability, to act as a maverick competitor. That was how the case was  
9 put in the appendix, so the chain of causation was from the traffic imbalance to the  
10 competitive distortion.

11 THE CHAIRMAN: But they do argue that the traffic imbalance arises from the competitive  
12 distortion of the current mobile number portability arrangement.

13 MR. HOLMES: They do, madam, that is true, but this competitive distortion, which is not  
14 identified here, is ----

15 THE CHAIRMAN: You think it is referring to something more than the mobile number?

16 MR. HOLMES: We say that it is at least surprising that H3G do not identify what competitive  
17 distortion they have in mind. I think that is the only point I wish to make in respect of that.  
18 The fourth argument relied on by H3G is that its new approach would increase consumer  
19 welfare on the basis of a new model, which unlike H3G's previous welfare updated in the  
20 proceedings, now seeks to determine the welfare gains of the move to marginal cost  
21 pricing. We have, of course, seen already two previous welfare models by H3G in these  
22 proceedings, neither of which proceeded on the basis of the new welfare model. There is  
23 then reference made to academic analysis. There is an argument about the costs of the  
24 current regulatory regime which is novel. There is an argument based on the  
25 appropriateness of the new approach for avoiding distortions as the new technologies are  
26 introduced – again novel. There is an argument about competitive distortion between fixed  
27 and mobile operators, and this again is an argument of principle for the alignment of fixed  
28 and mobile call termination rates. At point (I) of my skeleton at p.5 I draw attention also to  
29 H3G's reliance on the need to avoid regulatory arbitrage by aligning mobile-to-mobile and  
30 fixed-to-mobile, and fixed call termination rates. There is sometimes a suggestion in  
31 H3G's pleadings for today that there is simply a happy accident whereby their very low  
32 level of mobile to mobile call termination rates, which they now propose as a pragmatic  
33 alternative to net payment zero, simply happens to approximate or align with the low level  
34 of costs which they now say should be attributed by a new ... in respect of fixed-to-mobile

1 calls, and that this in turn aligns by happy circumstance with the rate of BT's fixed  
2 termination charge.

3 The argument in relation to regulatory arbitrage shows that this is not the basis of the new  
4 approach; the new approach is not simply a pragmatic alignment of three different  
5 variables, which happened to equate. This is an argument supported by a basis of principle  
6 concerning competitive conditions between fixed and mobile operators and the need to  
7 avoid arbitrage as between mobile-to-mobile and fixed-to-mobile, and fixed termination  
8 rates.

9 Finally, madam, H3G also commenced the new approach by reference to retail price  
10 competition and greater pricing transparency.

11 We say, and here I am reading from para.16 of my skeleton, taking the new approach and  
12 the new arguments in its support together, it is apparent that the supplemental submissions  
13 seek to transform H3G's case. H3G no longer seeks net payment zero in relation to  
14 mobile-to-mobile calls alone as a means of addressing its specific commercial position vis-  
15 à-vis the other MNOs, which was how the case was put in its amended appendix. It now  
16 wishes instead to use these CC proceedings as a platform for advocating a shift from the  
17 current regulatory arrangements involving cost related charge caps to a bill and keep, and  
18 potentially receiving party pays model, in which mobile networks recover their termination  
19 costs from their own retail customers without MCT payments from other fixed or mobile  
20 operators – in other words, root and branch reform of the system of mobile call termination  
21 regulation in the United Kingdom.

22 THE CHAIRMAN: That shift would take place if the CC adopted the NPZ model?

23 MR. HOLMES: Madam, with respect, Ofcom would not agree with that proposition. The NPZ  
24 model which was proposed was exclusively in relation to mobile-to-mobile termination  
25 charges. Remember, madam, with the exception of H3G there is a broad equilibrium  
26 between the levels of traffic going to and from the various 2G/3G MNOs with the  
27 consequence that, in fact, the impact of removing mobile-to-mobile rates as between the  
28 2G/3G MNOs might be very minor indeed. There would not be a significant effect on their  
29 financial position. This is obviously an empirical question but we submit that there is at  
30 least a possibility that the effect would be relatively contained.

31 MR. SCOTT: Just to pause on receiving party pays, and we have noted the reference to the  
32 article from 2004, so this is not new either in practice or in academic literature. We need to  
33 be clear about two forms of receiving party pays. Here we are talking about wholesale  
34 receiving party pays as distinct from retail receiving party pays. We just needed to make



1 sure that we had that clear so that when we are talking we are talking about wholesale  
2 receiving party pays.

3 MR. HOLMES: Yes, sir, the technology is rather vague and overlapping as it has been used by  
4 various parties in these proceedings. As you say, receiving party pays, properly speaking,  
5 is the retail manifestation of an arrangement in which no transfers take place, assuming that  
6 the parties decide to recover the costs of call termination from the party receiving the call.  
7 That is an empirical question on which there may be differences of opinion. As you say,  
8 that is a phenomenon in the retail market.

9 When H3G refers to RPP they sometimes refer to it in order to draw the distinction  
10 between wholesale and retail and receiving party's network pays, which is to draw  
11 attention to the fact that they are using the term as it applies at the wholesale level.  
12 Properly, we would suggest, the term "bill and keep" should be used to describe the  
13 wholesale issue – that is to say a situation in which each network operator bills from its  
14 own clients and keeps the revenues which it thereby attains without a transfer of  
15 termination rates in respect of termination costs.

16 Madam, if there were any doubt as to the breadth of H3G's new position we say it is  
17 entirely dispelled by the quotation from Dr. Littlechild extolling the virtues of RPP and bill  
18 and keep with which H3G chooses to conclude its 7<sup>th</sup> March submission. You will find  
19 that, madam, at 4.5 on p.15. You will see there that Dr. Littlechild is said to have  
20 eloquently stated the case for change, and there can be no doubt as to the breadth of his  
21 attack on the existing regulatory arrangements in place in the United Kingdom.

22 Madam, we say on our first submission that there is no mystery involved in the  
23 supplemental submissions. They clearly transcend H3G's case as pleaded. We are not  
24 engaging in hair-splitting exercise here, or attempting to engage in fine distinctions. The  
25 new approach is quite plainly outside H3G's case as pleaded. It differs from the  
26 fundamentally from the features of H3G's case to which I drew the Tribunal's attention  
27 during the course of my submissions.

28 That leads me to the question of whether H3G should be permitted to amend its notice of  
29 appeal. If the Tribunal accepts that the new approach is indeed nowhere to be found in the  
30 notice of appeal, I believe it is common ground between the parties that H3G will need to  
31 apply to amend its notice of appeal. We say that the new approach is a new ground. If  
32 anything is a new ground the new approach must be that, whatever the fine points of  
33 Continental pleading as between a *moyen* and an argument, there is no doubt that what we

1 are dealing with here is something fundamentally new which is not foreshadowed in the  
2 notice of appeal. So we say that the higher threshold set out in Rule 11.3 therefore applies.  
3 Madam, in our submission, H3G's application to amend should be refused under either  
4 Rule 11.1 or Rule 11.3. There are compelling reasons why it should be refused. The first  
5 of those relates to the consultation process prior to the publication of the MCT statement.  
6 Mr. Scott has made the point already that RPP is hardly new, bill and keep is hardly new,  
7 to communications policy debates. It has now a long lineage. Indeed, Ofcom has floated  
8 the idea of a move to RPP and bill and keep on several occasions now. It has raised the  
9 possibility of such a move. Indeed, it did so during the consultation process which led to  
10 the adoption of the MCT statement. We say that it is relevant in considering whether H3G  
11 should be allowed to amend to look at how they put their position in relation to this  
12 dramatic shift of regulatory policy during the course of that consultation process.

13 Madam, if the Tribunal will allow me, although I am aware that I am now at the limits of  
14 my time, I think it would be helpful to take you to specific passages in that consultation  
15 process to see how the debate evolved and to see the limits of H3G's submission during the  
16 course of that consultation process.

17 THE CHAIRMAN: Is it contended by H3G that they did raise this point during the consultation?

18 MR. KENNELLY: Madam, if the point is, do we contend what we now contend is our situation,  
19 that is not in dispute. We do not contend that the consultation is what we are now  
20 contending. There are further arguments about how Ofcom characterise our position, but if  
21 the narrow point that Mr. Holmes now makes is that we did not seek what we now seek in  
22 the consultation then that is not in dispute.

23 THE CHAIRMAN: Is it accepted that this idea was floated by Ofcom during the process?

24 MR. KENNELLY: No, we disagree with that point. We say that it was not. What we are now  
25 proposing in the formal proposal was not floated by Ofcom in the course of the  
26 consultation.

27 MR. SCOTT: Would you accept that it was present in the academic literature prior to the making  
28 of the decision with which we are concerned?

29 MR. KENNELLY: I will take instructions on the extent to which it was in academic literature.  
30 Certainly, sir, you have seen our argument that the academic literature, as we would argue  
31 quite radically ----

32 THE CHAIRMAN: Has been developing.

33 MR. KENNELLY: -- has been developed. We will obviously make submissions as to why that  
34 ought properly to be put before the CC, but on the narrow point I will just take instructions.

1 (After a pause) It will not surprise you to know, we obviously do not dispute that the bill  
2 and keep was floated.

3 THE CHAIRMAN: The bill and keep was floated during the consultation period or was in the  
4 academic literature?

5 MR. KENNELLY: In the academic literature, yes.

6 THE CHAIRMAN: Mr. Holmes, you have heard that.

7 MR. HOLMES: Madam, on the basis of that, I think we have little choice but to look at how the  
8 point was put in the consultation, because we say it was squarely raised by Ofcom.

9 Madam, as by now the Tribunal will be well aware, there were three consultations prior to  
10 the adoption of the MCT statement. The first is to be found in trial bundle F1, p.303. You  
11 will see it is dated 7<sup>th</sup> June 2005. It deals with the issue of RPP and bill and keep at the  
12 very front of the document. On p.305 at the summary you will see that the heading half  
13 way down the page or two-thirds of the way down the page, "Scope for fundamental  
14 change removing the causes of SMP". You will see that Ofcom referred during the  
15 Telecoms Strategic Review to the possibility that RPP moved to bill and keep and RPP in  
16 para.16 might be a means of addressing the market power which results from the calling  
17 party pays model. There is a clear reference to bill and keep as well as receiving party  
18 pays.

19 Over the page at para.1.7 Ofcom notes the very frosty reception that its proposal in relation  
20 to RPP receives during the course of the Telecoms Strategic Review. I should note that the  
21 Telecoms Strategic Review was published on 18<sup>th</sup> November 2004, so as to the novelty of  
22 this debate I think that point is a telling one.

23 At para.1.8 Ofcom indicates that it is "keen to stimulate further serious consideration" of  
24 changes without limiting those changes to the retail level, changes generally having  
25 referred to bill and keep and receiving party pays,:

26 "... which the industry might implement, or which future technological  
27 developments might enable, which would remove the underlying causes of  
28 Significant Market Power. The prospect of SMP, and regulation, enduring into  
29 the indefinite future is not one which Ofcom finds attractive. Ofcom therefore  
30 encourages the mobile industry to renew its efforts to identify a change to market  
31 structures which would lead to a competitive market from which all regulation  
32 may be removed, and which would be beneficial to consumers."

33 So at this crucial shaping stage of the consultation process when Ofcom was considering  
34 what matters it would take into account, how it would go about this market review, it was

1 positively inviting parties in the position of H3G to come forward with proposals to make  
2 the case for bill and keep.

3 Madam, if there were any doubt as to what Ofcom means by these fundamental structural  
4 changes from the very outset of the consultation process, they are dispelled if one turns to  
5 p.315 of the first consultation document. You will see at the beginning of para.3.2 Ofcom  
6 clarifies:

7 “Where the RPP principle applies, there is a direct commercial relationship  
8 between the terminating operator and the customer which pays to receive the call;  
9 under this scenario, the cost of receiving calls would be taken into account by  
10 purchasers selecting a provider of mobile services, and this is likely to cause  
11 MNOs to compete, in part, on charges for receiving calls.”

12 That is the argument in favour of RPP in a nutshell, that you would basically by ensuring  
13 that the retail customer, when choosing a mobile phone package, will be paying for the cost  
14 of terminating the calls, that will be factored into the consumer’s choice, they will look  
15 very carefully to see what different operators charge by way of the termination cost to the  
16 receiving party. So that is again a retail consideration. Ofcom recognises full well that the  
17 retail and the wholesale are inextricably linked, and its consultation clearly extends to the  
18 wholesale level. One sees this further down the page, you will see a sentence a few lines  
19 down, about the middle of the paragraph beginning: “It is conceivable ...”. So Ofcom first  
20 recognises in the passage between the passage I quoted and that sentence that you are not  
21 going to be able to achieve RPP voluntarily and the reason for that is because each MNO  
22 who is permitted to charge a termination charge would have a strong incentive to continue  
23 doing so. In other words the mobile network operator that originates the call, if it were  
24 entitled to charge, would obviously have a strong incentive to continue doing so, and  
25 therefore you would have a free rider problem; there is no way you could really bind all of  
26 the MNOs, other than by regulation to ensure that they did not continue levying a  
27 termination charge.

28 But Ofcom then notes that it is conceivable that MNOs could be required to operate RPP  
29 principles perhaps by having termination charges set below cost or indeed at zero, so that  
30 the cost of termination cannot be recovered from originating operators, sometimes known  
31 as the bill and keep approach.

32 Now, this is exactly the approach for which H3G contends. They contend for zero, or close  
33 to zero termination rates for mobile and fixed call termination alike. They contend in other  
34 words for the bill and keep model, and they do so in terms. If there is any doubt about that,

1 if the Tribunal is in doubt I am very happy to take you to many, many references in the  
2 new materials where bill and keep is indicated as the relief which H3G now seeks.  
3 Then you will see, madam, just to conclude on the first consultation, on p.316 a question is  
4 posed:

5 “Could RPP principles be made to work to the advantage of consumers in the  
6 UK? If so, how?”

7 Of course that question must be read in the light of the previous reference to the need for  
8 wholesale intervention in order to achieve RPP.

9 H3G responds to the invitation that Ofcom has offered in its consultation response, which  
10 is at p.489 of the same bundle, bundle F1. You will see there a document dated 30<sup>th</sup>  
11 August 2005, and at p.499 H3G turns to consider: “Receiving party pays” and “Bill and  
12 Keep”. In the first paragraph H3G recognises in common with para. 3.2 of the  
13 consultation, that:

14 “... such an approach would need to be imposed as an operator retaining a calling  
15 party pays (CPP) approach would potentially be at an advantage if competitors had  
16 moved to charging on a RPP basis.”

17 Now, the imposition as we have seen could only be at the wholesale level, and H3G  
18 candidly recognises as much when it heads this section not only receiving party pays, but  
19 also bill and keep. We see what H3G makes of this proposal to mandated RPP by a  
20 wholesale intervention to MCT rates of zero.

21 THE CHAIRMAN: We will read what it says.

22 MR. HOLMES: Yes, madam. (After a pause) There is just one specific point I would like to  
23 flag up madam, one which I will return to later. You will note that at the third bullet point  
24 in the second half of the page: H3G specifically relies on the fact that:

25 “... effective introduction of RPP would require an EU wide change to this form  
26 of charging, else there would be on-going confusion and a reduction in the  
27 benefits of roaming.”

28 Madam, just to complete the first consultation, you will see on p.513 the specific response  
29 that H3G made to the question raised in the consultation:

30 “Could RPP principles be made to work to the advantage of consumers in the  
31 UK? If so, how? No, the overall effect of enforcing RPP is likely to be to hinder  
32 the development of the mobile sector for all the reasons set out above.”

33 In the second consultation -----

1 THE CHAIRMAN: Well let us see if we can speed this up a little bit, Mr. Holmes. Perhaps it  
2 would be enough if you just point us to the paragraphs rather than taking us through, we  
3 can look ----

4 MR. HOLMES: Certainly, madam, you will find in the second consultation document, which is  
5 at p.1, bundle F2, a paragraph at 6.4 setting out RPP and I would just note that in that  
6 paragraph Ofcom specifically says that the way you would achieve RPP is typically by  
7 setting mobile voice call termination charges at zero, in other words, by wholesale  
8 intervention of the kind that H3G now contends Ofcom should have done in the MCT  
9 statement.

10 Then carrying on from there over a number of paragraphs, para.622 Ofcom develops its  
11 interim position in relation to RPP and the merits of it. I would just note that in para.6.6  
12 Ofcom points out that while numerous countries have moved from the RPP system to the  
13 CPP system, Ofcom has not been able to identify a single example of the reverse. In other  
14 words, there has never been in Ofcom's knowledge, and there still has never been in  
15 Ofcom's knowledge an example of this experiment, which H3G contends should now be  
16 mandated by the Competition Commission in these appeal proceedings, having been  
17 implemented.

18 At 622 Ofcom then poses another question: "Do you feel that Ofcom has understated the  
19 benefits to consumers of a mandated move to an RPP charging regime? Ofcom are  
20 particularly interested to hear from consumer groups." It did not hear from consumer  
21 groups but it did hear from H3G, whose submission is to be found at F2, p.243.

22 Unfortunately, madam, H3G deals this time with bill and keep very briefly, at p.282 it says  
23 that it broadly agrees with Ofcom's approach in this area for the purposes of this market  
24 review.

25 In the third consultation document where, of course, Ofcom did not pose specific  
26 questions, as you will see from one point in para.1.11, but instead basically sought  
27 responses in relation to the whole document in accordance with its obligations under the  
28 Telecoms' regulatory framework.

29 At para.8.4 on p.655 through to 8.5 on p.656, Ofcom set out its interim conclusions which  
30 were that bill and keep was not an appropriate method, and again made reference to  
31 compulsory RPP or bill and keep being equivalent to very low or no wholesale termination  
32 charges at para.8.7. No doubt about this being a wholesale intervention.

1 At para.8.8 Ofcom notes that the situation may change over time and in the event that fresh  
2 evidence on the matter is brought to it. Ofcom will consider any such evidence and  
3 any potential implications for structural remedies.

4 The final H3G response at p.193 of bundle F3. H3G basically deals with bill and keep, it  
5 does not directly address it but it deals with it in the context of the duration of the price  
6 control at p.235 and p.253. The key point that Hutchison makes – I think, madam, with  
7 respect, on this point I would like to take you to one specific passage, because I think it is  
8 important to see how H3G concluded the consultation process.

9 THE CHAIRMAN: It is at p.253.

10 MR. HOLMES: Yes, indeed. “Conclusion on the appropriate range for any price control”. You  
11 will see that the heading is 8.2.3. H3G sets out its preferred approach for now, that is to  
12 say a glide-path which takes all of the various circumstances specific to H3G into account,  
13 and is therefore likely to be shallower and a higher long run cost benchmark. We have  
14 seen of course that in relation to the fixed-to-mobile call termination rates, that is exactly  
15 what H3G went on to plead for in its notice of appeal.

16 Further down the page in the paragraph immediately following you will see H3G draws  
17 attention to the uncertainty about the evolving market, and urges Ofcom to:

18 “... be prepared to keep this under review during the current market review  
19 period. It may be that other approaches to wholesale pricing will become more  
20 appropriate ... during the period of the proposed price control, for example, based  
21 on some form of bill and keep wholesale arrangements.”

22 Then again, the final paragraph on the page:

23 “Given Ofcom’s approach to regulating mobile wholesale markets and the market  
24 analysis on which it is based, the proportionate regulatory response is therefore to  
25 base any remedies on cautious assumptions and keep the situation under review.”

26 So there H3G says yes, in the future bill and keep may be appropriate, just as Ofcom did in  
27 the third consultation document. But for the purposes of this charge control H3G said what  
28 it wanted was a shallower glide path and a higher MCT rate, a higher TAC. That is what it  
29 sought, and of course Ofcom itself had offered to keep the situation under review and we  
30 are certainly not here debating whether Ofcom was wrong to impose the period of charge  
31 control, that is just not a ground of appeal in these proceedings. If H3G had wanted to  
32 challenge the fact that we had chosen a four year period it could have done so; it has not  
33 done so. Instead, it seeks now, having contended against bill-and-keep at the start of the  
34 consultation process, and having recognised at some future point that bill-and-keep might

1 become appropriate during the final consultation process H3G seeks now, having not raised  
2 the matter in its original notice of appeal, to turn these proceedings into a wide ranging  
3 debate about the merits of bill-and-keep. We say quite simply our first compelling reason  
4 why their application to amend should be refused they should not be permitted to do so,  
5 and therefore the new approach, and the many new arguments which are set out in their  
6 additional supplemental submissions should not be admitted today. Madam, that is my first  
7 point.

8 My second point is that a proper appraisal of the new approach would require very  
9 substantial additional work by the Competition Commission, Ofcom, and the other parties.  
10 I am picking up here on p.8 of my skeleton at para.27. The approach Ofcom took in the  
11 MCT statement was shaped very much by the reaction that it encountered to bill and keep  
12 during the consultation process. The almost universal negativity from other parties,  
13 including H3G, to the suggestion that bill and keep was now appropriately to be  
14 introduced. Ofcom identified various potential merits and demerits but acknowledged  
15 uncertainties and doubts about the available evidence, and invited parties to come forward  
16 with any fresh evidence relating to the matter. Now, madam, because of the time I will not  
17 take you to it, but if you go to the MCT statement, and specifically to paras. 8.24 to 8.28,  
18 Ofcom there deals with mandated RPP by which it means imposing a zero NCT rate on the  
19 wholesale market. That having been accepted during the consultation process, as the only  
20 method to achieve RPP at the retail level. The flavour of those paragraphs, without taking  
21 you to them, is of uncertainty. Ofcom identified risks, but it lacks the evidence as to the  
22 extent of those risks. It thought the evidence that it had before it was uncertain, and  
23 problematical.

24 The second additional work is the need to examine likely consumer reactions to changing  
25 pricing structures, a point of course which H3G laboured in its response to the first  
26 consultation, also a need to examine economic justifications for efficiency of bill and keep  
27 as against the current cost based regime which I understand Ofcom simply has not yet  
28 done, but which will be a very significant job involving ----

29 THE CHAIRMAN: You say the reason why you do not have to do all this just to deal with a  
30 current NPZ case is because apart from H3G, because of its traffic imbalance, the move  
31 does not have that great an effect on the 2G/3G MNO.

32 MR. HOLMES: Three points: We do not have to do it in relation to H3G's pleaded case  
33 because they have not made a broad based for a route to bill and keep, they have sought to  
34 identify specific competitive distortions.



1 THE CHAIRMAN: Right, and you are content that you can knock those out without having to  
2 do all this fundamental work?

3 MR. HOLMES: Yes, madam, the second point is we think there are compelling practical  
4 objections to H3G's approach which makes it simply unmanageable. The third point is,  
5 yes, we say that the effects of a move to zero mobile-to-mobile MCT rates would be more  
6 contained.

7 THE CHAIRMAN: Right. Okay, perhaps you can move on to your next point.

8 MR. HOLMES: You have my submissions then in terms of the ----

9 THE CHAIRMAN: Yes, we have your submissions on the amount of work that would be  
10 involved.

11 MR. HOLMES: I should just briefly say, madam, in Ofcom's letter of 2<sup>nd</sup> March 2008, it was a  
12 letter in which we said we needed basically until 2<sup>nd</sup> May 2008 to deal with the new  
13 material. We intended there to deal with the material at a very high level because we say it  
14 is simply impossible really within the confines of the Competition Commission  
15 proceedings to do this other than at a very high level, and what Ofcom would be doing is  
16 basically pointing out the significant uncertainties and risks involved in a transformation  
17 just to warn the Competition Commission of what this would involve, especially given that  
18 it is an experiment which has never been attempted anywhere else in the world, so that  
19 would be the flavour of our submission.

20 We obviously are not here arguing the merits of that submission, but we would say that it  
21 would involve significant additional work merely to make those points, and if the  
22 Competition Commission were to grapple seriously with the merits or demerits of the move  
23 from CPP to RPP via bill-and-keep that is a huge piece of work which Ofcom certainly has  
24 not attempted as yet.

25 My third point is that the Competition Commission proceedings are not an appropriate  
26 forum for debating the new approach. We say there that because of the way in which the  
27 consultation process evolved these issues were not properly ventilated, that the detailed  
28 empirical work was not done. Ofcom at the beginning was enthusiastic to undertake such  
29 an exercise, but it was pushing at a closed door, not least as a result of H3G's well argued  
30 and cogent submissions in the first consultation. So, as a result, the work has not been  
31 done, and we now find ourselves before the Competition Commission with at most six  
32 months in which to attempt this exercise.

33 MR. SCOTT: Presumably, if we were to permit this to go before the Competition Commission  
34 we would then be in a situation where the parties before the Competition Commission

1 would only be a very small subset of the parties who would have an opportunity to  
2 comment were this to be done in a proper consultation. For example, the other MNOs  
3 would not be there, the MVNOs would not be there, the public generally, users of various  
4 sorts would not be there.

5 MR. HOLMES: Indeed, sir. The whole point of the consultation process is to capture all of the  
6 relevant interests and that simply is not the case in these proceedings. We have seen that  
7 the FNOs, while they intervened in the termination rate disputes are not here today. You  
8 will also have seen from the consultation process that Ofcom specifically invited consumer  
9 groups to make their views known – they will not be here to make their opinions heard in  
10 this set of proceedings before the Competition Commission.

11 MR. SCOTT: Just to complete that point, that is because in this sort of Competition Commission  
12 proceeding they move straight to their recommendation not via a consultative phase?

13 MR. HOLMES: Sir, even if they did proceed via a consultative phase they will be doing so  
14 within a very compressed period of time. You know that two years was taken over the last  
15 market review, Ofcom may very well take the same period again, especially given that it is  
16 not opposed to considering a move to RPP and bill-and-keep in the next round. Indeed, if  
17 anything it is open to all reasonable and relevant suggestions during that process.

18 THE CHAIRMAN: Mr. Holmes, is there anything on the statement of intervention in the BT  
19 appeal which is a different point from the point that you have made in your submissions?

20 MR. HOLMES: In relation to the BT appeal, madam, I think that can be dealt with very briefly,  
21 you will be pleased to hear.

22 We say simply that the points that H3G now tries to advance are clearly not related to the  
23 specific matters raised. BT itself notably accepts as much in its letter to the Tribunal and  
24 given its generally supportive stance towards H3G in relation to the new material. I think  
25 that is a clear indication of whether these matters are within or without. The Tribunal has  
26 also, of course, warned H3G of the need to raise matters in its own appeal rather than by  
27 way of an intervention, and it would be an extraordinary result if it were able to circumvent  
28 the constraints imposed in relation to its own appeal by pleading matters in the BT appeal.  
29 The general pleadings on which H3G relies in the appeal we say do not support its attempts  
30 to raise new matters. We simply point out para.65 of the BT notice of appeal which clearly  
31 circumscribes and brings back the general submissions to the specific matters raised by BT  
32 in its appeal.

33 As regards the Yarrow and Richardson witness statement, it is true that Professor Yarrow  
34 ranges quite widely and as Ofcom noted in correspondence at the time, but Ofcom did not

1 pursue the point, given that BT has maintained its focus on the specific objections. We  
2 would only say that if it were the case that the Richardson or the Yarrow witness statement  
3 has indeed broadened the scope of BT's notice of appeal then we would wish to pursue an  
4 objection in relation to those documents in the course of these proceedings today.

5 Madam, I obviously have not had the benefit of hearing how H3G puts its application this  
6 afternoon, and if any new points are raised during the course of that application I would  
7 like an opportunity if I may to respond to them, but subject to that proviso those are my  
8 submissions.

9 THE CHAIRMAN: Thank you very much, that is very helpful, Mr. Holmes. Mr. Pickford?

10 MR. PICKFORD: Madam, I am grateful. I am going to adopt the same tripartite approach that

11 Mr. Holmes did. I can obviously go much more swiftly because he has already covered a  
12 great deal of ground, and we support and adopt everything that he has said on behalf of  
13 Ofcom. First, I will be dealing with the main new points in the supplementary  
14 submissions, then the core points advanced by H3G in support of its application to amend,  
15 and finally the legitimate scope of its stepped intervention in BT's appeal.

16 Turning first to the new points in H3G's supplementary submissions, we have put those in  
17 a table which we appended to a letter which is at tab 23 of the bundle for today. It may  
18 just be helpful to go very briefly to that – I am not going to go through it in any detail – just  
19 to make a few points. Madam, do you and the members of the Tribunal have the table to  
20 hand?

21 THE CHAIRMAN: Yes, I think we do.

22 MR. PICKFORD: The first preliminary point to make is that the paragraphs that we cited in the  
23 left hand column are only intended to be illustrative of points where submissions arise and  
24 in that respect we therefore support and adopt the submissions of all the other parties where  
25 they have identified other paragraphs that they say are relevant to the particular issues. So  
26 we are not merely seeking to strike out those particular paragraphs insofar as another party,  
27 such as Ofcom, has identified other paragraphs that it says are relevant to the same points  
28 we support and adopt that approach.

29 THE CHAIRMAN: Well what are we to do then if, at the end of the day, we decide that there  
30 are some aspects, because we have not heard what H3G have to say yet, but if we were to  
31 decide that there were some aspects of their supplementary material which should not be  
32 allowed to go forward, is there something we can rely on that points us in the direction of  
33 what we would order, depending on which bits we found were objectionable?

1 MR. PICKFORD: Yes, madam, it is the consolidated table, H3G has been good enough to put  
2 together a consolidated table where it takes everyone's points together, and in that table  
3 everyone has identified particular paragraphs that concern them in its pleadings and in its  
4 witness evidence, and it takes them against the main submissions that are made against  
5 each of those paragraphs. That is the most convenient place to deal with striking-out if the  
6 Tribunal is inclined to do so. I have merely taken the Tribunal to this document because it  
7 is an easier means for me to explain T-Mobile's particular concerns. That is the first  
8 preliminary point.

9 Then if one looks at items 1, 2, 3 and 4 – item 1 is the “Reciprocal low MCT point”. Item  
10 2 is the “Application of the reciprocal low MCT to fixed to mobile termination”, item 3 is  
11 the attack on “The calling party pays”, and item 4 is a point that Ofcom really should have  
12 focused on, marginal costs rather than its LRIC approach. All of those four points fall  
13 within the scope of the broad attack that Mr. Holmes has made this morning on H3G's  
14 supplemental materials. They all concern in essence the metamorphosis of the NPZ case  
15 into the new case that you have described this morning. I really am just going to add a  
16 very few points to what Mr. Holmes has said. The first is that it is really very surprising  
17 that we have a situation where Hutchison was of course present for the hearing when the  
18 particular questions to be referred to the Competition Commission were decided upon and  
19 clearly articulated by the Tribunal. I am afraid I do not think we actually have in the  
20 bundles for today those particular questions, but it would be helpful if I could just remind  
21 the Tribunal of what question 7 said, because this is the key question concerned with NPZ,  
22 and I just quote. It was whether:

23 “...Ofcom should have exercised its powers in such a way that net wholesale  
24 payments between MNOs were zero with suitable cost based price controls  
25 retained for fixed-to-mobile calls.”

26 At that point we did not hear Hutchison standing up and saying, “Hold on a minute, that is  
27 not our case at all, when we say zero we do really mean zero, we mean potentially tens of  
28 millions of pounds”, because they say, “Well, it is all a bit of an approximation”, but we  
29 are talking of still very large sums of money potentially, even at a termination rate of 0.4  
30 pence per minute. Neither did we hear Hutchison standing up and saying, “Well, when we  
31 talked about a different remedy for fixed-to-mobile, what we really meant was the same  
32 remedy, ‘fixed’ merely means the same in this context”. We did not hear them say that  
33 either. It is really not credible or sustainable for Hutchison now to say that these points

1 were always in their notice of appeal, because they clearly were not. If they had been they  
2 would raised it quite obviously at that point in time.

3 If further proof were needed at this point we can go very quickly to Hutchison's own  
4 submissions for today and they are contained at tab 1 of the second file. It would be  
5 helpful not to put away my table just yet. If one turns to p.10 of their submissions for  
6 today, there is a lengthy section here which actually begins on p.9 where Hutchison sets out  
7 the key passages of its notice of appeal on which it relies on this application in order to  
8 persuade the Tribunal that, in fact, none of this is new. On p.10 one sees quoted  
9 para.1.2(a). We find there a definition of net payment zero. It says:

10 "A net payment zero outcome between MNOs, that is no actual wholesale  
11 payments would be made by H3G to the 2G/3G MNOs or *vice versa*."

12 So they define quite clearly what they mean by NPZ there. Firstly, it has nothing to do  
13 with fixed-to-mobile termination; and secondly, as the name tends to imply, it means a  
14 zero net payment not a potentially significant one, albeit less than would otherwise be the  
15 case. If one looks at para.4.2, again we find effectively the net payment zero solution  
16 being defined again:

17 "The payments made by H3G to the 2G/3G MNOs in relation to call termination  
18 on their prospective networks are wholly offset by the payments it receives from  
19 the 2G/3G MNOs for call termination on its network."

20 Again the same points can be made.

21 H3G's essential response to all of this is to say, "What we really meant by NPZ was  
22 something that would address the consumer benefits and the distortions of competition".

23 THE CHAIRMAN: They do go on then to say in 4.3 that one way and the simplest way of  
24 achieving this would be for all rates to be set to zero. So they were contemplating other  
25 ways of achieving it. What do you say was your understanding then of what ----

26 MR. PICKFORD: No other way of achieving this particular solution, which is net payment zero,  
27 was ever actually articulated by Hutchison, because of course what they are now seeking to  
28 achieve via reciprocal low, as we might term it, is not net payment zero because it extends  
29 across the board generally, including to fixed-to-mobile and it is not zero. That is we say  
30 in response to that.

31 If one returns then to T-Mobile's table, I have taken you through items 1 to 4 very briefly,  
32 because essentially those are the points that have already been covered by Mr. Holmes and  
33 I do not want to duplicate. If we then turn to items 5 and 6, these are particular points that  
34 T-Mobile has identified that Ofcom I do not believe do identify. They concern factual

1 matters in the third witness statement of Mr. Russell. The first of those is an alleged  
2 inability on the part of Hutchison to discriminate between customers depending on the  
3 balance of outgoing and incoming calls. That is point 5. Point 6 is another inability on the  
4 part of Hutchison to target customers, it says, because of lack of calling history. These are  
5 said to be yet more disadvantages that Hutchison suffers in the market place. We say these  
6 are completely new factual allegations and they were not previously raised in its notice of  
7 appeal.

8 THE CHAIRMAN: These would fall into the category – Mr. Holmes was telling us that, in  
9 arguing for NPZ, H3G focused on competitive distortions in the market which particularly  
10 disadvantage them. His point is that the arguments they are now putting forward in favour  
11 of reciprocal low are much broader than that. These would fall within the class of  
12 competitive distortions which arise from their particular place in the market, but you would  
13 say are nonetheless still points which were not specifically raised in the notice of appeal?

14 MR. PICKFORD: That is true, and whether one says that they are new grounds of appeal in that  
15 the implicit allegation here is that Ofcom failed to take these differences into account or  
16 whether one says that these are merely new arguments in support of existing grounds of  
17 appeal, one still has to consider whether they should be permitted because they do not fall  
18 within the scope of notice of appeal and obviously the difference there is between is Rule  
19 11.3 and Rule 11.1 in essence. I will come on to deal with that point very shortly.

20 Then, finally, in this table we have point 7, and this is, of course, our old on-net/off-net  
21 price discrimination. I will return to this issue in the context of H3G's statement of  
22 intervention in BT's appeal, because there we see that the issue is pursued in all its naked  
23 glory yet again.

24 Here it is raised in slightly different contexts from the way it was previously raised. It is  
25 raised effectively in two contexts: firstly, it is evidence for prices being above marginal  
26 cost, it is said; and secondly, it is also relied upon to drive the results of the welfare  
27 analysis. What we say is that even to respond to the way on-net/off-net issue is raised here  
28 it would still potentially require us and others to grapple with, firstly, the alleged existence  
29 of, and secondly, the extent of, and thirdly, the implications of, and fourthly, the correct  
30 inferences to be drawn from on-net/off-net price discrimination to the extent that it exists.

31 The Tribunal will of course remember that it was the requirement on the parties to  
32 potentially engage in further factual investigation about on-net/off-net price discrimination,  
33 which was one of the core reasons that was relied upon previously for not permitting  
34 Hutchison to amend its pleadings. Moreover, we know now from somewhat bitter

1 experience that Hutchison does take a somewhat liberal approach, we might say, to what  
2 has been pleaded. So, for all we know it, as soon as we see on-net/off-net price  
3 discrimination creeping back in here under these particular guises, it really becomes a  
4 stalking horse for the whole issue to be reopened later on before Competition Commission.  
5 We say that for that reason the Tribunal really should be very careful about letting it back  
6 in at this stage.

7 In response to the point that Hutchison make about the fleeting reference to on-net/off-net  
8 price discrimination as a so-called commentary on the appendix to their notice of appeal,  
9 that, of course, as the Tribunal has already noted, arises in a completely different context,  
10 which is really an attack on the reliability of Ofcom's market shares. Ofcom, and indeed  
11 all the other parties, are able to deal with that issue without getting into the underlying  
12 points about on-net/off-net price discrimination at all, and indeed they have done. That  
13 issue as pleaded there is certainly not sufficient to bring that on-net/off-net price  
14 discrimination at large.

15 Could I then turn to the question of whether the Tribunal should grant permission to  
16 amend. In relation to the reciprocal low reincarnation of the NPZ remedy that is quite  
17 plainly, as we have heard from Mr. Holmes, a new ground of appeal and therefore it falls  
18 for consideration, if at all, under Rule 11.3. In respect of that we say it plainly could have  
19 been pleaded earlier. It was not, and there are no exceptional circumstances justifying its  
20 inclusion now. Quite the contrary, to respond to that new case now will require  
21 considering extra work, and Mr. Holmes has helped explain some of the concerns that  
22 Ofcom has.

23 Could I just expand very briefly on some of those because I appreciate this was a point that  
24 the Tribunal was particularly concerned about. It is now said that really termination rates  
25 should be based on marginal costs. I think we understand what is meant by that is short-  
26 run marginal costs. It is also said that BT's termination rate is somehow a good  
27 approximation for this, certainly as I understand Hutchison's pleadings. This immediately  
28 raises the question, what are the true marginal costs here? This is not any longer a LRIC  
29 approach, this is a different costs approach. If we are going to respond to this properly we  
30 need to assess what marginal costs are and whether indeed it is true that BT's tandem rate  
31 is a good approximation. That is one factual issue that we would need to go into.

32 There is also the question of the economic implications of equalising fixed and mobile  
33 termination rates because, of course, that was never part of NPZ. That raises a whole host  
34 of new economic issues that would need consideration and investigation.

1 THE CHAIRMAN: Presumably the effect of that would be dramatically to reduce the income of  
2 all the mobile net operators, because at present BT pays their higher MCT charges, but  
3 only receives the 0.4 pence per minute itself – is that right?

4 MR. PICKFORD: That is probably right, madam, in general terms, but of course the wider  
5 economic implications of setting mobile termination rates on the basis of BT's costs would  
6 need to be considered and investigated.

7 MR. SCOTT: Just going back to the point we had earlier on which arose in the context of  
8 economic depreciation, if you have a network which has been built and has plenty of  
9 capacity the marginal cost of carrying incoming calls is likely to be very small. If you have  
10 a network which is already heavily loaded at peak times and needs to be expanded in order  
11 to carry incoming costs, then you are likely to have a very different picture. So we could  
12 well have a situation in which the effect of moving to a marginal cost basis would be  
13 dramatically to reduce mobile call termination payments to H3G compared with rates that  
14 could well be higher for the other MNOs if they could demonstrate that they needed extra  
15 capacity because of the existing heavy load?

16 MR. PICKFORD: Indeed, sir, and we would say that that is illustrative of the wider general  
17 issues that would need to be considered and grappled with if one really does get into this  
18 new territory. They are not points that we have currently dealt with. I do not need to  
19 remind the Tribunal that of course we are here today and the questions have already been  
20 referred to the Competition Commission. This is really beyond the 11<sup>th</sup> hour that we are  
21 talking about here. When one considers additional extra work it really should be  
22 considered against that backdrop.

23 As Mr. Holmes said a little earlier, what the challenge really amounts is a wholesale attack  
24 on the previous LRIC approach in favour of something that really is going to go down the  
25 road of bill and keep. That opens up a comparative international analysis that we simply  
26 have not got into yet at all. Certainly if it is advocated that we really should be going down  
27 that road and taking this experiment, as Mr. Holmes has characterised it, we would wish to  
28 engage considerably in analysing those international comparisons. Again, we say we  
29 should not be getting into that now.

30 As to the points that I have highlighted concerning H3G's inability to price discriminate  
31 and target on the basis of calling history, those clearly raise new factual matters.

32 THE CHAIRMAN: That is items 5 and 6?

33 MR. PICKFORD: Items 5 and 6.



1 THE CHAIRMAN: Can I just check with Mr. Holmes, do you also take a point on those  
2 passages or are you content with those passages?

3 MR. HOLMES: Madam, we do. I think we have raised the points in our table.

4 THE CHAIRMAN: Yes, I am sorry, Mr. Pickford, go on.

5 MR. PICKFORD: Even at its very lowest, they raise new factual allegations which would  
6 require investigation and response. For that reason we say again that they should not be  
7 permitted now. The same goes, of course, for the reintroduction of the on-net/off-net issue  
8 for the reasons that the Tribunal has well on board.

9 If we turn to Hutchison's counter-arguments, and I am going to go through these very  
10 briefly, it sets out the essence of its case on why it should be allowed to amend its notice of  
11 appeal at para.4.6, which is again at tab 1 of folder 2, p.18. The first thing it says is:

12 "In summary, the amendment application should be allowed as:

- 13 (a) H3G is arguing in its notice of appeal for much lower ppm rates to  
14 remove a competitive distortion that also translates into inflated  
15 retail call prices in the context of litigation that has the interests of  
16 consumers at its heart."

17 Putting aside Hutchison's touching concern for the interests of consumers, this does not  
18 actually take Hutchison's case on amendment any further. Anyone at all could come up  
19 with totally new arguments that they say are based on the latest economic thinking. Of  
20 course, ultimately these arguments would lead to consumers being made much better off. I  
21 think that is not the test for the matters that should go before the CC for consideration  
22 unless the issues are raised fairly and squarely within the scope of a notice of appeal; or  
23 secondly, are raised in the context of an intervention in a manner that is properly  
24 responsive to the matters that are put in issue by that intervention. They are not issues with  
25 which the Competition Commission should concern itself unless permission to amend is  
26 granted, and for the reasons that I have already given we say permission to amend should  
27 not be granted.

28 Point (b) is the allegation that the weight of support for H3G's case has increased  
29 materially over the past 12 months. That is really no good either, firstly, because, in fact, a  
30 number of the key papers that are relied upon pre-date the submission by H3G of its notice  
31 of appeal; but more fundamentally because we say Rule 11.3(a) and 3(b), which we  
32 understand is what is being alluded to here, really are not about the existence of new  
33 academic papers. They relate to the question of whether there are underlying facts or  
34 matters that have since come to the attention of the parties that could not have properly

1           been known previously. There are no such underlying matters of fact or law which would  
2           support a case based on 11.3(a) or (b), we say.

3           Point (c), Hutchison prays in aid the interests of the Competition Commission. In response  
4           to that we say that the Competition Commission is not at all hindered by having a clearly  
5           defined set of issues based strictly on the notices of appeal and the legitimate responses to  
6           them in statements of intervention. Obviously Mr. Sharpe is here today so we can hear  
7           further from him on what he considers to be in the Competition Commission's best  
8           interests. What we do say is, by definition, if Hutchison requires permission to amend its  
9           notice of appeal because something is not contained within it currently then that is not  
10          something that needs to be addressed by the Competition Commission to adjudicate upon  
11          that notice of appeal.

12          Point (d), at that point Hutchison prays in aid the novelty of proceedings. BT does not  
13          seem to have had any terrible difficulty in complying with and understanding the rules set  
14          down by the Tribunal for these proceedings. We say that, if anything, Hutchison has  
15          already been indulged to some extent in being allowed to advance supplemental  
16          submissions, and it really should not be allowed to abuse that opportunity that has been  
17          granted to it.

18          Point (e), it is now said that the points are foreshadowed in its statement of intervention in  
19          BT's appeal. I will come to deal with the substance of that in a minute, but this lacks all  
20          logic as a coherent basis for allowing the amendment in the present case. If the points are  
21          legitimately raised in response to BT's notice of appeal then they do not need permission to  
22          amend their own notice of appeal, because they are within the scope of BT appeal. If the  
23          points are not legitimately raised in the context of their response to BT's appeal, then we  
24          say that cannot possibly assist them to illegitimately raise the point previously as a basis for  
25          now being allowed permission to amend. We say that is just not a logical basis on which to  
26          proceed.

27          The same of course goes for Dr. Littlechild's statement. Either they canvassed points that  
28          were legitimately raised previously, in which case there is no problem; or if they were  
29          illegitimately raised previously, then that cannot assist Hutchison now, we say. Indeed, we  
30          note that at the time of the last substantive hearing in this matter in January and February,  
31          prior to that hearing we took issue with certain parts of Dr. Littlechild's evidence as going  
32          outside the scope of Hutchison's notice of appeal. The response to that was to say,  
33          "Disregard those aspects of the witness evidence". So it really does not lie in Hutchison's  
34          mouth now to come back and say, "But we raised these points before in witness evidence".

1 Then, as to whether the points would require additional work to respond to, for the reasons  
2 that I have already set out we say they would require additional work. Even if they would  
3 not, however, that is not sufficient to support an application under 11.3. That is not the test  
4 under 11.3. Even under 11.1 we say that is simply too late in the day now irrespective of  
5 the degree of extra work that is required for this Tribunal to be entertaining reformulating  
6 the questions the Competition Commission has to address and allowing an amendment to  
7 H3G's pleading. We say it would be wholly antithetical to the orderly and just conduct of  
8 these proceedings to allow that to happen.

9 Finally, if I could address the statement of intervention. As a preliminary matter there is a  
10 general mistake that is made by Hutchison in that it seems to think that in a joined appeal it  
11 should be able to develop points in relation to its own appeal in the context of its  
12 intervention in BT's appeal. We say that is simply wrong a matter of principle. There is  
13 no reason at all why Hutchison should be in a different position from any other intervener  
14 in the context of BT's appeal. Every intervener is constrained at its intervention to be  
15 entirely responsive to the matters that are put forward in the appellant's notice of appeal.  
16 That is not of course the same thing as saying that they have to support them or that they  
17 have to support Ofcom. They can advance their own case in relation to those matters, but it  
18 is only in relation to those matters that are raised in the notice of appeal.

19 So BT's appeal really puts in issue three matters: firstly, what is the correct approach a  
20 matter of principle and in practice to the valuation of H3G's spectrum; secondly, on the  
21 facts of the present case can a network now be justified; thirdly, should Ofcom have been  
22 less generous in the amounts it permitted the mobile network operators in respect of  
23 administration costs, because of course BT has now dropped its network sharing point so  
24 we only have those three issues remaining.

25 What BT's appeal does not do in the slightest is, for example, raise the issue of whether on-  
26 net/off-net price discrimination causes traffic imbalance as between H3G and the other  
27 mobile network operators. That is not an issue falling within the scope of the three points  
28 that I have just articulated.

29 Hutchison does not have any need to advance its own case in BT's appeal. All it needs to  
30 do in its pleading is say, "Everything we say in this statement of intervention is without  
31 prejudice to what we say in our own notice of appeal, see para.X which we still pursue".

32 That is the approach that we adopted in the non-price control appeal which of course is  
33 inter-related termination rate dispute appeals in which T-Mobile did have its own appeal.

34 We simply said, "Without prejudice to what we say there here are our submissions on these

1 particular issues". That is the right approach to adopt here. If you do not adopt that  
2 approach, firstly, a party has the opportunity to introduce by the back door a whole host of  
3 new issues that are not properly relevant to the matters in issue, and it completely muddies  
4 the waters in relation to what is actually in issue in its own appeal and what was in issue in  
5 someone else's appeal. Regrettably, we say, that is actually what is happening in this  
6 instance. Secondly, it is procedurally quite wrong to advance one's own substantive case  
7 in a statement of intervention which is supposed to be responding to someone else's notice  
8 of appeal. Statements of intervention are necessarily responsive and if H3G now starts  
9 advancing points in support of its appeal in a responsive document then we have not, for  
10 example, and nor has Ofcom, responded to H3G's statement of intervention and, quite  
11 rightly, the Tribunal has not provided for that in the case management of these  
12 proceedings. We should need to, but if one is allowed to pursue one's own substantive  
13 case in someone else's appeal, then one just seeks that it is a recipe for confusion and  
14 prolongation of these proceedings.

15 One can see the concern this is obviously causing the Competition Commission because  
16 they have written to the Tribunal and they are here today.

17 If we turn very briefly to the statement of intervention itself, which is tab 22 of bundle A1,  
18 I believe.

19 THE CHAIRMAN: Outline statement of intervention?

20 MR. PICKFORD: Yes. Can we first look at para.1.4, save for the first two sentences which are,  
21 we say, unobjectionable, that paragraph advances Hutchison's case on bill and keep. It has  
22 got nothing to do with BT's grounds of appeal.

23 I am going to go relatively here because there is not long enough to read through all of the  
24 relevant passages. The next section is section 2 which is the context in which to assess the  
25 imposition of the price control remedies. This sets out a context which is not relevant in  
26 any way again to BT's appeal. It is a context which is purely relevant to H3G's appeal.  
27 Moreover it is now embellished to include the on-net/off-net point as a justification for  
28 traffic imbalance, and we see that that is at point 2.1(d)(i). There it is again in all its glory,  
29 traffic imbalance allegedly caused by on-net/off-net price discrimination which we thought  
30 was something that had been confined to the dustbin in these proceedings. We say the  
31 whole of s.2 is illegitimate.

32 Paragraph 3.1(a) again advances H3G's case that termination rate should either be zero as  
33 between MNOs or much higher for H3G, so that is again nothing to do with BT's appeal.  
34 Then s.4 sets out the relief sought and again the relief all concerns ----

1 THE CHAIRMAN: You said 3.1(a), what about (b) and (c), do you also object to that?  
2 MR. PICKFORD: No, we do not.  
3 THE CHAIRMAN: Then in 4, sorry?  
4 MR. PICKFORD: In 4 we see the relief that is set out, and that is all relief that really goes back  
5 to Hutchison's appeal, it is not relief that is connected with an intervention in BT's appeal.  
6 Again, s.5 also is illegitimate in its entirety and one has a clue to that from the title to it,  
7 because it says:  
8 "BT's MCT appeal incorrectly assumes that Ofcom's overall approach in setting  
9 the price controls was correct."  
10 So this is simply a vehicle under the guise of being responsive to BT's appeal, to do with  
11 issues that had nothing to do with BT's appeal whatsoever. One sees that even more clearly  
12 when one gets on to the next section, which is section 6, which is in fact the only section of  
13 this outline statement, statement of intervention which purports to deal with BT's grounds  
14 of appeal. So we say this is the only bit to which serious consideration really needs to be  
15 had at all.  
16 THE CHAIRMAN: So you are content with s.6 in its entirety?  
17 MR. PICKFORD: No, we are not, we say it needs to be considered.  
18 THE CHAIRMAN: No, I do not mean you are "content" in that sense, I mean you are not asking  
19 for it to be struck out.  
20 MR. PICKFORD: We are not asking for the entirety of s.6 to be struck out, but certain  
21 paragraphs within it which we say are still illegitimate. What we are content with is that at  
22 least in s.6 H3G is doing what it is supposed to be doing, which is grappling with BT's  
23 notice of appeal.  
24 The two issues which we say are raised within this that should not be raised because they  
25 are not part of BT's appeal find themselves articulated firstly at para.6.25, where we see in  
26 the first sentence that the on-net/off-net price discrimination point is coming back again.  
27 Then if I could just briefly take the Tribunal to 6.29, we see the case that Ofcom's costs are  
28 already well above any reasonable estimate of marginal costs of termination. Then from  
29 6.29 through to 6.34, those paragraphs develop a combination of the on-net/off-net price  
30 discrimination point again, and also the allegation that really what Ofcom should be doing  
31 is setting prices equal to marginal cost, which is the point, of course, Hutchison is now  
32 trying to advance in its own appeal. I am not going to read all of those because I am not  
33 sure it is actually in contention that those are effectively the points that Hutchison is  
34 advancing there.

1 What Hutchison says firstly is that these points are all bound up with the externality issue.  
2 It says because a higher termination charge aggravates the incentives for 2G/3G MNOs that  
3 they already have to engage in on-net/off-net price discrimination.

4 We say that is no more related to the externality point than to any other aspect of Ofcom's  
5 reasoning, because Hutchison's logic is essentially this: Because argument X pushes the  
6 termination charge in one particular direction, and another completely different point we  
7 would like to make, then we should be allowed to argue our completely different points  
8 because they both happen to be going in the same direction, and therefore we say that this  
9 point, this legitimate point exacerbates something that we have identified in relation to our  
10 point.

11 If one adopts that approach then there really is no constraint on the statement of  
12 intervention at all, because for instance T-Mobile could equally say "BT argues that there  
13 should be no externality charge, but that is wrong and it merely exacerbates the problem  
14 that the charge control is in fact far too low because of these other completely unrelated  
15 issues that Ofcom failed to address. So we say that obviously cannot be the test for  
16 whether something is within the scope of a legitimate response to a statement of  
17 intervention.

18 The second point H3G advance is that they say BT has already raised the on-net/off-net  
19 price discrimination point as causing traffic imbalance in para.63 of its notice of appeal. I  
20 am going to come back to para.63 very shortly, but we say that is just simply wrong,  
21 para.63 does not raise Hutchison's points that on-net/off-net price discrimination causes  
22 traffic imbalance.

23 Thirdly, they also say that on-net/off-net price discrimination is raised in Mr. Richardson's  
24 evidence. Now, the first point to make in relation to this is that if a point is not raised in  
25 BT's notice of appeal, it is not raised in BT's appeal; it does not really matter what Mr.  
26 Richardson does or does not say. Secondly, even in the context of Mr. Richardson's  
27 evidence, one has to look at the context in which the point is made. For the sake of time I  
28 am not going to take the Tribunal there, but to explain: Mr. Richardson does mention on-  
29 net/off-net price differentials, but it is in the context of an allegation that fixed and mobile  
30 networks compete directly. Now we are able to meet that point and indeed have met it  
31 without getting into the nitty-gritty of on-net/off-net price discrimination at all and it would  
32 be quite wrong to allow Hutchison on the back of that different point to then reintroduce  
33 on-net/off-net by the back door.

1 Fourthly, Hutchison say their case is also related to the evidence of Professor Yarrow, and  
2 in relation to that we make the same point: Professor Yarrow's comments are necessarily  
3 conditioned by the points that BT actually takes in its notice of appeal. We make the same  
4 points that of course if BT tries to widen out the scope of its notice of appeal to bring in  
5 points that are tangentially mentioned by Professor Yarrow, we would have the same  
6 concerns, but BT has not done that it has played by what we say are the rules.

7 Finally, Hutchison's last resort is to say that BT has pleaded general points on competitive  
8 distortion and harm to consumers, arising from the criticisms that BT has of Ofcom's  
9 approach, and all our points are more points about why there are competitive distortions  
10 and harm to consumers arising from Ofcom's approach. Again, we say that cannot be the  
11 right test in this case; it is far too vague, it is far too broad brush, and indeed it is  
12 completely contrary to the way that all of the parties have conducted themselves so far in  
13 relation to these appeals. Again, it can be said of literally any point, almost by definition, if  
14 one says that Ofcom has erred in some way in setting its price control then if it said a  
15 different, better price control, that would be better for consumers and it would not distort  
16 competition, so that really cannot be, we say, the appropriate approach.

17 Unless I can be of any further assistance those are the points I wish to make on behalf of T-  
18 Mobile.

19 THE CHAIRMAN: Thank you very much, Mr. Pickford.

20 (The Tribunal confer)

21 THE CHAIRMAN: Miss McKnight, you are down then for having 15 minutes, would it be  
22 possible for us to finish you before the short adjournment? I should say that what the  
23 Tribunal is currently minded to do is to hear Vodafone before lunch, and then to hear H3G  
24 after lunch, and then come back, if appropriate, to the other interveners thereafter if there  
25 are points on which we wish to hear further argument from them.

26 MISS McKnight: I am content to go before lunch, certainly. Thank you. Obviously, Vodafone  
27 is largely supportive of the points made by Ofcom and T-Mobile and that will assist me in  
28 being somewhat briefer.

29 If I could take you to the February bundle, to tab 1, which is the original notice of appeal  
30 and price control appendix of H3G. In the price control appendix at p.10 we see in s.4 the  
31 way in which H3G first set out its proposal for the NPZ remedy. It is made clear in  
32 para.4.2 that the NPZ remedy is one which would ensure that payments made by H3G ----

33 THE CHAIRMAN: I am sorry, I am not with you.

1 MISS McKNIGHT: Sorry, we were asked to bring along the February case management  
2 conference bundles, and at tab 1 ----

3 THE CHAIRMAN: It is tab 2 in ours.

4 MISS McKNIGHT: Sorry, I was looking at the original, we can look at tab 2, para.4.2.

5 THE CHAIRMAN: “Alternative approach to remedy”, right.

6 MISS McKNIGHT: Yes, that is right. H3G makes clear that what it regards as the appropriate  
7 remedy is one which ensures that the payments made by H3G to the 2G/3G MNOs should  
8 be wholly offset by the payments it receives from them. It goes on to say that one way, and  
9 the simplest way of achieving this, would be for all rates to be set to zero. I think this  
10 morning it was suggested that the very fact that they say that would be one way and the  
11 simplest way of achieving this would be for all rates to be set to zero. I think this morning  
12 it was suggested that the very fact they say that would be one way and the simplest way  
13 implies they must have had other things in mind.

14 I would wish to remind the Tribunal, this is a point which was aired when we were  
15 contemplating the terms in which the questions should be referred to the Competition  
16 Commission – I think the original question which the Tribunal proposed was a question  
17 whether all mobile-to-mobile termination rates should be set to zero. Vodafone, in its  
18 comments on the draft question, pointed out that that was not actually what H3G specified  
19 to be the objective of their remedy. The objective of the remedy is not to deal with every  
20 bilateral relationship between each pair of MNOs, but to look at H3G on the one hand and  
21 the aggregate of 2G/3G MNOs on the other. If one did not have all rates set to zero, the  
22 other way of achieving what H3G are requesting would be for essentially cost reflective  
23 charges to apply as between each bilateral pair, and then at the end of the year for  
24 balancing payments to be made so that H3G was revenue neutral vis-à-vis other 2G/3G  
25 MNOs in aggregate.

26 I think at first blush the Tribunal was attracted by our interpretation of this part of the price  
27 control appendix, but in the end the question was put in terms of should all mobile-to-  
28 mobile termination rates be zero, and we are content with that because we think that is the  
29 only sensible way of implementing this.

30 I think it was clear from that exchange in correspondence, and at the February hearing to  
31 determine the scope of the questions, that those two approaches were understood to be the  
32 ways in which H3G’s proposal could be implemented. I do not think it was ever  
33 contemplated, and this is a point which Mr. Pickford has already made, that zero was to be  
34 interpreted as near zero, and in our view that is clearly not the case. We would say that the



1 essence of the NPZ remedy which H3G was proposing was that it was designed to, and  
2 bound to result in a net payment of zero from H3G to the other MNOs. Whereas once you  
3 introduce a positive MCT charge, however small, it will merely be coincidental if it results  
4 in a net payment of zero at the end of the day and that cannot therefore be characterised as  
5 an NPZ remedy. That is the first point I would make.

6 The second point is that the case which H3G now seeks to put proposes the NPZ remedy,  
7 or the close to NPZ remedy for entirely different reasons from those which were put  
8 forward in the original notice of appeal price control appendix. If we stay with this  
9 document we see that after the section that I have been describing H3G explains what are  
10 the reasons for preferring the NPZ remedy. It focuses on the fact that if one has positive  
11 MCT charges flowing among MNOs, in the light of the traffic imbalance it results in  
12 material net out payments, so it is looking at the outcome of having positive MCT charges  
13 as being a bad thing and something which is avoided by net payment zero.

14 It then says that estimating the appropriate MCT charge for end-to-end calls is difficult  
15 because costing uncertainty is forecasting uncertainties. It notes that Ofcom has not  
16 modelled a base case, just looked at scenarios and this merely emphasises the uncertainty.  
17 It goes back to saying that the NPZ approach avoids the difficulties of material net out  
18 payments. So it is looking very much at avoiding the difficulties of setting a charge  
19 control, having to worry about what is the proper charge control, and avoiding the alleged  
20 competitive detriment to H3G of having to make out payments.

21 In contrast, if we now look at the way in which the case is put in the new price control  
22 submissions, which is in a separate bundle – I think it is just called “Price control  
23 submissions.

24 The first item in the bundle is the price control submission itself, then followed by the  
25 witness statements. As you know from what has been said this morning, the position of  
26 Ofcom and the interveners who support Ofcom is that what H3G is now saying is it will be  
27 best to have very low MCT charges both for mobile-to-mobile and fixed-to-mobile, for a  
28 variety of reasons. One of the reasons which it clearly puts forward is that this would  
29 approximate to the true cost of mobile call termination. This is clear from para.2.11(b) by  
30 implication because in this section the criticism that is put of Ofcom’s determination of  
31 MCT charges is that it results in their being set significantly above marginal costs, and  
32 above average incremental costs.

33 This then goes on to cite various ways, sort of proxies or insights into the fact that the  
34 marginal cost or the true cost of call termination is much lower. Paragraph 2.11(b)(i) – (iv)

1 sets out a number of reasons why Ofcom's estimate of the true cost, or the relevant cost of  
2 call termination is much higher than what H3G now puts forward as being the relevant  
3 cost, or the true cost.

4 Previously, Vodafone's expectation was that in addressing the case for NPZ that  
5 H3G had originally put, it had to focus on whether NPZ was the best thing that could  
6 be done in the light of s.88, whether H3G was right in putting the positive case for  
7 NPZ is avoiding competitive detriments to H3G. Clearly that would have to be  
8 weighed against whether NPZ was a good thing, given its relationship with the  
9 relevant costs of call termination. The way in which H3G put its case on costs, it did  
10 not say "NPZ is a good thing not only because it avoids competitive detriment, but  
11 because it is also more truly cost reflective". On the contrary to the extent that  
12 H3G's notice of appeal addressed cost at all, it suggested – as we heard this morning  
13 – that if prices were to be cost reflective they would be higher for H3G and they  
14 would be lower for the 2G/3G MNOs, but they would only be lower for those MNOs  
15 to the extent that a different depreciation model would be adopted. Without wishing  
16 to add possible further confusion to the different depreciation models the way I  
17 understand it is that if one imagines that a mobile network operator makes a capital  
18 investment of £1 million in an asset which is to last 10 years, if one were to apply –  
19 in simple terms – a straight line depreciation of recovering a tenth of that cost  
20 through charges in each of the 10 years of the asset's life, then if the utilisation of the  
21 asset is common from year to year, there is no growth or fall-off in utilisation the  
22 amount of depreciation charge recovered on each unit of output will be common  
23 from year to year.

24 Conversely, utilisation of the asset is building up over the 10 years. The same aggregate  
25 sum of depreciation charge will be recovered in year 1, year 2, year 3, but the per unit  
26 charge will fall off in later years because that aggregate charge for the year is recovered  
27 over a large number of units of output. Conversely, if utilisation is falling off one sees a  
28 higher per unit charge for depreciation in later years.

29 Ofcom's proposal was you estimate the total unit of output for the whole life of the asset  
30 and apply a uniform depreciation charge per unit of output over all of those units without  
31 looking at a straight line depreciation year to year. H3G propose something different,  
32 which it says would work better for the 3G network, which is growing in utilisation and  
33 would disfavour the 2G/3G networks which are already highly utilised. So in other words  
34 the cost benchmarks that they were expecting the NPZ remedy to be measured against was

1 a cost bench mark derived from Ofcom's call termination charges as proposed, subject only  
2 to the adjustments put forward in the H3G notice of appeal. So Vodafone's argument  
3 would have been NPZ is a very bad thing because it forces Vodafone to sell a mobile call  
4 termination unit to H3G for nothing, when in fact the cost of that MCT unit is either what  
5 Ofcom said it was, or it is what Ofcom said it was subject to the adjustments that H3G  
6 proposed if they turned out to be correct. We would have argued that forcing us to sell  
7 MCT for less than its cost would have inefficiency consequences, which would be a bad  
8 thing.

9 Now we are being told that the true cost of call termination is much lower. If that is so,  
10 and of course we dispute that it is, we have to examine and answer the request for the NPZ  
11 remedy by reference to an argument that in fact is roughly cost-reflective, which is a quite  
12 different case, and as has already been aired this morning it will call into question what is  
13 the marginal cost of call termination if H3G has an inefficiently large network which is  
14 built long before it needs it and it can carry much, much more traffic at no incremental cost  
15 – is that relevant? Is that an efficient benchmark. If Vodafone has built a well structured  
16 network to which it adds further modules as they come into use and its marginal cost  
17 therefore goes up, or there are additional marginal costs, what does that tell us? It also  
18 calls into question how one decides what the marginal unit is, because an increment of  
19 infrastructure is added to carry incoming and outgoing traffic indifferently, and therefore  
20 what assumptions does one make. So all of these questions are raised for the first time by  
21 allowing in – if one does allow in – arguments that the true marginal cost and the relevant  
22 cost of call termination is quite different from anything that has been aired to date.

23 THE CHAIRMAN: You say you would have to deal with that because even though it is  
24 generally accepted that the 0.4ppm figure is not derived from the mobile operator's costs,  
25 part of the justification put forward for it is that it is not out of line?

26 MISS McKNIGHT: Yes, it is not for us to say what H3G's case is, but the way I understand it  
27 is ----

28 THE CHAIRMAN: No, your understanding of it.

29 MISS McKNIGHT: They are saying that if you went for 0.4 ppm because that equates to what  
30 BT charges, then it certainly would not do much detriment because the true costs of call  
31 termination on mobile networks are much lower than Ofcom or anyone else had previously  
32 thought, and we say that is a substantial new matter to be answered, and not something for  
33 which we were at all prepared. That is why we think that this change to the NPZ remedy  
34 on mobile-to-mobile is a very substantial change to the case.

1 If I could take you back to the original price control appendix we were looking at, the way  
2 in which H3G put their case originally, looking at not so much what they wanted for  
3 mobile-to-mobile, but what they wanted for fixed-to-mobile.

4 In para.4.7 they indicated that whilst they thought that lower MCT rates generally would  
5 benefit consumers, they were proposing that there should be a suitable cost base price  
6 control taking account of the differences between 2G and 3G costs, and for all fixed-to-  
7 mobile rates. In 6.1 they then go on to explain that their case on what H3G's rate should be  
8 is that Ofcom has set too low a rate because, as we have heard this morning, they should  
9 have been allowed additional CARS costs and so on (section 8).

10 In a later section still we get the argument that the 2G/3G MNOs rates should be lower. So  
11 again, this is the section which caused us to conclude that this is the only case that H3G  
12 was making as to areas in which Ofcom had essentially erred in setting a cost reflective  
13 termination rate, so that was essentially the benchmark against which you measure whether  
14 NPZ is a preferable remedy. Now we are being told that that is not the case at all.

15 THE CHAIRMAN: The ED methodology seems to be only the first of those reasons or the  
16 second reason in 11.5 is the assumption about H3G's market share is too optimistic.

17 MISS McKNIGHT: Yes, you are quite right, that is presented as a separate element.

18 THE CHAIRMAN: That would be related to CARS costs.

19 MISS McKNIGHT: Yes, subject to whether my understanding of the different depreciation  
20 methodologies is correct, I see them as related points because the more quickly H3G goes  
21 to market share parity, the less significant is this debate about the number of units, about  
22 put over which one recovers the depreciation charge, but you are correct that it presents as  
23 a separate error.

24 MR. SCOTT: This is all on the basis of commenting on Ofcom's model, not replacing Ofcom's  
25 model with something profoundly different?

26 MISS McKNIGHT: Yes, in my view that is clearly correct. So in other words, there was no  
27 suggestion by H3G at this stage that Ofcom's model just needs to be torn up and we need  
28 something different altogether. They were saying by implication the model is substantially  
29 correct, but there are these potentially major, but adjustments to the model to be made, or  
30 to the inputs to the model.

31 We would argue therefore that on the basis of what I have said this is clearly something  
32 which is novel and goes beyond, and indeed in some ways contradicts what was said in the  
33 amended notice of appeal. So we would say that if H3G are to be permitted to pursue these  
34 arguments, it must be on the basis that they persuade the Tribunal that they should be

1 allowed to amend their notice of appeal so as to introduce these matters by way of  
2 elaboration to the Competition Commission. We say that what they are seeking to do is  
3 essentially to introduce a new ground. We agree with Ofcom in this regard. What they are  
4 now arguing is that Ofcom erred in adopting a long-run incremental cost model using the  
5 increment of total traffic and allocating appropriately, and that instead Ofcom should have  
6 gone for an NPZ, or close to an NPZ remedy one justification for which is that a close to  
7 NPZ remedy, a 0.4 ppm remedy would not depart far from a truly cost-reflective level, and  
8 we say that is entirely new ground.

9 If it is not treated as a new ground, it is certainly a new argument, and we say that in  
10 deciding whether to admit to such an amendment, the Tribunal should be mindful of the  
11 fact that to do so at this stage would lead to very substantial additional work for the parties  
12 along the lines that I have described. We see no countervailing benefit which would justify  
13 putting us to that extra work at this late stage in the proceedings.

14 We note that one reason that H3G puts forward is that the economic literature has  
15 developed to some substantial extent in the 11 months or so since the appeal was first  
16 launched. We do not see the relevance or merit of that point; it seems to us that the notion  
17 of NPZ was well aired in the literature, and indeed was considered by Ofcom, and Ofcom  
18 sought views on it during its consultation process.

19 The close to NPZ remedy does not seem to us such a substantial departure from that in  
20 terms of thinking, if one is thinking either cost reflective, zero, something in between, the  
21 notion of setting charge controls that would be mindful of the extent to which fixed and  
22 mobile operators compete with one another is certainly not novel. There is plenty in the  
23 Ofcom consultations that look at that and BT frequently raises concerns about distortions  
24 of competition through the very different levels of charge control rates.

25 So whilst I do not wish to dismiss the relevance or importance of economic literature we do  
26 not think it amounts to new facts or legal considerations such as to justify this kind of  
27 amendment and, as we say there are very serious concerns about the work to which it  
28 would put the parties to in the meantime.

29 We would also make the point that to the extent this literature is very novel it is really  
30 looking at what will be the next generation of charge control regulations, to the extent it is  
31 relevant at all. What this case should be doing is deciding whether Ofcom made the right  
32 decision as to the charge controls when it made that decision in March 2007. We do not  
33 really think the fact that there may be future evolutions in thinking on how charge control

1 should be set should be something which should entirely overtake a consideration whether  
2 Ofcom made the right decision at the time it took it.

3 Clearly, if some revelation had occurred since March 2007 to the effect that all previous  
4 price controls are entirely misconceived and damaging then perhaps the Tribunal would  
5 have to think: is this new insight of such substantial importance that we have to just stop in  
6 our tracks and start again? We do not think that this can be portrayed as that, and we  
7 therefore think that this is something which, at most, is going to be of significance next  
8 time around.

9 My submissions so far have focused on the H3G notice of appeal. As regard the statement  
10 of intervention in the BT case we would make the point that again, when we were last  
11 before the Tribunal to consider the questions we referred to the Competition Commission  
12 there was some substantial debate as to the role of interveners in CAT proceedings, and the  
13 extent to which it was open to an intervener to ask for a different remedy from the principal  
14 parties, or to adduce new arguments. The Tribunal was taken to the Tribunal Rules, which  
15 make clear, I think, that where an intervener supports the position of a principal party it  
16 should say so in its submissions but by implication it will not always do exactly that.

17 The point we made then by reference to the *Coke-Cola* case before the Court of First  
18 Instance was that Vodafone, to the extent that it seeks to make points different from those  
19 raised by Ofcom in these proceedings, it is raising points which it could not have raised in  
20 its own independent appeal. Vodafone thinks Ofcom got the price control substantially  
21 correct but it does not necessarily agree with every building block of the reasoning, so we  
22 would not have been able to appeal to say that we have no objection to the ultimate order  
23 but we do not like the reasoning.

24 When others appeal and take issue with the outcome that Ofcom reached, it is open to  
25 Vodafone in an intervention in support of Ofcom to say: "Ofcom have not reached the right  
26 decisions for the reasons it has stated, and what is more, for these extra or different  
27 reasons", that is a proper form of intervention which goes beyond what either of the  
28 principal parties is arguing, but we entirely adopt what Mr. Pickford has said about what  
29 H3G are seeking to do now in a BT appeal.

30 BT has said Ofcom got it substantially right but made three or four errors – I think they  
31 have dropped the fourth one now – but they adopt the model and ask for it to be tweaked.  
32 For H3G to come in and say BT is arguing that Ofcom got it wrong, so there are loads of  
33 other ways in which it got it wrong is simply not acceptable, particularly when it has itself  
34 already appealed. The question as to whether H3G should be permitted now to introduce

1 new arguments must be measured by whether it is proper in the context of its own appeal  
2 for H3G to be permitted to amend. They cannot be given more latitude to introduce new  
3 arguments via an intervention appeal relating to much more limited issues.

4 That completes my substantive submissions, but I am conscious, madam, that you asked at  
5 the outset that, if we were successful, we identify how this would affect H3G's price  
6 control submissions.

7 THE CHAIRMAN: Well I think we have been taken through some of that material.

8 MISS McKNIGHT: Yes.

9 THE CHAIRMAN: We have been pointed to H3G's table, I know you presumably put in your  
10 own table?

11 MISS McKNIGHT: Yes, we put in our own table, all I would say about that is that we identified  
12 the paragraphs that we felt went beyond what was permitted within the scope of H3G's  
13 notice of appeal. But in many cases a paragraph appears to say: "We should have an NPZ  
14 remedy bracket or something close to it", so clearly parts of those paragraphs will be  
15 acceptable to the extent that they merely elaborate on what was always in the notice of  
16 appeal. So we feel that it would require quite a lot of careful blue pencilling to get it right;  
17 it will not always be a matter of just taking out whole tranches of the document, but we are  
18 happy to co-operate on whatever basis the Tribunal would wish to assist with that. Thank  
19 you.

20 THE CHAIRMAN: Thank you very much. We will adjourn now until 20 past 2 at which point  
21 we will hear from Mr. Kennelly.

22 (Adjourned for a short time)

23 THE CHAIRMAN: Yes?

24 MR. KENNELLY: Madam, members of the Tribunal, I propose to deal with this in two parts, to  
25 deal first with the H3G appeal and the issue of the admissibility of our supplementary  
26 submissions; and then, finally, to deal with the BT appeal. The vast majority of my  
27 submissions will relate to our own appeal. That is by far the most important matter for  
28 H3G.

29 In relation to H3G, I will be submitting that our supplementary submissions in full are  
30 admissible – these were referred to in brief earlier by Mr. Holmes for Ofcom – that is the  
31 supplementary submissions served on 7<sup>th</sup> March, the letter with the two further documents  
32 served on 14<sup>th</sup> March, and the short Morgan Stanley report served with the submissions for  
33 this hearing. Those, in their entirety, are the supplementary documents which have been  
34 served for the purposes of H3G's case before the CC.

1 Madam, I will be taking the Tribunal at some length and with some care to our notice of  
2 appeal, price control appendix and commentary. That has not been done so far and it is  
3 critical for the purposes of this hearing for this Tribunal's determination.

4 Before doing that it is useful, in my submission, to recall just for a moment what the  
5 background to this issue is. This Tribunal at the CMC of 18<sup>th</sup> March made it clear that they  
6 would appreciate the most robust guidance possible from the CC. The CC is engaged with  
7 the task of finding, if possible, the correct figure. This Tribunal has asked that the CC give  
8 it the most robust guidance possible in determining the issues in this appeal. For the CC to  
9 do this they must necessarily have all of the relevant materials before them, and this  
10 Tribunal should be astute to avoid any artificial limits or deadlines to this end. I refer in  
11 particular there to such documents as have emerged very recently and which, in our  
12 submission, are extremely material to the CC's examination.

13 The second background point that I wish to draw the Tribunal's attention which the  
14 Tribunal will not have lost sight of is that we are engaged in determining the figure which  
15 is of the greatest possible benefit to end users. My learned friend Mr. Pickford for T-  
16 Mobile, if I may say so, rather sarcastically referred to his when he quoted from our own  
17 submissions, but it is central to this point and central to the examination in which the CC is  
18 engaged. It is not an over-simplification to say that if H3G is correct in its case it is highly  
19 likely that prices for end users would fall substantially. That is the interest which this  
20 Tribunal is astute to protect, not the maximum possible benefit for MNOs but for  
21 consumers and end users.

22 Finally, again I would, in the course of my submissions, ask the Tribunal to bear in mind  
23 that some degree of flexibility is appropriate in the deliberations before the CC. These are  
24 very complex and developing areas and it is entirely unreal to suggest that a party can set  
25 out in full its entire case on the facts, on the economics, on the law from beginning to end  
26 for all purposes in circumstances where there would be a price control reference to the CC.  
27 Those are my background points. Could I ask the Tribunal now to turn up bundle A, which  
28 is the bundle where we find H3G's notice of appeal. I would ask the Tribunal first to turn  
29 up the notice of appeal itself behind tab 1. In the course of taking the Tribunal through this  
30 document I would ask the Tribunal to recall, and I will draw the Tribunal's attention to  
31 some of the submissions that have been made earlier today, because our case is that this  
32 document and its accompanying documents have been quite seriously mischaracterised  
33 before the Tribunal. Some of the confusion which we have heard from the representatives  
34 of the MNOs may be understandable and some of the points may be fairly made, but other



1 points we would ask the Tribunal to treat with great care, particularly in relation to the  
2 treatment of what is plainly an alternative case in this case.

3 Taking the notice of appeal first and turning to para.2.6 – and I shall go through the notice  
4 of appeal itself quite quickly because the price control appendix is the central point in this  
5 matter – this introduces the summary of grounds of appeal on the price control matters. It  
6 states that the decision constitutes an error of law and assessment as to fact or analysis  
7 relied upon and/or reasons given. The Tribunal is familiar with the case that it further tilts  
8 the playing field against the recent entrant and makes it more difficult to compete in the  
9 retail market, unnecessary and/or disproportionate. There are a number of reasons for this,  
10 including, and I will be reading quite a lot of this document and if the Tribunal gets bored  
11 with my rather nasal tones and my cold then I will be grateful to have an indication to stop.  
12 What is stated there is:

13 “... the price control imposed on the 2G/3G MNOs has a TAC that is not justified  
14 by the underlying cost model and is too high (both for mobile-to-mobile calls and  
15 fixed-to-mobile calls); and it generally ignores or fails to take sufficient account  
16 of the impact of the price controls in terms of payments by H3G to its competitors  
17 and the resulting distortion of competition and dynamic incentives.”

18 In my submission, what H3G is saying there is that the price control in general is not  
19 justified by the underlying costs model and it is too high in general both for mobile-to-  
20 mobile calls and fixed-to-mobile calls.

21 In 2.7 H3G submits:

22 “In addition or in the alternative, Ofcom errs ... regarding its decision to impose a  
23 price control on H3G in that ...”

24 Then a number of points are made on p.10, which are plainly set out in the alternative to  
25 the case referred to at 2.6.

26 Turning in that same document to the reference to relief sought ----

27 THE CHAIRMAN: When you say in 2.7, “regarding its decision to impose a price control on  
28 H3G”, that is actually dealing not with the non-price control matter that we have covered in  
29 the hearing in January, but with the price control itself?

30 MR. KENNELLY: That is correct, madam, yes. That wording could be clearer, I have no doubt,  
31 but you are absolutely right.

32 MR. SCOTT: In 2.6 you do not say that the price control on H3G had been set too high?

33 MR. KENNELLY: We do not say that expressly, sir, absolutely not. That point has been  
34 already made and I shall have to ask the Tribunal’s indulgence in looking at this document

1 in full, much as BT did its in letter, to look at this document as a whole. It is possible to  
2 cherry-pick certain references and to characterise this case not as H3G intended it. So I  
3 shall ask the Tribunal for some patience in perhaps forgiving some of these omissions, but  
4 reading this document as a whole and seeing, as BT did, what the case truly is, and, in my  
5 submission, what the other parties and Ofcom plainly understood the case to be when one  
6 looks at Ofcom’s defence and the points that H3G made in its submissions before the CMC  
7 in February.

8 Turning then to the relief sought at 3.1 – I shall not read that, the Tribunal has seen it  
9 already.

10 Then 3.2:

11 “In relation to the issue of which MCT rates (both in relation to cost benchmark  
12 and glide path) should apply if the Tribunal adopts the approach in paras.(c) – (d)  
13 above ... H3G submits that the CC should determine:

14 (a) the level of mobile-to-mobile MCT rates so that the MCT rate paid and  
15 received by H3G to and from other MNOs equals zero pence per minute or  
16 otherwise leads to a neutral net revenue position ...”

17 The Tribunal has the case which we set out in writing that if our remedy which we  
18 proposed would address the competitive distortions and other problems which are  
19 identified elsewhere in this document, and if this was strictly limited to zero pence per  
20 minute, the words “or otherwise leads to a neutral net revenue position” would be entirely  
21 superfluous and unnecessary. Some meaning must be given to these words and, in my  
22 submission, these words are used to indicate the flexibility which H3G intended to argue  
23 before the CC, and it is plain from this document that this was intended. The figure itself  
24 did not necessarily have to be zero, it could be close to zero provided the problems that  
25 H3G identified were addressed in the ultimate figure set by the CC. Zero was and is still  
26 H3G’s best case so, but it may not be possible, and H3G may have to make some  
27 concessions.

28 Turning then to 3.2(c) and the vexed question of fixed-to-mobile MCT rates, plainly here  
29 there has been some development because at 3.2(c) H3G submit the level of fixed-to-  
30 mobile MCT rates should be fixed so that:

31 “(i) the level of the MCT rate paid by fixed operators to all UK MNOs is based  
32 on long-run average cost, with separate controls for 2G and 3G call termination;  
33 and/or

1 (ii) the level of the MCT rate for 2G call term ... is at a rate based on long-run  
2 average cost, reduced so as to reflect the lower risk that attaches to the investment  
3 in 2G networks ...”

4 – and (iii) the Tribunal has already been taken to, the separate treatment H3G seeks in  
5 relation to its call termination.

6 I will come later to how H3G’s case has developed in relation to fixed-to-mobile.

7 Staying with that document and turning to the price control appendix, I would ask the  
8 Tribunal to turn up para.1.2. It is necessary to read this paragraph quite clearly because it  
9 has been mischaracterised, in my submission, by the submissions of my learned friends.

10 “... H3G considers that a more appropriate package of remedies would:

11 (a) eliminate or mitigate the distortionary effect on competition ...”

12 So there plainly we are saying that this is intended to eliminate or mitigate the distortionary  
13 effect on competition, which is a general problem:

14 “... by producing a result that is or is at least equivalent to a ‘net payment zero’  
15 outcome between the MNOs.”

16 True it is that this is limited only to mobile-to-mobile termination.

17 “That is no actual wholesale payments would be made by H3G to the 2G/3G  
18 MNOs or vice versa. This would eliminate an artificial cost floor on competition  
19 in the mobile sector at the retail level.”

20 One of the points made against me is that H3G, for the first time in these supplementary  
21 submissions, refers to retail problems and talks about the fact that these rates proposed by  
22 Ofcom have led to improperly high retail prices. This is the first time the point has been  
23 made by H3G. In my submission, that is not true. Here we refer expressly to the fact that  
24 the existing rates create an artificial cost floor – that is they are too high, they create an  
25 artificial cost floor on competition in the mobile sector at the retail level. If H3G’s remedy  
26 were adopted that cost floor would go and it is plainly implicit in that that retail prices  
27 should fall.

28 In relation to fixed-to-mobile calls H3G submits slightly differentially. It says that the  
29 average MCT rates should be reduced through applying an appropriate methodology for  
30 assessing costs. Our starting point here is a reduction in the average MCT rates.

31 My learned friend Mr. Holmes took the Tribunal very quickly from this case to the  
32 alternative case made by H3G where we ask for greater asymmetry. If we fail NPZ we  
33 have to impose greater asymmetry for H3G’s benefit. That is the alternative case. We  
34 only get to that case if we fail on our main case which is that all the rates should be

1 dropped. It is very important that the Tribunal makes that distinction because much of our  
2 economic analysis is devoted to the alternative case, the case which seeks greater  
3 asymmetry and higher prices for H3G. We only get to that case if we fail on our NPZ case  
4 which is our primary case.

5 THE CHAIRMAN: You maintain that as an alternative case, and now an alternative to what has  
6 been dubbed “reciprocal loan case” or in your nomenclature a “different NPZ case”?

7 MR. KENNELLY: Madam, I am afraid this, the 0.4 or something lower between zero and 0.4, is  
8 simply a refinement of our NPZ case. It is the same case as our NPZ case. As I shall show  
9 you later in this document NPZ does not need to be zero or zero right now. There can be a  
10 glide path, for example.

11 THE CHAIRMAN: I am saying, you still maintain the alternative case of the bigger asymmetry  
12 in the event that the NPZ case fails?

13 MR. KENNELLY: Yes, that case is maintained. We are perfectly entitled to change the  
14 emphasis on our pleaded case. We are perfectly entitled before the CC to place a much  
15 greater emphasis on our primary case. It is perfectly permissible for us to have an  
16 alternative case which may rely on entirely different economic methodology. That is the  
17 way one can bring these points. We should not be punished in our NPZ case by virtue of  
18 the fact that we are running a different case in the alternative case. That, with respect, is  
19 what Mr. Holmes’ submissions sought to do. He sought to prejudice the arguments we  
20 make by reference to our alternative case. Plainly there is inconsistency between them, but  
21 it is permitted inconsistency.

22 Sticking with the vexed question fixed-to-mobile, here one can have some sympathy for  
23 the points made by my learned friends. They say, “You said very little about fixed-to-  
24 mobile in this document, in this notice of appeal and the appendix and now you have  
25 produced quite a lot of detailed work on it and this is very different”. One must focus on  
26 what one says at 1.2(b). We say that the rates should be reduced and we say there should  
27 be an appropriate methodology for assessing costs.

28 MR. SCOTT: Sorry, that is not what you say. What I would like you to do is go back for a  
29 moment. You have just said the result is higher than justified MCT rates for 2G/3G  
30 MNOs. That is what you say in 1.1.

31 MR. KENNELLY: Yes.

32 MR. SCOTT: What you then go on to say in 1.2(b) is reduce the average MCT rates. In the  
33 context of what you have just said about 2G/3G rates that means that you have said nothing  
34 in particular about H3G’s rates, because it is very easy to reduce the average by reducing

1 the other fours' rates and leaving your own rates either where they were or at a higher  
2 level. I think you have got to be careful in how you characterise what you have just read  
3 out to us.

4 MR. KENNELLY: Indeed, and I am grateful for that intervention, because it is true that we say  
5 very little about our own fixed-to-mobile rates. That is a point that we have well in mind  
6 and we shall come later to how we address that. Again I will be submitting that it is open  
7 to us in this proceeding to, for example, recognise that the point made against us is a valid  
8 and to make a concession. That is a perfectly acceptable route one can adopt, particularly  
9 if the detriment falls on H3G. The point is one we can take but I will come to that later. I  
10 have well in mind that what we were talking about earlier is 2G/3G, and so far we have  
11 said very little about H3G. What we have said in general terms, which applies equally to  
12 H3G, is the appropriate cost methodology. We have opened the issue of whether or not  
13 Ofcom have applied the appropriate methodology for assessing costs. That is something  
14 that we have done and that is something I will come to, because really, in essence, the  
15 problem here is that we have, subsequent to this plea, done the work in relation to what is  
16 the appropriate methodology and that is what we presented in the supplementary  
17 submissions. That is what created this storm of protests. We reserve the right to do it  
18 implicitly in this plea. We have done it and that is what has excited the objections of my  
19 learned friends.

20 Then turning to para.3.2, I shall not read that. For the Tribunal's reference, I am doing a  
21 comprehensive analysis of these documents. Some parts are less central than others, but I  
22 just ask the Tribunal to note that. It says:

23 "An 'effects' based analyse against the regulatory background as referred to in  
24 section 1 of the Notice of Appeal indicates that, as a whole, the price control  
25 remedies are disproportionate/inappropriate."

26 At 3.5 there is a reference to the imbalance in H3G's cash flows. That relates to the  
27 financial effect on H3G individually.

28 At 3.8 there is in italics the heading "*Consequential adverse effect on competition give*  
29 *H3G is the 'maverick' competitor*". The Tribunal will see that at 3.10 there is a reference  
30 to:

31 "The financial impacts of the price controls, as outlined above, are bound to  
32 reduce H3G's ability to act as the maverick competitive force promoting price  
33 reductions and innovation ..."

1 There is a direct reference to a reduction inhibiting the ability to promote price reductions  
2 and innovation – two points it is said we raise for the very first time in our supplementary  
3 submissions.

4 At 3.11 we make a more general submission. We say:

5 “Moreover, H3G submits it is likely that the additional monies passing to the  
6 MNOs will either lead to an increase in the incumbent MNOs’ profits or will be  
7 spent in retaining customers (further disadvantaging H3G’s ability to compete).  
8 With a lesser competitive threat from H3G, H3G submits that it is unlikely that  
9 the situation will result in significantly lower retail prices or other consumer  
10 benefits.”

11 I take the point that is made against me that these refer only to H3G. We do not make the  
12 general point that it is damaging competition between the other MNOs. The point is made  
13 there that consumer benefits are reduced, there is less competition and innovation is  
14 harmed, albeit in relation to the prejudice suffered by H3G.

15 Turning to the most important section of all, which is section 4, “Alternative Approach to  
16 Remedy”, at 4.1 there is a reference in the very first line to “The sections that follow set  
17 out the issues”. I need to clarify this for the Tribunal because the reference to the sections  
18 that follow is a reference to the sections that follow section 4. The reference there to  
19 sections that follow actually refers to section 5 and following, not to the sub-paragraphs in  
20 section 4. This deals with the NPZ argument.

21 “4.2 However, H3G also submits that there is an alternative approach to a price  
22 control remedy regarding mobile-to-mobile calls which have substantial benefits  
23 for consumers in general ...”

24 There again we refer to consumers, this is not the first time this has been raised in  
25 supplementary submissions.

26 “... promote competition and not have the detrimental effects of the current price  
27 controls which Ofcom has determined. That, the appropriate remedies should  
28 ensure that the payments made by H3G to the 2G/3G MNOs in relation to call  
29 termination on their respective networks are wholly offset by the payments it  
30 receives from the 2G/3G MNOs for call termination on its network – in other  
31 words, the resulting position for mobile-to-mobile calls should be ‘net wholesale  
32 payments zero’ or ‘NPZ’.”

33 Again, I take the point made against me that the word “wholly” seems to refer to a single  
34 route.

1 In 4.3 that ambiguity is clarified, it is washed away, because we refer plainly to more than  
2 one route. We say that one way, and the simplest way, of achieving this would be for all  
3 rates to be set to zero. That plainly envisages other ways of achieving the NPZ solution.  
4 The favoured route is zero. True it is that H3G does not set out a detailed case for a  
5 different figure, but hg3 submits that zero is one way and the simplest way, but the  
6 wording of the notice of appeal and the price control appendix permits, in my submission,  
7 H3G to make a submission in favour of a slightly different figure achieving the same end.  
8 I will come in a moment to 4.4 which makes that clearer.

9 MR. SCOTT: But the end is still wholly offset, not simply offset?

10 MR. KENNELLY: Sir, with respect, no. The word “wholly” I cannot get around. The word  
11 “wholly” is inconsistent with what I am saying. The end, which I hope is plain, is that  
12 what H3G is seeking to do is to remove the competitive distortions caused by the transfer  
13 in these termination payments. The point that I made at the very first CMC in these  
14 proceedings far too long ago, that is the end that we seek to address. Sir, I would hope that  
15 this Tribunal will have some sympathy with my submission which is that technical  
16 pleadings points are not what this case is about. I completely understand what Mr. Holmes  
17 says about Ofcom having a right to know our case, having a right to address it, and us  
18 having to be clear so that our case can be properly met. That submission I cannot dispute,  
19 and I will show in a moment why Ofcom are not only in difficulty in that regard and, in  
20 fact, in their defence have addressed the points that we make.

21 One way and the simplest way indicates that it envisages more than one way. At 4.4 H3G  
22 say that, in the alternative, it could be considered as part of a glide path approach while a  
23 decent MNP system is brought in. If H3G is proposing a glide path it is entirely unlikely  
24 that the glide path is going to begin with zero. A glide path envisages a different figure  
25 reducing, we would say, quickly to the zero pence per minute. H3G there is plainly  
26 acknowledging that some flexibility may be necessary in dealing with NPZ beginning with  
27 a figure above zero and reducing quickly, or slowly depending on what the CC wants to do,  
28 to the preferred figure. The glide path envisages the flexibility which H3G now seeks  
29 before the CC.

30 H3G then at 4.5 set out a number of reasons for preferring this remedy. The Tribunal has  
31 been taken through this and it has been argued against me by Ofcom that these are very  
32 limited grounds, that H3G has put its case on a very narrow basis and therefore it can be  
33 knocked out for doing any of the difficult work that Mr. Holmes suggests.

1 Again, we would hope that Ofcom would not take narrow pleading points such as that but  
2 instead would seek to address the substance of H3G's case and if it is misconceived it  
3 ought properly to be dismissed, but on the substance not on the individual narrow  
4 particulars which are given by H3G. As I shall submit to you, looking at Ofcom's defence,  
5 Ofcom have addressed the substance in their defence.

6 I am reminded that there is a reference to retail charges at the end of 4.3 for the avoidance  
7 of doubt. This is a point that operators' interconnect payments would be reduced as well as  
8 their interconnect revenues, while network costs would be recovered through retail charges.  
9 This is a point that operators then put aside for themselves where they could recover their,  
10 we would say, very low costs, and those could be recovered through increased retail  
11 charges. That would be at the election of the operators. I shall make the distinction  
12 between and mandated RPP but I will come to that in a moment.

13 Then 4.5 sets out the various reasons given by H3G at that stage as to why NPZ is the  
14 appropriate remedy. There is a reference at 4.5(b) to the uncertainties around Ofcom's  
15 estimates. Ofcom fairly admits that it is extremely difficult to have accurate estimates of  
16 cost benchmarks and there are risks of regulatory error and H3G submits that these would  
17 be removed by its NPZ solution. This a general point of general application between all of  
18 the MNOs.

19 Then 4.5(c) refers to the fact that Ofcom's cost model could encompass the solution which  
20 H3G proposes, and Mr. Scott made the point earlier today that that is not a root and branch  
21 attack on the Ofcom costs model, and that is absolutely right. I will come in a moment to  
22 why H3G in 1.2(b) said that they would look to the appropriate costs methodology for  
23 fixed-to-mobile and came to the 0.4 ppm or something like it, which ultimately it put  
24 forward.

25 Then at 4.5(d) H3G returns to its own interests from the general point that it said that the  
26 NPZ approach does not require to it to make material net out-payments. Here I would ask  
27 the Tribunal to pause on the word "material". The submission here is not that H3G must  
28 never made an out-payment. Because H3G is concerned at removing the competitive  
29 distortions, it is concerned with reducing the out-payments to the extent that they distort  
30 competition. That is why H3G here refers to "material" net out-payments. In my  
31 submission, that could envisage a very small out-payment that was *de minimis* or an out-  
32 payment that did not have the distorted effects that H3G is anxious to avoid. This again is  
33 inconsistent with a strict case that only zero will do, and it is consistent with the submission  
34 that H3G now makes that what it offered in this appeal and before the CC is not a simple



1 binary choice between Ofcom or zero, but something close to zero would work if it  
2 addressed H3G's concerns. That is consistent with the NPZ case put forward by H3G in  
3 this document.

4 At 4.7, in the same section as the NPZ, section 4 is the NPZ case, there is the references to  
5 fixed-to-mobile files, and H3G submits that lower MCT rates generally would benefit  
6 consumers. There, and I referred this to Mr. Scott, is a general submission that in relation  
7 to fixed-to-mobile calls in general H3G submits that lower MCT generally would benefit  
8 consumers.

9 Maybe it has taken me a long time to get to the point, and, Mr. Scott, you might well say  
10 that that point ought to have been flagged more clearly at the beginning of the document,  
11 but it is there and it is of general application. This is:

12 "In circumstances where the effects on competition between the MNOs have been  
13 addressed, H3G submits that a suitable cost based control (taking account of the  
14 differences between 2G and 3G costs) is appropriate for all fixed-to-mobile rates."

15 H3G there is still asking for some distinction to be made between 2G and 3G in its own  
16 interests.

17 Turning to section 6, which is on p.16, 6.1 – I take the Tribunal to this section just to draw  
18 the Tribunal's attention to the first three words of the section, which are "In the alternative"  
19 to the NPZ approach. This section has been canvassed before the Tribunal on at least two  
20 occasions today as this is in some way linked to NPZ case and in some way inconsistent  
21 with it. The point here is that it is an alternative to the NPZ approach. The sections that  
22 follow in this document set out H3G's rationale for its alternative case for the greater  
23 asymmetry for the fact that H3G seeks recognition of its higher costs which H3G submits  
24 should give rise to a higher termination payment for H3G. This is alternative to its case on  
25 NPZ between all the MNOs.

26 THE CHAIRMAN: So there is nothing that you rely on after section 4 that you took us to, there  
27 is nothing in these later sections 6 to 12 that you rely on as foreshadowing the 0.4  
28 reciprocal rate?

29 MR. KENNELLY: Not in the price control appendix. In the commentary we refer to the  
30 importance of efficiency in the cost methodology.

31 THE CHAIRMAN: Which commentary?

32 MR. KENNELLY: The commentary at the end of the appendix. Madam, you will recall that  
33 there is the notice of appeal, the appendix and then there is a commentary attached to the  
34 appendix.

1 THE CHAIRMAN: The model?

2 MR. KENNELLY: Yes, indeed. There are several references in that to the importance of  
3 efficiency in the appropriate cost methodology, and that led H3G ultimately to its case on  
4 marginal costs, by reference in part to Ofcom's own analysis of MCT statement.

5 MR. SCOTT: One of the points you have already made in relation to the development of your  
6 case is that it has taken you some time and some work to get to the point that you have  
7 reached. The implication of that, it seems to me, is that it is going to take others in the  
8 room some time and some work to catch up with and then to respond to the work that you  
9 have doing.

10 MR. KENNELLY: I take the point, sir, but the answer to that is, first of all, the reason why H3G  
11 has come to the fixed-to-mobile point with rather less detail in the notice of appeal was  
12 because, of course, it was not central to H3G's case on NPZ. H3G's greatest prejudice  
13 comes from the out-payments to the other MNOs, and that is why it was at the forefront of  
14 its case. H3G sought to expand its case based on its pleaded case before the CC and that is  
15 when it did the work for the purposes of fixed-to-mobile. The important point here is that,  
16 first of all, Ofcom, which is by far the most important party here, guarantor of the public  
17 interest and the right of consumers to low prices, is that it has addressed these points in its  
18 full defence. Ofcom, I would submit, has done the work. I take what Mr. Holmes says  
19 about the remaining work that will need to be done and I will address that, but plainly on  
20 the defence one can see a great deal of the important work has already been done by  
21 Ofcom, we will submit wrongly and we will submit that they are in error, but some very  
22 important work has already been done.

23 Secondly, one must not exaggerate the shock that the other MNOs have in seeing these  
24 points. Since November 2007 it has been plain to all the world, at least those that saw our  
25 statement of intervention in the BT appeal, that we had done the work on fixed-to-mobile  
26 costs methodology and we were proposing a very, very low rate on the basis of low fixed-  
27 to-mobile costs. That was November 2007. It may be that it has decided to take the point  
28 against us, take the risk that they would not do the work and hopefully come to the  
29 Tribunal and persuade you to knock us out, I think was the expression used today, but the  
30 fact is that the evidence of our work was demonstrated in November 2007. If they had  
31 wanted to start addressing it they could have done so then. That is a risk we all take in  
32 dealing with these points. H3G, it could be said, has taken some risk in not doing the work  
33 behalf it lodged the notice of appeal, but all the parties take these risks. Provided  
34 something is pleaded we ought properly to be able to adduce further material on it.

1 Turning to the commentary itself and just addressing the point raised by the Chairman, at  
2 p.3 – this is, as I said earlier, the commentary on the model – I think it is important to draw  
3 the Tribunal’s attention to one point about H3G’s understanding of the Ofcom model. The  
4 point has been made that there is a great distinction the LRAC approach which H3G  
5 favoured at this stage and the Ofcom LRIC model. Could the Tribunal just read footnote 6  
6 on p.3. H3G there acknowledge that:

7 “Strictly speaking, to the degree that Ofcom’s LRIC model includes elements of  
8 common costs, the approach to calculating LRAC described here will include  
9 some pre-allocated common costs. Hence more than one estimate of ‘long-run  
10 average cost’ for any period be derived by changing the allocation of common  
11 costs. Ofcom assumes that the level of network common costs are negligible,  
12 however, so this should not materially alter our conclusions. Indeed, Ofcom’s  
13 definition of the LRIC of voice call termination as ‘the additional cost an MNO  
14 incurs to provide termination’ or ‘the cost that the firm would avoid if it decided  
15 not to provide voice termination’ would appear to preclude the existence of any  
16 pre-allocated common costs in its LRIC model.”

17 It was on that assumption that H3G proceeded with its case for LRAC.

18 H3G’s emphasis on producing the most efficient cost methodology should have been in no  
19 doubt, because the references to the importance of efficiency appeared throughout this  
20 commentary. Just to give the Tribunal the references – it is not necessary to read through  
21 each one – p.5, under section 5(ii), p.7, section 6, the second full paragraph on that page,  
22 and pp.8-10 all refer to the importance of efficiency in determining the appropriate cost  
23 methodology.

24 THE CHAIRMAN: That was always, you say, relating to fixed-to-mobile as well as mobile-to-  
25 mobile?

26 MR. KENNELLY: Yes, certainly for fixed-to-mobile. At 1.2(b) in the price control appendix  
27 we said that fixed-to-mobile should be reduced for all parties. I take the point that it was  
28 not clear. We certainly said that it should be reduced, fixed-to-mobile for all parties on the  
29 basis of an appropriate costs methodology, but we did not explain at that stage what the  
30 appropriate figure would be having applied the appropriate costs methodology.

31 THE CHAIRMAN: I am confused now as to what is an alternative argument to what. You  
32 accept that in the original amended notice of appeal appendix what was being suggested  
33 was NPZ or something like it for mobile-to-mobile and a costs based price for fixed-to-  
34 mobile based on an appropriate costs methodology.

1 MR. KENNELLY: Yes.

2 THE CHAIRMAN: Is the case that you are putting now that NPZ incorporates the prices  
3 charged to both mobile and fixed and is not now zero but 0.4 p, but that is how you are  
4 now putting the NPZ case? In which case is the cost methodology then an alternative to  
5 that still for the fixed-to-mobile and then the increased asymmetry is the alternative case as  
6 regards to mobile-to-mobile? Is that how it fits together?

7 MR. KENNELLY: (After a pause) Madam, I just wanted to make sure I was not going to  
8 mislead you. NPZ relates only to mobile-to-mobile. That is what we pleaded and that is  
9 what we have set out in the price control appendix. Separately we argued for lower fixed-  
10 to-mobile rates on the basis of an appropriate costs methodology. We have suggested in  
11 our supplementary submissions what that costs methodology should be, and we say it  
12 produces a very low termination rate. That is not our NPZ case, that is a separate case  
13 based on what the appropriate rate should be for fixed-to-mobile termination. The  
14 alternative, if we are wrong about that, is our greater asymmetry on mobile-to-mobile rates  
15 which we have set out also in the notice of appeal.

16 THE CHAIRMAN: I thought that the appropriate methodology result for fixed-to-mobile was  
17 0.6 to 0.8 ppm, but you do seem to be arguing for 0.4 ppm which is for fixed-to-mobile, but  
18 that 0.4 ppm is not based, as I understood it, on any cost methodology as far as the mobile  
19 costs are concerned, but is the alignment with the BT rate which you may say is a fair rate  
20 is because it is just about the same as what you arrive at on the appropriate costs  
21 methodology but it is not derived from that methodology. Are you now saying that you are  
22 not pursuing the NPZ remedy for fixed-to-mobile, but are pursuing an appropriate costs  
23 methodology basis, in which case what is the figure that you are arguing for fixed-to-  
24 mobile derived from that methodology?

25 MR. KENNELLY: Just to be clear, as we say in our submissions for the CMC, 0.4 may not  
26 ultimately be the figure which we will propose to the CC. 0.4 is, we think, close to the  
27 figure which it will ultimately arrive at, but that is a pragmatic choice. It is not clear to us  
28 at the moment what that figure should be. The basic point, the economic rationale, which  
29 Mr. Scott referred to, is that because the marginal costs are so low the termination charge  
30 ought to be extremely low, as close to zero as good as, in our submission, for fixed-to-  
31 mobile. That is the costs methodology I have referred to. We have referred to LRIC or  
32 marginal costs. That is what we suggest is the appropriate costs methodology in  
33 determining the appropriate figure for fixed-to-mobile.

1 THE CHAIRMAN: So you are not arguing that the NPZ remedy should apply to fixed-to-  
2 mobile?

3 MR. KENNELLY: (After a pause) Madam, the concern is simply this, that NPZ in section 4 of  
4 our price control appendix applies to mobile-to-mobile. That is what we are referring to.  
5 At 4.7, the end of that section 4, we refer to fixed-to-mobile. Although it is in the section 4  
6 section, we have sought to explain why termination rates for fixed-to-mobile should be  
7 reduced. We have argued that on the basis of this appropriate costs methodology which we  
8 have preferred in the supplementary submissions. It has been developed separately to the  
9 NPZ solution for mobile-to-mobile.

10 MR. SCOTT: Just to be clear then, were you able to argue for this alternative methodology for  
11 F2F and to convince the CC that that is the most appropriate approach to efficient price of  
12 F2M. As I understand it, you would, for other reasons, still be saying to the Competition  
13 Commission that you want an NPZ approach to the M2M?

14 MR. KENNELLY: Absolutely, yes.

15 MR. SCOTT: So if the Competition Commission were convinced that this was a wonderful  
16 methodology for getting efficiency out of the F2M market, you would not want them to be  
17 persuaded that it was an equally efficient approach to the M2M market?

18 MR. KENNELLY: Well that is setting out our case before the Competition Commission as it  
19 stands. As I will come to, when I look at the Ofcom defence, it may be that the  
20 presentation of the fixed-to-mobile case and how it has developed, and to the extent it  
21 contains some concessions from H3G is in order to secure the primary case which is NPZ.  
22 For that reason we rely on ----

23 THE CHAIRMAN: Well ----

24 MR. KENNELLY: Sorry, just to address the point about fixed-to-mobile, the Armstrong &  
25 Wright Article, is what we rely on for that, that is the economic rationale, it is in that  
26 document which was before the Tribunal in the SNP appeal and by the Tribunal's order ----

27 MR. SCOTT: I think the difficulty the Competition Commission are going to have is that the  
28 Competition Commission have got to bear in mind the overriding requirements are not  
29 unduly to discriminate between F2M and M2M, and between the interests of fixed and  
30 mobile network operators, and so they are going to have an interesting task trying to work  
31 out how to deal with your various arguments.

32 MR. KENNELLY: Sir, perhaps I have not been clear enough, that is precisely why we have  
33 characterised the case in the way we have. Why, for example, H3G is proposing,  
34 effectively foregoing a substantial termination revenue is precisely because it may well be

1 the Competition Commission prefer to say if we are going to lower rates for you (the  
2 MNOs) on the basis of NPZ it will be necessary to be fixed-to-mobile otherwise it will not  
3 work. Ofcom make the point fairly in their defence why should H3G not now be able to  
4 say, even though H3G came to the same conclusion itself earlier than the Ofcom defence,  
5 what is to stop H3G saying to the Competition Commission “that may be a very valid  
6 point, we may concede our pitch for higher 3G termination rates fixed-to-mobile and  
7 accept the point that is made against us”, in order to remove the risk of distortions by  
8 having a difference in M2M and F2M rights, and produce a workable, pragmatic solution  
9 which is our primary goal.

10 THE CHAIRMAN: So is this how it fits together then, that as far as mobile-to-mobile are  
11 concerned, your case is MPZ set it all to zero, or MPZ (plus/minus) set it all to 0.4 ppm, or  
12 have a bigger asymmetry between 2G and 3G and separate 2G/3G rates. As far as fixed-to-  
13 mobile is concerned, your case has always been this should be based on some appropriate  
14 cost methodology, now you have done the work and what you think is the appropriate cost  
15 methodology results in a much, much lower rate, less than 1 ppm, which could then either  
16 be – well it is up to the Competition Commission then to work out precisely what that is.

17 MR. KENNELLY: Yes, precisely, madam, yes. Moving on just in the chronology, our  
18 statement of intervention in the BT appeal – I shall not take you to it (bundle A, tab 22) –  
19 there H3G submitted that having done the work on the cost methodology the appropriate  
20 fixed-to-mobile rate should be about 0.4 ppm, that is at para.5.9, footnote 20, and the  
21 reference there is also made to marginal costs, para. 5.3.

22 Following this, Ofcom changed its defence, its full defence in this case, and it is important  
23 to look at this document because it goes directly to the points made by my learned friend,  
24 Mr. Holmes, as to the catastrophic results that will flow from permitting H3G to make  
25 these arguments before the Competition Commission. Ofcom address H3G’s NPZ points  
26 and its points in the BT appeal, s.6, which is at p.72 of the full Ofcom defence which is  
27 behind tab 52 in bundle A. I refer to these points to demonstrate that Ofcom, although it is  
28 said it has not done the work, and I do not mean to call into question the truth of the  
29 statement, but it is important to see what they have done, and how it addresses many of the  
30 points – if not all of the points – that H3G are making in supplementary submissions, and  
31 in fact addressing the points that Mr. Holmes made to you earlier today.

32 First, Ofcom summarises its own position. It refers to H3G’s proposal at para.6.2. At 6.2.3  
33 Ofcom refer to H3G’s suggestion that the simplest way to achieve NPZ would be to set all  
34 MCT rates at zero and then implicit in that is a recognition that there are other ways to get

1 to NPZ other than zero pence per minute. Ofcom recognises also at that stage that H3G is  
2 not asking for NPZ at any stage, asking that NPZ is the appropriate rating for fixed-to-  
3 mobile calls and asks for a suitable cost based price control.

4 Turning through the document, 6.3 refers to Ofcom's view on the consequence of traffic  
5 imbalance, I do not need to take the Tribunal to that because mercifully for this point we  
6 are not looking at traffic imbalances. 6.4 is the consequences of NPZ for efficient pricing.  
7 This is the substance of Ofcom's response to H3G's case on NPZ.

8 "As discussed in paragraph 6.2.3 above, H3G suggest that NPZ could be achieved  
9 by setting all MTM MCT rates to zero. While in theory other mechanisms may  
10 exist in Ofcom's assessment, setting termination rates to zero would be the only  
11 realistic method of achieving H3G's proposal.

12 Again recognising the possibility of other mechanisms than zero pence per minute. At  
13 6.4.2 Ofcom refers to the rationale for its own MCT charge controls, and refers to H3G's  
14 submissions in relation to NPZ. Ofcom acknowledges at 6.4.2(i) that the efficient costs of  
15 MCT are inherently uncertain. But then Ofcom makes a positive case that NPZ is not the  
16 appropriate response to those uncertainties, and for the reasons given below:

17 "Ofcom has described how those uncertainties are managed when setting the  
18 charge control levels. In particular, Ofcom has attempted to identify bounds on  
19 uncertainty using its scenario based approach (within which Ofcom exercises its  
20 judgment) whereas NPZ involves rejecting entirely the information provided by  
21 Ofcom's benchmarks; and

22 Insofar as H3G is proposing the introduction of NPZ as part of a move to a RPP  
23 system, Ofcom addresses this argument [below]"

24 Pausing there, it is no part of H3G's case that this Tribunal has asked Ofcom, or that  
25 Ofcom should introduce mandated RPP, and as Mr. Holmes fairly said – and I think Mr.  
26 Scott made the same point – you have to be very careful with the use of these terms,  
27 because the references to RPP made in Ofcom's submission, in our submission refer to  
28 retail RPP. On no view is H3G asking for mandated retail RPP, and Professor Littlechild  
29 expressly states in the point upon which Ofcom rely that he is not suggesting that RPP is  
30 the best solution. On the contrary he is saying the solution of NPZ captures the best bits of  
31 RPP without the problems of RPP, that is what Professor Littlechild actually says in the  
32 part of his article to which Mr. Holmes referred.

33 Sticking with what Ofcom said in addressing NPZ, at 6.4.3 Ofcom then set out their  
34 reasons for why NPZ rather than improving price signals will create new distortions. The

1 Tribunal can read to itself how Ofcom makes its case. There is no reference there to a  
2 difficulty in gathering information or understanding the points in H3G's case.

3 6.4.5 Ofcom also considers the possibility that the introduction of NPZ would result in  
4 pressures on MNOs to move in whole or in part to an RPP system. Here the Tribunal  
5 might have been forgiven, after listening to my learned friend for Ofcom to day, for  
6 thinking that Ofcom never had to consider the RPP system, or a proposed move to the RPP  
7 system before because it was not demanded by any of the MNOs in consultation, nor was  
8 there any Ofcom suggestion and therefore to look at it now would involve a great deal of  
9 new work.

10 First, H3G is not asking for a mandated RPP, but in any event if Ofcom is right, and NPZ  
11 leads to something like RPP, Ofcom here addresses the point in its defence, and Ofcom  
12 puts, what I am sure Ofcom will say is compelling case why MPZ does not work to the  
13 extent that it moves in whole or in part to an RPP system. The Tribunal can read to  
14 yourselves, but I think it is important to read those passages down to 6.4.8 and over to 6.4.9  
15 because they go directly to the point that Ofcom made today that they would have to do  
16 further work to consider these points which have come as a complete shock to them.  
17 I will just take the Tribunal to the point raised by Mr. Scott earlier, and the point which is  
18 made against me that an inconsistent approach to fixed-to-mobile could lead to distortions  
19 and Ofcom make the very point at 6.4.8 and 6.4.9 which our submission is designed to  
20 address.

21 At 6.4.9 Ofcom say:

22 "If there were a significant differential between FTM and MTM charges, because  
23 of the high volumes of FTM traffic concentrated in a small number of FNO  
24 customers, incentive problems could arise for fixed operators."

25 The point made by Mr. Scott, and there is a reference there to the fact that there could be  
26 use of GSM Gateways because of the arbitrage issue. Ofcom acknowledge at 6.4.10 that:

27 "In H3G's Statement of Intervention in the BT MCT Appeal H3G further  
28 proposes that FTM termination charges be set at a substantially reduced level, at a  
29 level at or just below marginal cost, which for practical purposes suggests could  
30 be the current level of MTF termination rates, 0.4 ppm.

31 Ofcom say:

32 "A differential as small as 0.4 ppm, as proposed by H3G SOI is unlikely to cause  
33 a material distortion."

34 Ofcom go on to say:



1                    “It is Ofcom’s understanding that any differential between FTM and MTM MCT  
2                    charges would be likely to introduce possible implementation difficulties for  
3                    operators ...”

4                    And sets out the reasons for that point. Again, this is the very point which H3G’s  
5                    supplementary submission would address. Ofcom might say: “You, H3G, ought to have  
6                    come to your FTN case earlier, but in circumstances where Ofcom make the point, address  
7                    the difficulty, and where H3G has already done the work, which we can see by the  
8                    reference to the very low rate in the statement of intervention in the BT appeal, why should  
9                    H3G be barred from agreeing this point before the Competition Commission? How is that  
10                    in the public interest? In our submission our supplementary submission addresses the  
11                    difficulty. Ofcom may disagree but this is not about substance, this is about what H3G can  
12                    or cannot debate before the Competition Commission. In our submission it is in no way in  
13                    the public interest to bar H3G from making what might be viewed as a concession in  
14                    relation to its case on high fixed-to-mobile rates for 3G operators.

15                    MR. SCOTT: You are mentioning the public interest, and as we put earlier, one of the  
16                    difficulties about this form of Competition Commission proceeding is that it is not a public  
17                    proceeding, it is a proceeding between a limited number of parties, and the questions which  
18                    we will face is whether it is proper to proceed in a way which may look to some outside the  
19                    parties immediately in this room, as a way of subverting the normal approach to  
20                    consultation that we have heard about before; the usual way in which Ofcom, through an  
21                    iterative process can consult with a much wider group than is present in this room, so that is  
22                    one of the issues with which we will have to wrestle and that you should probably address?

23                    MR. KENNELLY: Yes, that, with respect, is a very good point, because as you say this is a  
24                    point that goes and influences and affects a great number of people. This is still a well  
25                    canvassed case. The issue of the appropriate level of both mobile to mobile charges and  
26                    fixed-to-mobile charges is always going to go before the Competition Commission in the  
27                    price control reference. True it is that the detailed point that H3G makes in relation to  
28                    fixed-to-mobile has not been set out before in detail, but the general nature of this  
29                    proceeding is well known and very closely followed by the industry at large. I will make  
30                    submissions on what may be done about the point that you made, sir, but it is possible for  
31                    other parties to make submissions to this Tribunal. It is very late to intervene, but there  
32                    may be methods in which the points could be addressed.

33                    In any event, the primary guardian of all these interests is Ofcom. Ofcom has a submission  
34                    of all of the parties here and is very well placed to address the points that H3G makes in the

1 public interest. If Ofcom, in its expert role, has good arguments for saying that H3G's  
2 proposals do not work, or are superficially attractive, but will prejudice parties not  
3 represented, Ofcom will do so before the Competition Commission, and it maybe that  
4 Ofcom will succeed on that point. But Ofcom is well placed to take that expert view in the  
5 interests of all parties affected; it is not ideal, so I take the point but it is a route whereby  
6 this potential prejudice could be avoided, and Ofcom, because of the extensive  
7 consultations to which you have been taken, is well placed to decide what is or is not in the  
8 wider public interest in relation to this proposal of H3G.

9 As I say, the point is made to me, that it may go to the relief that this Tribunal takes in  
10 remitting matters to Ofcom. It may be that this particular narrow issue will need to be  
11 looked at separately by Ofcom in a wider way. The points raised may be addressed through  
12 the relief this Tribunal gives if we are ultimately successful.

13 Turning to Ofcom's submissions themselves – I can do it relatively quickly because I have  
14 already taken the Tribunal to the notice of appeal and defence in detail. It would be useful  
15 if the Tribunal could take up the skeleton argument which Ofcom produced for the purpose  
16 of this hearing, to which you were taken earlier today. If the Tribunal could turn to para.7  
17 on p.2, where Ofcom summarise H3G's case as pleaded. They first refer to H3G's  
18 differing approaches to the regulation of M2M and F2M. I have explained to the Tribunal  
19 why that was and how H3G has sought to reconcile it.

20 At para. 9 Ofcom argue that H3G has sought to justify NPZ on the basis of a very narrow  
21 set of arguments based almost exclusively on aspects of H3G's own situation. The  
22 reference to "almost" is my learned friends very fairly conceding that there are broader  
23 points that we make, and which we supplement.

24 I pause there to say the Tribunal gave us permission to put in further supplemental material  
25 with the very clear qualification that no new issues would be raised, no new grounds of  
26 appeal would be raised. To the extent that we were to put in further submissions, clearly  
27 we were not going to duplicate exactly what we had put in before. We were permitted by  
28 the Tribunal to expand our existing arguments, and that would include in my submission  
29 producing further particulars of an existing argument to support an existing ground of  
30 appeal in our pleaded case. If we could not do that it would beg the question what was the  
31 purpose, what would be the use of having any supplementary materials if we could not  
32 produce further particulars in support of our existing grounds. What we were not allowed  
33 to do was produce a completely new issue, or a completely new ground of appeal. That we  
34 acknowledge, and that is why my submission in the first instance is that we do not need

1 permission to amend, these are simply supporting our existing case. I will come to the  
2 application to amend at the end of my submissions because I will have already explained  
3 why we should come under 11(1) rather than 11(3), but I will come to that when I come to  
4 the end of Ofcom's submissions on the substance.

5 THE CHAIRMAN: As far as the F2M position is concerned, you say well what we have always  
6 pleaded is that this should be based on an appropriate costs' methodology and I think you  
7 accept – though tell me if you do not – that there was nothing in the price control appendix  
8 that indicated that what you were going to argue was an appropriate costs' methodology  
9 was something which is quite substantially far away from the cost methodology that Ofcom  
10 based its decision in the MCT statement on. There was nothing there to say that you were  
11 approving of that for fixed-to-mobile, but there was nothing to say that you were going to  
12 be putting forward something very different from that. But your case is still: “nonetheless  
13 we are entitled to flesh out what we meant by appropriate methodology and the fact that it  
14 is rather more different than what people might have been expecting does not mean that it  
15 was not covered by the pleading in the first place” – is that what you say?

16 MR. KENNELLY: Subject to two qualifications. First, we would submit that part of our case on  
17 marginal costs, for example, is based on the Ofcom/MCT statement. Ofcom themselves  
18 say in the MCT statement that for efficiency one looks to marginal costs. That is stated  
19 expressly in I think it is A.17 of the MCT statement – perhaps it is better to go to it so the  
20 Tribunal has it now. It is in bundle B and the MCT statement is behind tab 1, and it is  
21 appendix A17. Annex 17 is at p.371 (in the internal numbering). It deals with “Common  
22 Costs and Ramsey prices. A.17.8 over the page Ofcom state that:  
23 “Economic theory suggests that, in general, static efficiency is maximised when prices are  
24 set equal to marginal costs.”

25 I do not seek to say that that is in any way flagging H3G's argument.

26 “However, in the presence of fixed and common costs of production, firms can  
27 break even only by setting prices that are higher than marginal costs. Ramsey  
28 prices are defined as those prices that maximise static efficiency under the  
29 constraint that firms recover all costs of production.”

30 Just to complete the picture – to the extent that it can be completed by reading this single  
31 annex – at A17.15, and this is just to demonstrate another part of Ofcom's analysis:

32 “Ofcom considers that the use of Ramsey pricing to set regulated charges is not  
33 appropriate for the following reasons:

1                   \* In order to estimate the level of welfare-optimal termination charges, it  
2                   is necessary to account not only for the impact that prices have on  
3                   demand, as in a basic Ramsey model, but also for a variety of other  
4                   important factors such as externalities, imperfect competition and price  
5                   discrimination ...”

6                   That deals with the second part of 17.8. We are not suggesting that Ofcom decided to  
7                   follow marginal costs. Ofcom for its own reasons wanted to take account of and include a  
8                   number of factors which H3G submits it ought not to have done, and the true cost figure  
9                   should have been much lower. But Ofcom’s starting point was, as I say, beginning at 17.8  
10                  marginal cost is the appropriate place to start. The difference between H3G and Ofcom is  
11                  that H3G stays there and Ofcom moves on and includes a whole range of other factors  
12                  which lead to a higher cost.

13                THE CHAIRMAN: Such as spectrum costs and CARS costs which you are now saying with  
14                  regard to fixed-to-mobile should not be included in the costs’ base?

15                MR. KENNELLY: Nor mobile-to-mobile. We are arguing for a much lower cost.

16                THE CHAIRMAN: Sorry, for fixed-to-mobile?

17                MR. KENNELLY: And for fixed to mobile, yes. That is an argument that we will make before  
18                  the Competition Commission and we will see how we get on, but the point is that is it  
19                  appropriate for us to be blocked from making that argument before the Competition  
20                  Commission when Ofcom itself acknowledges that the starting point is marginal cost.

21                MR. SCOTT: Meantime your shareholders, because you have mentioned the small problem of  
22                  being profitable, will be hoping that you recover your fixed and common costs from  
23                  somewhere?

24                MR. KENNELLY: Indeed, because that, with respect, sir, is our problem, and the interests of  
25                  consumers is quite a separate concern.

26                  Turning to the Ofcom submissions, I was at the stage where Ofcom had gone on to  
27                  describing at para.11 of their submissions the fact that H3G is expressly contending for  
28                  higher MCT rates for it, higher than those set by Ofcom – that is the alternative case which  
29                  I have taken you to at s.6 of the price control appendix.

30                  Moving on to para.16 of Ofcom’s skeleton.

31                MR. SCOTT: Sorry, just to go back to that for a moment, I realise that you are stressing the  
32                  consumer benefit, but in the past one of the things that you have stressed is that the  
33                  Tribunal, and presumably the Competition Commission should have regard to the need to  
34                  encourage investment and innovation, and whereas it is arguable whether you are a new

1 entrant or an established player now, Ofcom will have to have regard to future auctions,  
2 and future potential new entrants, and to the signals that may be sent by whatever emerges  
3 from this process to those who may in future be thinking of investing in a licence, and in a  
4 network.

5 MR. KENNELLY: Indeed, and the pricings which follow from NPZ are squarely in issue. H3G  
6 has sought to address them, and Ofcom has sought to rebut them in its defence. Ofcom  
7 deals expressly with profit signals in the NPZ sense, and the distorted effects that may arise  
8 from them. That will be a debate before the CC, and with respect, that is a debate that is  
9 going to happen in any event. I come, in examining Ofcom's arguments, to draw the  
10 Tribunal's attention to the risk and a concern of ours that Ofcom's case to exclude the  
11 supplementary submissions looks very worryingly like a case to exclude NPZ. NPZ is  
12 before the CC we have permission to debate it. Many of the points that Ofcom raises  
13 against us for these submissions are points that are against NPZ as a whole, and not against  
14 any new case that we are accused of having raised.

15 Just returning quickly, because I am aware of the time, and I always get the graveyard slot  
16 in this Tribunal, it is a hard day and ----

17 THE CHAIRMAN: Oh we are wide awake, Mr. Kennelly, do not worry about that! (Laughter)

18 MR. KENNELLY: I am sure you would not like to be hearing me at 5 o'clock, I want to finish  
19 on time. Paragraph 13 of Ofcom's skeleton deals with H3G's case in the supplementary  
20 submissions, and it is plain from para.14 and the submission of Mr. Holmes that all that  
21 has really changed in Ofcom's submission is H3G's case on fixed to mobile. In my  
22 submission there is no basis for Ofcom's case or Ofcom's submission that H3G has  
23 abandoned NPZ or is asking for a mandated RPP. NPZ or bill and keep is squarely before  
24 the Tribunal and before the Competition Commission. What Ofcom's submissions boil  
25 down to is their objection to H3G's case on fixed to mobile rates.

26 THE CHAIRMAN: But according to what you were saying before, this whole submission then  
27 is a misunderstanding of your case, because you are not extending NPZ to fixed-to-mobile,  
28 you are just adopting appropriate methodology for assessing the costs of terminating fixed-  
29 to-mobile calls which comes to something like 0.4p but might be slightly higher.

30 MR. KENNELLY: Madam, that is precisely the point. It is based on a misunderstanding of our  
31 case, and we see that from the fact that it can be addressed, and to some extent has been  
32 addressed in Ofcom's own defence. There was a contradiction between the way they have  
33 addressed it in defence, and the submissions that you see before you today.

1 Turning through that to this point about RPP, because I want to put that to bed, because  
2 that would be a very radical change if we were asking for mandated RPP; that is not what  
3 we are asking for. If the Tribunal could take the time to look at Dr. Littlechild's statement,  
4 and indeed the paragraph referred to at the end of H3G's supplementary submission. In  
5 fact, if you could go to that, it is in the supplementary submission bundle. The submission  
6 is the first document in that bundle, and at p.15, para.4.5 there is the reference to Dr.  
7 Littlechild's statement.

8 THE CHAIRMAN: What are you looking at now, Mr. Kennelly?

9 MR. KENNELLY: Paragraph 4.5, the very last paragraph of H3G's supplementary submission  
10 on 7<sup>th</sup> March 2008, p.50.

11 MR. SCOTT: Where is that?

12 MR. KENNELLY: It should be in this supplementary submission bundle which contains the  
13 supplementary submissions.

14 THE CHAIRMAN: Yes, which paragraph?

15 MR. KENNELLY: Paragraph 4.5. I take the Tribunal to this first because it was the one that  
16 was referred to by Ofcom.

17 THE CHAIRMAN: Oh yes. It is a quote from Dr. Littlechild.

18 MR. KENNELLY: It is a quote from Dr. Littlechild, and Ofcom, at para.16(c), say that Dr.  
19 Littlechild is extolling the virtues of RPP and that this is the basis for their case, that what  
20 we are seeking is for the Tribunal to order or require them to mandate RPP. What Dr.  
21 Littlechild said is that NPZ has essentially all the beneficial consequences of RPP but  
22 offers the prospect of avoiding the downside. For the avoidance of doubt, at the beginning  
23 of our submission, note the footnote at p.2 – if you could turn back to p.2 of the same  
24 document and I would be grateful if the Tribunal could themselves just read the note – I  
25 shall not read it out loud – it clarifies for the avoidance of any doubt that H3G is not  
26 seeking a mandated RPP.

27 THE CHAIRMAN: (After a pause) Yes.

28 MR. KENNELLY: I hope that is clear. But then turning back to Ofcom's skeleton argument  
29 (p.7), Ofcom took you to the various consultations where bill and keep was raised, and we  
30 submit squarely that whatever Ofcom was proposing there is no doubt that H3G could have  
31 raised the argument – at least in outline – that it is raising now, in relation to appropriate  
32 cost methodology and bill and keep. There is no suggestion by us that somehow one can  
33 find lingering in the consultation little gems on which we can build our case. We face  
34 squarely the point made against us that we did not raise this in the consultation. I

1 understand Ofcom's frustration that having raised the issue we did not address it, and then  
2 having done the work later we did address it. But as the Tribunal knows that does not  
3 preclude us from making the point in the notice of appeal. If that were the case we could  
4 not raise NPZ at all, and while therefore I have some sympathy for Ofcom's submission it  
5 is not an objection in principle to H3G making its NPZ arguments before the Competition  
6 Commission, because all of Ofcom's objections apply to our NPZ case, and they were  
7 points which may be made before the Competition Commission again to attack the merits  
8 of our underlying case, but that is not an argument to exclude us entirely from the just ... in  
9 relation to these points.

10 Then turning to Ofcom's objections and the work they say they will have to do if the  
11 supplementary submissions are admitted. That is at p.8 of Ofcom's skeleton, and it is to  
12 Ofcom that we address these submissions. The other MNOs – we have not heard from all  
13 of them – T-Mobile spoke for nearly an hour about the various points and mentioned two  
14 or three times the very great work that had to be done to address these various points. No  
15 particulars were given to the Tribunal, no details were given, and the Tribunal should be  
16 careful to treat with caution very exaggerated submissions about enormous amounts of  
17 work that have to be done to address these points bearing in mind that the consequences of  
18 H3G's case – if successful – may well mean far lower revenues, certainly termination  
19 revenues, for the large incumbent MNOs.

20 Ofcom turned to the work that they will have to do if we are successful and various jobs  
21 are set out at p.9 of the skeleton. In my submission when one looks at these points one sees  
22 that this is the work that Ofcom should be doing in relation to NPZ. These are the jobs that  
23 if Ofcom has not already done they may well have to do them for the purposes of our NPZ  
24 case. But, as I have already demonstrated before the Tribunal, in Ofcom's defence they  
25 have already addressed many of these points where they have sought to address the bones  
26 of the NPZ case already. If one looks at the various points that Ofcom say are linked  
27 exclusively to the new points, which they say bear no resemblance to the old NPZ case,  
28 first they say determine the consequences of a move to zero MCT for retail pricing  
29 structures. Putting to one side the mandated retail RPP point, which we do not raise, that  
30 could equally be said to be necessary in relation to NPZ. Similarly, examining the likely  
31 consumer reactions to changed pricing structures. Again, that applies equally to the case of  
32 NPZ which is before the Competition Commission.

33 Examining economic justifications for efficiency bill and keep as against the current cost  
34 base regime, Ofcom will be arguing before the Competition Commission that bill and keep,

1 or NPZ, is less efficient than the current costs' regime; that is not new. A detailed  
2 consideration of international comparators to determine the appropriateness of comparisons  
3 and indications as to the merits and demerits of the respective regulatory approaches:

4 Ofcom say because H3G's case is so narrow, and potentially so weak, it is not necessary to  
5 do this very difficult work, but we will have to do it if these new points are admitted. But  
6 equally, it could be said that those international comparisons will have to be made in any  
7 event. H3G certainly will be arguing before the Competition Commission that it is  
8 important to look beyond the UK in support of its NPZ argument, and Ofcom will have to  
9 address those points.

10 Then identification and quantification of potential disruption resulting from a shift to zero  
11 MCT rates, existing contractual arrangements, etc., again, Ofcom in relation to NPZ will be  
12 identifying and quantifying if it chooses to, but certainly it will be arguing that NPZ will be  
13 disruptive and harmful to consumers; they make that point in the defence. That is not a  
14 radically new case that Ofcom will have to develop with evidence.

15 Then implementation questions about how to minimise such disruption, again that applies  
16 equally to the existing NPZ case which is before the Competition Commission. True it is  
17 that Ofcom may have decided not to do that work, and may feel that if this supplementary  
18 material is adduced they will have to do it, but that is choice for Ofcom. Certainly, as a  
19 matter of principle, it could be said that all of this work would have to be done to deal with  
20 the existing NPZ case, which is before the Competition Commission in any event.

21 To the extent that the supplementary submissions simply develop our existing NPZ case,  
22 all of Ofcom's arguments which they make in their defence apply equally to the new case.  
23 If it is new, Ofcom's arguments address it.

24 I have taken you to the defence, which sets out Ofcom's opposition to the points which we  
25 now seek raise, which we say we are developing – Ofcom say we are raising for the first  
26 time.

27 **THE CHAIRMAN:** I can see that point if your case was now: "Well it for mobile-to-mobile it  
28 should be either zero or 0.4, but as far as fixed-to-mobile is concerned we are content with  
29 the rates that were fixed in the MCT statement. If that were your case then I can see that  
30 you could say: "Why does 0.4 instead of 0 make a difference?" But what seems to make  
31 the difference is the idea of the substantial reduction in the fixed-to-mobile rate, whether  
32 you arrive at that by saying: "Well actually this new way of putting the NPZ argument  
33 encompasses fixed to mobile as well as mobile-to-mobile, so we get to 0.4 by that route,  
34 which it seems to me is what some of the parties thought you were saying; or, whether you



1 are saying: “No, we do not get to it by that route, we get to it by fleshing out our  
2 appropriate costs’ methodology pleading and saying that actually the appropriate cost  
3 methodology is a marginal cost and that then brings us down to 0.6p and well, you might as  
4 well say it is 0.4p and then you get over the arbitrage problems. It seems to me it is that  
5 second step that is causing the contention.

6 MR. KENNELLY: Indeed, and it is that second step that Ofcom say they could not have seen, or  
7 could not have anticipated previously, and that involves further work. We say that we  
8 flagged that we would be challenging the cost methodology and that would lead to lower  
9 fixed-to-mobile rates. So we say Ofcom ought to have been allowed the risk that was  
10 coming, that we had not accepted their cost methodology and what we were going to  
11 oppose was going to lead to lower rates.

12 Dealing with the detail though, it may be inevitable that that analysis of the effect of lower  
13 fixed-to-mobile rates will take place in any event, because if we are right about NPZ, if  
14 NPZ is the best solution – let us assume that we are completely correct, and the  
15 Competition Commission adopts that in total, it may be necessary to adduce fixed-to-  
16 mobile rates in any event to avoid this arbitrage problem.

17 It may have been an implementation issue, but if NPZ is very clearly the right solution, if  
18 the Competition Commission finds that without doubt this is key, it may be necessary in  
19 any event, in order to avoid arbitrage, to seek to reduce fixed-to-mobile rates as an  
20 implementation issue among other things.

21 That is one argument, but that cannot of itself be determinative of fixed-to-mobile ----

22 MR. SCOTT: Just pause there and let us understand what we mean by NPZ in this particular  
23 context?

24 MR. KENNELLY: Yes.

25 MR. SCOTT: Because when you talk about NPZ in this particular context, are you meaning that  
26 there will be no net payments between any MNO?

27 MR. KENNELLY: Yes.

28 MR. SCOTT: So it is not just between H3G and any MNO, but no net payment between any  
29 MNO and any other MNO. So if we look at the matrix every space on the matrix says  
30 zero.

31 MR. KENNELLY: Yes, or as close to zero as makes no difference, yes, that is correct, sir.

32 If we were running that case for the first time again, I could see Ofcom saying that is going  
33 to require a lot of work, but that is not being run for the first time, that we ran from the  
34 beginning. Unpalatable thought it may be for Ofcom to have to do this further work,

1 justice and convenience are very often not on speaking terms. This maybe something that  
2 they have to do and if it is in the best interests of consumers, and it is necessary among  
3 other things, to secure the best possible solution – which could be NPZ, then they will have  
4 to do that work.

5 Of course, before the Competition Commission the extent to which that work will need to  
6 be done is a matter for the Competition Commission. The Competition Commission has  
7 jurisdiction to say we are going to limit the ability of the parties to examine this issue.

8 H3G expect various things to be done while the Competition Commission will say we will  
9 set deadlines, we will give people limited windows in which to make the points. There was  
10 an element of control which could avoid the timetable spiralling out of control and one  
11 must not forget that the Competition Commission itself is able to control its process.

12 What we are talking about here is blocking H3G from even making the submission, and  
13 that, in our submission, is not correct and is contrary to the notice of appeal itself, the point  
14 is made, and the simple inconvenience of having to look at this further issue of fixed-to-  
15 mobile should not be enough to block H3G from developing the point which is in its notice  
16 of appeal in any event.

17 PROFESSOR BAIN: Mr. Kennelly, you seem to be saying now that determining what the cost  
18 for F2M should be by an appropriate methodology falls within what you were saying  
19 before. If I can take you to p.2 of the Ofcom note, at (b) here they suggested that in your  
20 appeal the contention was that the rate should be set by reference to long run average costs,  
21 and on the basis of asymmetric regulation, including actual market circumstances and in  
22 particular CARS costs, and these were rather important matters.

23 I thought I recognised that when it was put to us this morning. I find it very difficult to see  
24 what you are now saying about an appropriate cost methodology bears any relation to that  
25 particular cost methodology. Can you explain to me how it does?

26 MR. KENNELLY: Well that was the very first point, sir, that I made, which is that there is an  
27 alternative case. The case we made about asymmetric termination rates, and various  
28 reasons why H3G ought to get higher rates, based on the cost model we developed, that is  
29 all in the alternative.

30 THE CHAIRMAN: But that is just mobile-to-mobile.

31 PROFESSOR BAIN: That is mobile-to-mobile.

32 MR. KENNELLY: Yes, indeed. It is not, with respect, necessary, for our case on fixed-to-  
33 mobile fixed methodology to be exactly the same as the one that we ran for mobile-to-  
34 mobile LRIC.

1 THE CHAIRMAN: I see, so insofar as people read across from what you were saying in your  
2 alternative case about mobile-to-mobile if NPZ was rejected, insofar as people thought that  
3 that then might say something about what the appropriate methodology for fixed to mobile  
4 charges would be, that that was a mistaken assumption that one could read across from  
5 what you were saying in that part of your case on mobile to mobile, into what you were  
6 going to be saying about fixed-to-mobile?

7 MR. KENNELLY: Yes.

8 PROFESSOR BAIN: So why is the appropriate methodology for estimating costs so different in  
9 these two cases?

10 MR. KENNELLY: Sir, one may well say when one has two alternative approaches that are, I  
11 would say, not diametrically opposed here, because you recall, sir, that when we looked at  
12 LRAC we assumed on the basis of Ofcom's assumption that the fixed and common costs  
13 were negligible, and so we thought adopting what Ofcom had done at that stage, subject to  
14 our difficulties with their adjustments, was appropriate.

15 THE CHAIRMAN: The point that Professor Bain makes is right. So what happens then –  
16 suppose the Competition Commission say: “No, we do not agree with this NPZ, or this 0.4  
17 case.” We then move for your mobile-to-mobile case we are going to focus on what you  
18 say that you should have said – 5p more for CARS, and the depreciation methodology was  
19 wrong, and therefore we are going to tinker with the M2M costs on the basis of your  
20 alternative case in relation to M2M costs.

21 Now, where does that leave your case on fixed-to-mobile? Do you still, in those  
22 circumstances say, that the appropriate methodology for determining fixed-to-mobile  
23 charges is the marginal cost of about 0.6p. Or do you then go back for fixed-to-mobile, to  
24 what?

25 MR. KENNELLY: We go back to fully allocated costs of fixed-to-mobile. I am afraid, madam,  
26 we go back to the original view, to Ofcom's view. The Tribunal smiles, but the Tribunal  
27 sees that there is a conflict between the two approaches, but again, this is an important  
28 point, the Tribunal knows very well that we are entitled to run cases that may on their face  
29 be contradictory for very good commercial reasons; we may decide to give something up  
30 for a bigger price. We are allowed to run different economic cases as alternatives. If we  
31 ran them at the same time there would be an inconsistency and we could be criticised for  
32 that, but there is nothing to stop us from ----

33 THE CHAIRMAN: Well I can see that you can say: “Well it should not be a cost-based race at  
34 all, it should be zero or 0.4, it should not be a cost based rate – either fixed-to-mobile, or

1 mobile-to-mobile, then I can see. But if you say: “But in the alternative, if you disagree  
2 with that and you think it should be a cost base rate, then these are the costs that you should  
3 take into account, but I cannot see how you can argue in the alternative that the appropriate  
4 cost base for fixed-to-mobile, is a marginal cost basis but the appropriate cost base for  
5 mobile-to-mobile is fully allocated on costs.

6 MR. KENNELLY: No, no, madam, that is a misunderstanding of our case. That is not what we  
7 say. We say that NPZ for the purpose of mobile-to-mobile, and the very low marginal  
8 costs for fixed to mobile.

9 If we lose on NPZ, then we revert to our original case on fixed-to- mobile, and we say that  
10 it should take into account the costs that Ofcom has suggested – of course, and for mobile  
11 to mobile, if we lose on NPZ then we are back to our greater asymmetry.

12 THE CHAIRMAN: Yes, that is clear, thank you.

13 MR. KENNELLY: I fear that the Tribunal members may find there is a certain intellectual  
14 dishonesty in running those two points, but it is important the Tribunal recognises that we  
15 are entitled to trade off certain things in order to choose the case that we plead.

16 THE CHAIRMAN: Oh no, we are fully able to deal with arguments put in the alternative, Mr.  
17 Kennelly, we just want to work out what the alternatives are and how the structure of our  
18 case fits together. It is absolutely right that you can argue, well (a), but if not (a) then (b),  
19 and if (b) is inconsistent with (a) then that is absolutely normal in terms of litigation ----

20 MR. KENNELLY: There is nothing new in that.

21 THE CHAIRMAN: -- there is nothing new in that.

22 MR. KENNELLY: And also in our notice of appeal there is nothing new. That is how we have  
23 run the case from the very beginning.

24 MR. SCOTT: We also recognise that there are a variety of ways of looking at costs. We were a  
25 bit concerned when Miss McKnight referred to “true” cost because what we recognise is –  
26 two economists, three views of costs ----

27 MR. KENNELLY: At least.

28 MR. SCOTT: -- that you have a multiplicity of view and that what you have to do is to decide  
29 what is appropriate in what circumstances.

30 MR. KENNELLY: Indeed, and no doubt Ofcom will address this point in the Competition  
31 Commission, and will have the opportunity to attack our cost methodology in the  
32 Competition Commission, and they are well placed to do that. Ofcom did a great deal of  
33 work in relation to marginal costs for the purpose of the MCT statement. Ofcom is well  
34 placed to attack our costs methodology before the Competition Commission – Ofcom have

1 done that work in relation to the appropriateness of marginal costs and we saw some of that  
2 in the MCT statement itself.

3 THE CHAIRMAN: Yes, thank you.

4 MR. KENNELLY: Dealing briefly with the question of amendment; I shall not take the Tribunal  
5 to the authorities, we are well experienced now in the principles governing rule 11(1) and  
6 11(3). For the reasons I have given, in our submission there is no need for an amendment  
7 at all. The notice of appeal is sufficiently broad to deal with this. I take the Tribunal's  
8 point well in mind in the BT Ruling that one cannot rely on generally drafted paragraphs in  
9 a large notice of appeal document to support brand new points. But I took the Tribunal  
10 very carefully through the bundles in order to demonstrate that these arguments we make in  
11 supplementary submissions are not new, and simply develop the points made in any event.  
12 To the extent that permission is required we ask it under 11(1). If the Tribunal is against us  
13 in 11(1), we say that it is appropriate under 11(3) to give us permission to make these  
14 amendments for two reasons. First, in the public interest, as we say, it is important that  
15 these matters be brought before the Competition Commission in full so the Competition  
16 Commission can give the Tribunal the robust answer that the Tribunal requires and come to  
17 the correct figure.

18 Secondly, some of the materials could not physically have been produced by H3G at a time  
19 that we drafted the notice of appeal, or indeed when the Tribunal gave us time to produce  
20 the further supplementary materials, referring in that regard to the WIK Report, and to the  
21 final version of the ERG paper.

22 THE CHAIRMAN: Just going through the list of materials that you outlined at the very  
23 beginning of your submissions and just to check which of those documents, and which of  
24 the witness statements stand and fall with which parts of the pleading which are in  
25 contention. Taking the 0.4 gloss on the NPZ ----

26 MR. KENNELLY: Madam, the only sensible way of doing this is by doing it through the table.  
27 This is a very laborious task. H3G has produced a 40 page table setting out all of the  
28 objections of the MNOs and Ofcom, and I pity the poor person who had to do it, setting all  
29 the reasons for the objections and H3G's response by reference to the pleading. That  
30 document was served on the Tribunal – I really do hope you have that; that is a critical  
31 document. It is not possible, in my submission, for me to take you through the 40 pages  
32 today. If the Tribunal wishes to sit for a further day then I am happy to do that, but that is  
33 something I think the Tribunal will have to go through themselves and see it. I only have

1 time to deal with the broad objections that are raised against us by Ofcom, and by the  
2 MNOs.

3 THE CHAIRMAN: Yes, fair enough, Mr. Kennelly.

4 MR. SCOTT: We are grateful to everybody who has, not at our request, produced the tables, and  
5 to those who have consolidated them. Having spent some time trying to go through it all,  
6 you are right, because you are trying to hold together the general principles, and the  
7 minutiae and that is not easy.

8 MR. KENNELLY: It is not easy but very important.

9 MR. SCOTT: I understand.

10 MR. KENNELLY: The risk in this case – as one often finds in these proceedings – when Ofcom  
11 and the MNOs are against H3G there is a great deal of mud being thrown, and I do not use  
12 that word pejoratively, it is a figure of speech to describe their opposition, it is difficult  
13 sometimes to focus on the detail. The detail is critical because it is too easy simply to  
14 dismiss it all as another attempt to raise something new. The table demonstrates that if one  
15 goes through it slowly and carefully one gets there in the end and sees how all of the points  
16 tie in to the existing notice of appeal, or are otherwise permissibly raised – much indeed as  
17 BT came to the same view in their own letter on the new material. Madam, if you will  
18 permit me, I shall not take you to the table, but simply commend it to you. I am sure if the  
19 Tribunal has questions arising out of it the parties could deal with it in writing, and maybe  
20 scope for a further round of written submissions dealing with the points arising out of the  
21 tables themselves; it is simply not possible for all of us to deal with all of the items in the  
22 table.

23 Drawing the Tribunal's attention though to the documents themselves because, madam,  
24 you did raise the point: what is actually sought to be adduced? As I said at the beginning  
25 there are three sets of documents, the first are the supplementary submissions dated 7<sup>th</sup>  
26 March; the second 14<sup>th</sup> March letter, which contained the WIK Report, which is the report  
27 prepared for the European Commission, and the ERG final common position paper.  
28 Finally, the Morgan Stanley Report which is adduced really to demonstrate to the Tribunal  
29 that matters are afoot, the European Commission is clearly planning something and the  
30 Competition Commission needs to have that in mind otherwise it will potentially produce a  
31 ruling on a false basis. It goes no further than that; there is no trick or trap, it is something  
32 that is happening in the public domain, and the Competition Commission needs to see what  
33 is going on.

1 Turning to the supplementary submissions themselves, and as I said I do not propose to go  
2 through each and every item, but my learned friend, Mr. Holmes, took you to one point in  
3 relation to on-net/off-net. I have to deal with this because all of the parties have laboured it  
4 in their submissions.

5 Before I take you to the point itself, the Tribunal will recall that we are forbidden from  
6 mentioning the words “on-net/off-net” – one certainly gets the impression that it is some  
7 terrible taboo and heresy. The Tribunal said expressly at para.30(e) of the Ruling on this  
8 issue that to the extent that we referred to it already in our notice of appeal in relation to  
9 market share clearly that puts in issue the existence of on-net/off-net. We say its existence  
10 is in issue, the extent of it is in issue. The further consequences relating to traffic and  
11 balance are off the table and that is crystal clear. I hear what my friends say that  
12 sometimes when we refer to it there may be some room for misunderstanding, well for the  
13 avoidance of doubt there is no attempt – and there will be no attempt – by H3G to rely on  
14 on-net/off-net for the purposes of showing traffic imbalance. That was clearly ruled on by  
15 the Tribunal.

16 **THE CHAIRMAN:** By saying that in relation to traffic imbalance, what we ruled – from what I  
17 recall – is that insofar as you are relying, not only on the existence of a differential in fact  
18 in the pricing of the tariffs of the 2G/3G MNOs, but that you are also mounting an  
19 argument which depends on consumers being aware of that differentiation and possibly  
20 that influencing their choice of network, that is the fact which led us to conclude that in  
21 order to make good or refute that substantial survey evidence, etc. of consumer knowledge  
22 and preferences would need to be undertaken, and it is that which we ordered should not  
23 form part of the case. If by referring to traffic imbalance you are using that as a shorthand  
24 term for that issue then we are in agreement, I think.

25 **MR. KENNELLY:** Madam, yes. What I wanted to make clear was the existence of on-net/off-  
26 net and the fact that it does produce effects. I will take instruction on the point that you  
27 raise, madam, because that could be a very important point about how the Competition  
28 Commission is run – I was not at the last Competition Commission hearing so I will check  
29 to ensure that what I am saying is correct. My starting point is simply limited to the  
30 existence of on-net/off-net pricing differentials, because that input in our welfare model we  
31 submit ignores reality, to ignore the existence of on-net/off-net pricing differentials. It has  
32 been recognised by Ofcom in the Communications’ Report 2007 – I will take you to – that  
33 the existence of it is recognised. Vodafone themselves have referred to it in their own

1 internal and external work, and it is referred to by the parties, so we can use that as an input  
2 in our own welfare model – the existence is an input we can use.

3 MR. SCOTT: If one goes way back now to the days when there was a Mr. Barling in the case,  
4 one of the points which BT withdrew was the issue of self-supply which is being treated  
5 differently in the case of fixed networks to the way it is being treated in relation to mobile  
6 networks. So we are conscious that that was flagged up right at the beginning but then  
7 went away again. I suppose the difficulty is that this is one of those instances where there  
8 is an important point which might be considered in some future consultation, but where it  
9 is an example of where we are going to be self-disciplined in these proceedings, both here  
10 and in the Competition Commission, in terms of keeping some boundaries on the  
11 considerations in which the Competition Commission need to engage.

12 MR. KENNELLY: Absolutely, sir. I think the important point we make is that in drawing the  
13 line between our permissible references to on-net/off-net and our impermissible references  
14 to on-net/off-net, we would ask the Tribunal not to favour the approach of T-Mobile which  
15 is: “You cannot trust H3G, better go hard on them on on-net/off-net, block it entirely  
16 because you never know what arguments they will run in the Competition Commission”,  
17 that precautionary approach that T-Mobile have canvassed today, we would say you can  
18 reject that approach, because on-net/off-net does exist; its name ought to be spoken – not in  
19 the way in which we have been forbidden from speaking, but in every other way; in every  
20 other permissible way to the extent that it exists and may influence the welfare analysis, it  
21 would be absurd to exclude its existence, to exclude it from a welfare model, and that is not  
22 what the Tribunal ruled when they prevented us from relying on on-net/off-net pricing  
23 differentials as a cause of the traffic imbalance.

24 PROFESSOR BAIN: I think, Mr. Kennelly, that when we made our ruling before, our concern  
25 was that in order to determine the practical importance of on-net/off-net in the particular  
26 circumstances of the UK, a lot of practical work would need to be done. We took the view  
27 that since this had not been raised specifically at the appeal initially, it was unreasonable to  
28 expect people to have to do that now. I notice that the ERG Paper that you took excerpts  
29 from in your submissions said exactly the same. They said that if you are going to look at  
30 this in practice, you have to look at A, B, C, D, E, F, the number of different items, all of  
31 which will need to be investigated in the practical situation before you can use it.  
32 The conclusion I draw from that, subject to your persuading me otherwise, of course, is  
33 that as a theoretical proposition that on-net/off-net mixed can make a theoretical difference,  
34 I do not really think there is an issue. Where I think there is a problem is if you argue that



1 this is important in the UK in the current circumstances, because if you are going to  
2 demonstrate that, or you are going to have the opportunity to demonstrate that this may or  
3 may not be so, they have to do all this work, and it is the work that has been ruled out. So,  
4 so long as you confine it to pure theory I do not think I have the slightest problem, but as  
5 soon as you try to say: “This matters in the UK”, I do; that is what I think we ruled out.

6 MR. KENNELLY: Indeed, I am very grateful for that intervention and I am sure my clients are  
7 formatting my response (laughter) because this is central to points we make in the  
8 Competition Commission, so it is important to get it clear now and then there is no  
9 ambiguity.

10 However, I do say this, sir, that we are entitled to say that it is important in the context of  
11 market share. We raised on-net/off-net as one of the causes of the market share problems  
12 that we set out in our notice of appeal. The Tribunal has not sought to limit our ability to  
13 argue about the significance of on-net/off-net in that context. That does not mean we can  
14 use it for all the other purposes, but I just want to qualify, if I may, sir, my agreement with  
15 your observation that we should be blocked from arguing it is important at all, but I  
16 completely take your point that outside the area of market share our ability to argue that the  
17 significance in practice in the UK of on-net/off-net is barred by the Tribunal’s ruling. If  
18 the limitation on theory allows us to refer to the existence of on-net/off-net in our welfare  
19 model, and the theoretical implications in our welfare model, then again we would have no  
20 objection. Our submission is that, on the application of the other parties, we are being  
21 barred from using this as an input for our welfare model, which simply recognises that on-  
22 net/off-net exists, and its effects; it is an input which goes to the ultimate effects of NPZ.  
23 We seek to argue NPZ is effective, and recognising on-net/off-net is an important input in  
24 our welfare model. (After a pause) I should say this, in our submission no more practical  
25 work is necessary on that basis. In our submission, there is no need to do any further  
26 survey work, and to the extent that it is then we accept we are barred; we are barred from  
27 arguing something which requires that kind of survey work – that was the very reason the  
28 Tribunal gave.

29 There is a limit to how much clarity I can give because we will be arguing about our  
30 welfare model in the Competition Commission, but the Tribunal’s ruling is crystal clear.  
31 We have it, the parties have it and the Competition Commission has it. We do not suggest  
32 today to go behind that in any way, and really it should be sufficient to have the Tribunal’s  
33 ruling, which is clear, with all the parties and the Competition Commission, and H3G  
34 should be trusted, with respect, to respect that ruling before the Competition Commission.

1 If the parties think that we have gone further than is necessary then they can say so, but I  
2 would counsel caution because both Ofcom and T-Mobile said in terms that we were  
3 forbidden from making any reference to on-net/off-net and that is plainly not correct.  
4 Forgive me, Ofcom did not say that, T-Mobile did – it will be in the transcript – and we  
5 just want to make clear that there is some limited scope for referring to it.

6 THE CHAIRMAN: I think the position is that insofar as you mentioned it in your notice of  
7 appeal in relation to market shares then obviously you are allowed to refer to it. Insofar as  
8 you want to rely on it in relation to traffic imbalance, which was expressly the amendment  
9 that you sought to make and leave was refused then you cannot refer to it. Insofar as you  
10 are seeking to rely on it for some third reason, which is neither market share nor traffic  
11 imbalance, then you would have to apply for permission to amend your pleading to  
12 introduce it, and unless and until that permission was granted you cannot rely on it.

13 MR. KENNELLY: But if its existence is a matter of undisputed fact, surely it can be used as an  
14 input ----

15 THE CHAIRMAN: Yes, insofar ----

16 MISS McKNIGHT: We can explain why but we certainly do not admit that.

17 MR. KENNELLY: Well I said “if”, madam. I am fully aware my friends dispute the existence  
18 of it, then we would say that we ought properly to be able to use it as an input as well – just  
19 the existence, not the implications or consequences of what it leads to.

20 THE CHAIRMAN: Well we must leave that to the Competition Commission.

21 MR. KENNELLY: Forgive me, I have gone over my time, but the Tribunal will appreciate why.  
22 BT’s statement of intervention – again, there may be very little between ourselves and the  
23 points of principle that are raised. We cannot use the BT appeal to run arguments that we  
24 cannot properly run in our own appeal, that bear no resemblance to the BT appeal. We  
25 must stay within the four corners of the BT appeal. The Tribunal is well aware, having  
26 heard arguments about what the MNOs can do in our appeal; it is possible to disagree with  
27 both the appellant and the respondent, and seek the relief which is sought by neither the  
28 appellant nor the respondent provided we are addressing issues that are raised in the BT  
29 appeal.

30 My learned friends draw a distinction between the notice of appeal and the witness  
31 evidence put in by Professor Yarrow and Mr. Richardson. We say that is a false  
32 distinction. As the Tribunal is well aware the notice of appeal which goes before the  
33 Tribunal comprises both notice of appeal and the supporting evidence, that is the whole  
34 point of producing all of the documents at the very beginning of the process. The case has

1 to be seen as a whole. It maybe that the parties want to raise with BT the inadmissibility of  
2 parts of Professor Yarrow's evidence, or Mr. Richardson's, but the extent that those  
3 statements are live before the Tribunal in the BT appeal we ought to be able to address  
4 them in our own statement of intervention. It is our submission that we go no further than  
5 that.

6 We are entitled to say, as a starting point, that both Ofcom and BT have the wrong starting  
7 point. BT have, in Professor Yarrow's statement, put through a much more general  
8 challenge to Ofcom's approach than exists in the strict paragraphs referred to by Ofcom.  
9 We respond to that by saying the starting approach is wrong, and we say it should be this.  
10 We have rehearsed parts of our own appeal, we take the point that it may be completely  
11 unnecessary for us to rehearse our own appeal in the BT statement of intervention, and if  
12 the Tribunal feels that that is inappropriate, that is something I will not trouble you with.  
13 What we are allowed to do, within the BT appeal, is to raise the general challenge made by  
14 Professor Yarrow, raise our own point, which is that the starting point is wrong and that  
15 Ofcom have taken the wrong route. I should take you – because no one has – to the  
16 relevant passages in Professor Yarrow's and Mr. Richardson's statements. If the parties  
17 want to take an objection to those then that is a matter against BT and not for this Tribunal  
18 today.

19 Professor Yarrow's statement, and Mr. Richardson's statement should be in the second  
20 volume. (After a pause) If you would go to paragraph 6 b). This is the summary of  
21 Professor Yarrow's main conclusions. I should say I have not taken the Tribunal to the  
22 notice of appeal because the Tribunal has our detailed submissions in writing about the  
23 admissibility of our statement of intervention, and there is not time to take you to all of  
24 that. These are the important points to which you have not been taken. Professor Yarrow  
25 says: "Ofcom's general methodology is not consistent with the MF/MOC approach."

26 Then he says:

27 "The methodology appears to be unduly influenced by cost principles in  
28 traditional utility regulation, whereas the determination of Mobile Call  
29 Termination ("MCT") charge calls for something rather closer to a market  
30 assessment that focuses on effects (of alternative, possible determinations) on  
31 competition and consumers."

32 I do not need to repeat the broad nature of that submission made by Professor Yarrow in  
33 support of BT's appeal.

1 Turning to para.11 he raises the issues at stake. Again, typically the part of the witness  
2 evidence which would show the four corners of their appeal, the extent of the challenge.

3 At para.11 Professor Yarrow says:

4 “A first, critically important point to make here is that the issues at stake in  
5 relation to wholesale MCT charges are, for the most part, dissimilar to those  
6 traditionally facing a regulator when determining the retail prices that a regulated  
7 undertaking might be allowed to set in selling its products/services to its  
8 customers. Wholesale MCT charges are prices charged by an MNO to another  
9 operator, whether of a mobile or fixed network, for services that are upstream of  
10 those operators’ interactions with retail customers. Retail mobile prices are not  
11 regulated ...”

12 The revenue-recovery questions that figures so prominently in classic price  
13 control determinations – *‘Will this set of price caps allow a reasonably efficient  
14 firm to recover its costs? Might investment be discourage if prices were set any  
15 lower?’* Wholesale mobile voice call termination charges should be set at zero,  
16 yet operators could still be able to recover their costs.”

17 THE CHAIRMAN: “... could be set at zero” it says.

18 MR. KENNELLY: Oh indeed.

19 THE CHAIRMAN: No, but I think you said “should” when you read it out.

20 MR. KENNELLY: Forgive me, sorry. I would be surprised if I got away with that in this  
21 particular room – forgive the slip. But the Tribunal sees there that Professor Yarrow has  
22 put squarely in issue the point that H3G is addressing in its statement of intervention.  
23 Paragraph 13 deals with the role of LRIC and he says:

24 “In the relevant market context, I cannot see any compelling reason for believing  
25 that Long Run Incremental Cost (“LRIC”) estimates of the conventional kind  
26 will, by and of themselves, necessarily constitute appropriate benchmarks for  
27 regulated wholesale MCTs”.

28 That is referring to the Ofcom version of LRIC which, as everyone has seen from our  
29 notice of appeal is, we say, the true LRIC because it includes FAC. That is the Ofcom case  
30 which Professor Yarrow is addressing. He says:

31 “Thus, whereas the logic for the argument for LRIC pricing is that the  
32 termination of extra calls imposes incremental costs on a network operator, which  
33 it is appropriate to reflect in charges, the reality is that there are many more things  
34 going on in the relevant markets than are encompassed by the ‘standard’

1 conceptual framework/model that underpins LRIC pricing. To give one example,  
2 termination of calls originating from another network can be expected to confer  
3 benefits, as well as costs, on the relevant network operator.”

4 In para.15 he says:

5 “At first, sighting-shot estimate of what an efficient MCT charge might look like  
6 is, therefore, that it should be equal to the incremental cost imposed on the  
7 terminating MNO *less* any consequential incremental benefits to that MNO. This  
8 is a sighting-shot only, because the consequential incremental benefit will depend  
9 upon the relationship between the charges paid by a calling party and the costs of  
10 the call, and the charges paid by the calling party depend upon retail prices,  
11 which will depend in part on wholesale call termination charges. As always,  
12 therefore, there is a requirement to look at the market equilibrium as a whole.”

13 Referring then to the summary and conclusions, para. 117(a) at p.28 of the statement, he  
14 says:

15 “In summary my main conclusions are as follows:

16 a) Ofcom’s general methodology appears to rely, at least in part, on approaches  
17 that are more appropriate to the determination of *average* or *across the*  
18 *business* price levels of monopolistic utilities than to the determination of  
19 inter-operator charges in a context where charges for only one (of many)  
20 products is at issue and where, in particular, retail markets are competitive  
21 and not subject to price regulation.”

22 In particular, in relation to the reference to zero it is incorrect to suggest that H3G’s  
23 statement of intervention is entirely outside the issues at stake in the BT appeal. This is  
24 how Professor Yarrow sees them, perhaps that would be clarified by BT on an application  
25 by the other parties, but as it stands at the moment at least it is within the four corners of  
26 BT’s appeal for H3G to raise the points it raises. As we saw from the previous time the  
27 scope of the interventions was canvassed, we are entitled to see the different relief from  
28 that sought by BT and opposed by Ofcom.

29 Turning to the second witness statement of Robert Richardson, which is over in the next  
30 tab, tab 4. He discusses how high MCT rates distort competition. This is illustrated by an  
31 example in relation to the pricing that on-net have their calls. If the Tribunal would turn to  
32 para.7 on p.3, and I would be grateful if the Tribunal could read paras. 7, 8 and 9.

33 THE CHAIRMAN: (After a pause) Yes.

1 MR. KENNELLY: I do not wish to go into further detail about the scope of the BT appeal.

2 Those statements, in my submission, demonstrate the broad nature of BT's challenge and it  
3 is appropriate in the circumstances for H3G to raise its own statement of intervention and  
4 to say, by reference to its own case, what it believes a correct starting point should be and  
5 the ultimate solution.

6 THE CHAIRMAN: Do you rely on those paragraphs (7 to 9 of Mr. Richardson's witness  
7 statement), which refer to the cost of the tariff for on-net calls, and what that says about the  
8 MNO thinks are its network costs? Are you pointing us to those paragraphs in support of  
9 the points H3G wants to make about on-net/off-net pricing, or why are you drawing our  
10 attention to that?

11 MR. KENNELLY: Yes, we, in our submission, are entitled to refer to on-net/off-net to the  
12 extent that it is raised in the BT appeal. We are not allowed to run separate and  
13 unconnected on-net/off-net arguments in the BT appeal, but to the extent that BT is raising  
14 on-net/off-net arguments, we are entitled to address them in our intervention. But we are  
15 well aware, as I said at the very beginning, that we cannot run new a new on-net/off-net  
16 case. What we can do though is run something which addresses the issue. There is a fine  
17 balance to be drawn, we are not confined to adopting BT's argument, or adopting Ofcom's  
18 argument. We can offer our own view, but what we cannot do is seek to run our appeal  
19 through the BT appeal, outside the four corners of the BT appeal. The Tribunal should be  
20 astute not to prevent us – within the BT appeal – from arguing about on-net/off-net to the  
21 extent that it is raised in the BT appeal.

22 MR. SCOTT: So what you are saying is that what, for example, Mr. Richardson presents to us,  
23 is a factual analysis of how such calls are differentially priced?

24 MR. KENNELLY: Yes.

25 MR. SCOTT: He makes no inference as to the impact of that on traffic imbalance as I recall, and  
26 you are entitled to reiterate that before the Competition Commission, so that the  
27 Competition Commission have that in mind in a contextual sense.

28 MR. KENNELLY: Absolutely, except for this, that BT does raise the issue of distortions which  
29 it says will be eliminated if it is successful.

30 MR. SCOTT: That I understand because what this is doing is pointing out that there are  
31 distortions. This is not going on to draw inferences on inferences if you see what I mean.

32 MR. KENNELLY: Indeed, BT are saying there are distortions which include these, and they say  
33 at para.62.5 of their notice of appeal therefore there is a risk of anti-competitive behaviour  
34 by charging higher MCTs to some MNOs than others, and to fixed network operators,

1 again a general point about the distortions, which they say would be eliminated. We are  
2 entitled, in my submission, to intervene to say that we agree, and we agree by reference to  
3 the on-net/off-net distortion. We cannot then run an entire case about, for example, matters  
4 which do not go to BT's argument, or run a case about how it causes our traffic imbalance.  
5 What we can do is say that on-net/off-net leads to competitive distortions which would be  
6 eliminated if BT was successful, and that is raised properly in the four corners of BT's  
7 appeal, and of course BT's appeal would eliminate the price differential if we were  
8 successful.

9 So again, for the reasons I gave, this is within the four corners of BT's appeal. The issue  
10 may not be with us, but BT if the parties feel that this goes too far. But in our submission it  
11 does not go too far, the points are fairly raised by BT and our statement of intervention  
12 does no more than support them. Our error, if anything, was simply to use the language  
13 which came from our existing case, and perhaps that is what excited the opposition of the  
14 MNOs. But the substance does not stray outside the four corners of BT's appeal, and for  
15 those reasons it ought to be admitted.

16 Finally, turning to the WIK Report, and the RG report, I think I may, in view of the time,  
17 have to rely on the written submissions put forward, except to say this. The WIK Report  
18 needs to be seen in terms of its chronology. This is perhaps one of the more surprising  
19 submissions which is made against us, that it is too late to produce this document. This  
20 document, as you see from the chronology in our submissions was presented by the  
21 European Commission on 11<sup>th</sup> March 2008 and it deserves and rewards a close reading; it  
22 is directly on the points raised by H3G in the submissions before the Competition  
23 Commission, and it would be of very great assistance, in our submission. It could not have  
24 been raised previously because it was presented by the Commission in March, and it is  
25 extraordinary, in my submission, for Ofcom in particular to suggest that it not be permitted  
26 to be shown to the Competition Commission. The Competition Commission is able to  
27 decide itself how much weight it places on it; the Competition Commission is acting in the  
28 public interest. This is a document not expressing the views of the Commission but  
29 presented by the Commission and is clearly of the greatest importance, particularly in the  
30 context when the Commission itself, as we all know, is preparing to produce guidance or  
31 recommendations on the very issue of lowering MCT rates, and this again is something  
32 which the Competition Commission ought properly to have before it. The risk of  
33 producing an incomplete answer, and one inconsistent with guidance from the European

1 Union, is great in circumstances where these materials are not allowed to be shown to the  
2 Competition Commission.

3 PROFESSOR BAIN: Just on that particular point, Mr. Kennelly, I feel I must put this to you,  
4 what you are proposing it seems to me really is a radically different system from the current  
5 one. The EU are thinking about moving towards it, that is what the WIK Report is saying,  
6 they are thinking about it – they may, they may not. You expect a report from the EU with  
7 a guidance or a recommendation or something of that sort, perhaps, August/September,  
8 around that time, maybe.

9 The normal process, as I understand it, is that if the EU come out with a guidance or a  
10 recommendation, that goes out to all the NRAs throughout Europe. This lands on their  
11 desks and they start thinking about it, and deciding: “What are we going to do about it?”  
12 So if such a recommendation comes out it is for Ofcom in the first instance to take a look at  
13 it and decide what action they wish to take, and receiving such guidance or  
14 recommendation they will almost certainly want to consult, and they will consult rather  
15 widely – the point that Mr. Scott was making earlier on – there will be a consultation  
16 process. At the end of all this they will decide what they want to do, and probably come  
17 out with some kind of decision. It is open at that point to all and sundry to appeal it if they  
18 wish. If they appeal it, it will be a price control matter, and it will go to the Competition  
19 Commission at that stage, but not before that stage.

20 In the meantime what we have here is an appeal against a decision that has been taken in  
21 the past on the basis of the guidance that was available at the time. It goes to the  
22 Competition Commission to look at that appeal, it is not a wide-ranging, open-ended  
23 investigation as we keep emphasising, it is on that particular appeal. Does it not seem a bit  
24 odd to ask them to get involved in what would be a wide-ranging investigation, this  
25 particular thing that the EU has not yet decided, at the same time as we know the EU is  
26 actually thinking about it; it just seems a little odd to go about that process – could you  
27 comment?

28 MR. KENNELLY: Sir, that point which you have made is one which, no doubt, Ofcom could  
29 make in the Competition Commission, but what is being proposed in this Tribunal is that  
30 the Competition Commission be prohibited from seeing a document which has been  
31 presented by the European Commission in public, which goes to the heart of H3G’s case. I  
32 understand the Tribunal has been deluged with paper and you may not have had the  
33 opportunity to read the WIK Report, but I would be grateful before ruling on this issue if



1 the Tribunal could take the time to read it. The point will not be lost on you that it goes to  
2 the heart of H3G's case.

3 PROFESSOR BAIN: I was trying to make a slightly broader point, it was not about this  
4 particular document, but about the whole process of asking the Competition Commission to  
5 go through all the work that the EC at the moment are going through where they may or  
6 may not come to a conclusion of a particular kind and do it all simultaneously with what  
7 the EU are doing, coming up with a decision that may well be in advance of anything the  
8 EU come out with.

9 MR. KENNELLY: In general terms it would be very odd, sir, if the Competition Commission  
10 were not permitted to see a document which goes directly to the issues before it, produced  
11 by a consultancy instructed by the European Commission. It does not bind the Competition  
12 Commission, submissions can be made upon it. The Competition Commission may well  
13 say: "We will have regard to this, but we bear well in mind the fact that there will be  
14 consultation upon it and it may ultimately be rejected and Ofcom may adopt it in a different  
15 form." All these points can be borne well in mind. We bear well in mind ourselves, it does  
16 not bind anyone.

17 THE CHAIRMAN: The problem here though is that this is being introduced by you, a party to  
18 an adversarial process, in a course of proceedings which the other parties then feel it is  
19 incumbent upon them to make counter-arguments, which in relation to a document –  
20 whether this document or other documents – are bound to crop up between now and 31<sup>st</sup>  
21 October, where the Competition Commission perhaps in other proceedings it would be  
22 dealt with slightly differently. The Competition Commission would say it would know  
23 from its own researches that there has been this new development. It would decide whether  
24 it thinks it is relevant, if it thinks it is relevant it might say to the parties: "What do you  
25 think about this WIK document?" Then the process would be within the control of the  
26 Competition Commission and the parties would know that they are not being called upon to  
27 devote time and expense to commenting on a document which the Competition  
28 Commission may in fact not be interested in. Now, what concerns us is that if, during the  
29 course of the proceedings before the Competition Commission more documents are  
30 produced by economists, or are produced by other NRAs or the EC Commission, how can  
31 we limit the obligation that parties feel under to adduce these and comment on them at  
32 length in a way which may well not be helpful to the Competition Commission? Or would  
33 it be better for us to leave it to the Competition Commission to notify the parties: "This  
34 report has been produced, what do you think about it?"

1 MR. KENNELLY: I will make two points to that, madam, and then I will make a short point  
2 about the Competition Commission's own position. The first is a question of degree. Of  
3 course, every document that is produced between now and the end of the reference period  
4 cannot simply be brought forward, there is obviously a need to distinguish between those  
5 things which were very important – which need to be brought to the attention of the  
6 Competition Commission – and things which are less important, and we should not delay  
7 or hinder, or make more difficult or awkward their deliberations, so a line has to be drawn.  
8 We look at the WIK Report. It is necessary to determine how important and relevant it is,  
9 because if it is important, if it is highly relevant then there is a real risk the Competition  
10 Commission will make a determination in ignorance, that they will miss an important  
11 point; that they will not have the opportunity to judge themselves, a point of great  
12 importance which may be adopted by the Commission at a later stage. The fact that it is  
13 not immediately binding the Commission can be trusted to bear well in mind, but there is  
14 the risk, to which I draw the Tribunal's attention, of an incomplete or incorrect decision  
15 because an important point in this report, which is missed by the Competition Commission,  
16 and which we H3G would be forbidden from mentioning by reference to the WIK Report,  
17 and this is adversarial, as you say, madam, but this litigation is also in the public interest, it  
18 is producing, as I said at the very beginning, the right result for consumers. So the difficult  
19 job for the Tribunal is to decide: "Is this report so important and relevant that it ought  
20 properly to be shown to the Competition Commission?"

21 THE CHAIRMAN: But that would be better for the Competition Commission to make that  
22 decision, not for us to make that decision. So what I am struggling towards is some kind of  
23 procedure that we can set up, maybe by a direction, and Mr. Sharpe may well want to have  
24 a think about this, that you may adduce the WIK Report and the ERG Report, and then  
25 before all the other parties feel they have to pile in and produce expert witness statements  
26 and counter arguments and articles, whether there can be some indication first from the  
27 Competition Commission to say either "No, we do not want to hear any submissions on  
28 this", or "Yes, we think this chunk of this is important, and we would be glad to hear what  
29 other people have to say", or "Yes, we think this whole thing is a very important document,  
30 and we would be grateful to hear what people say" just to ensure that the Competition  
31 Commission is not overwhelmed with helpful suggestions put forward for reading material  
32 from the parties which then just generates a whole amount of potentially unnecessary work  
33 for the many different parties participating in these proceedings.

1 MR. KENNELLY: We would be content to have an opportunity to request before the  
2 Competition Commission permission to produce documents. It may well be useful to hear  
3 from the Competition Commission at this stage, if it is not too late, as to what their position  
4 would be. But if we had an opportunity to put written submissions before the Competition  
5 Commission, for example, asking them to tell us whether or not they want to read the WIK  
6 Report or the ERG Paper – that is a document Ofcom signed off on and if it is relevant it  
7 really ought to be before the Competition Commission also, but it is for the Competition  
8 Commission to decide and if we had opportunity to make written submissions to them we  
9 would be very grateful for that opportunity.

10 THE CHAIRMAN: Well we do not want then to get into a two-stage procedure where  
11 everybody has to make submissions on whether the Competition Commission should read  
12 it and then make submissions on the document itself, we are trying to shorten matters rather  
13 than increase them.

14 In view of the time, Mr. Kennelly, how much longer do you have on your submissions?

15 MR. KENNELLY: My last point was on the Morgan Stanley Paper, and I shall not take you to  
16 our explanation for why that is necessary, Professor Bain has already made the point. He  
17 referred to the fact that the European Union has been proposing radically reducing  
18 termination rates, Morgan Stanley have taken that on board, and it is really for the purpose  
19 of that, demonstrating that this is coming and the Competition Commission wants to be  
20 aware that it is there, and avoid the risk of an inconsistent or incorrect determination which  
21 would not be in the public interest. (After a pause) And of course they say the rates are  
22 too high, of course, that is exactly what it is saying, that is why we are relying on it. But to  
23 the extent that I have omitted anything from our written submissions, obviously I hope the  
24 Tribunal will have a chance to read through them, there is a great deal of material to cover  
25 and there is unfortunately no alternative to reading that 40 page schedule ----

26 THE CHAIRMAN: No, that is all right.

27 MR. KENNELLY: -- demonstrating how the case made in the supplementary submissions is  
28 within the four corners of our own appeal.

29 Unless I can be of any further assistance?

30 THE CHAIRMAN: We will rise now for 10 minutes, after which, Mr. Sharpe, I gather you want  
31 to address us briefly.

32 MR. HOLMES: Madam, I would ask, if necessary, to make responsive submissions.

33 THE CHAIRMAN: Well I realise that we have a number of people who came prepared to make  
34 submissions today who we have not yet heard and we are reluctant, for obvious reasons, to

1 go over to a second day, so can I just have an indication whether there are people in the  
2 room who have not yet said anything who have a burning desire to make a point which has  
3 not yet been made by anybody?

4 MISS BACON: For our part I think it is actually more important for Ofcom to have a proper  
5 right of reply. There are a number of points I would make but they would be mostly  
6 responsive to what Mr. Kennelly has just said, and it seems to me that would be better  
7 coming from Ofcom, because it developed its submissions fully in opening, so I was going  
8 to suggest that for 02's part at least we would be content to wait until after Mr. Holmes had  
9 developed his reply.

10 If the Tribunal then considers that it would still like to hear from people on this side, not of  
11 the room but of the case, then we would be happy to make such further submissions as we  
12 have, but let us put it like this, if the Tribunal were then to say it is not necessary for me to  
13 make my submissions then I would not wish to take further of your time unnecessarily.

14 MISS DEMETRIOU: We take the same view as that so I would also rather wait until Mr.  
15 Holmes develops his submissions in reply and if there is anything to add at that stage –  
16 which there may not be – then I could deal briefly with it then.

17 THE CHAIRMAN: Thank you, Miss Demetriou. Miss Lee?

18 MISS LEE: For our part, in relation to the comments in H3G's appeal, we have set out our  
19 position in our letter of 10<sup>th</sup> April. Some of the points there would echo the points Mr.  
20 Kennelly makes, with one or two other refinements, but I do not think I really need to  
21 address that. The one point that we do seek clarification on is whether it is a suitable cost-  
22 based approach or whether it is NPZ for fixed-to-mobile, because when you look at 7<sup>th</sup>  
23 March document it seemed rather different from the points that Mr. Kennelly was making  
24 today, because they seem to be saying you would extend NPZ to fixed-to-mobile, and that  
25 is what we had understood from that submission, so clarity in terms of what we have to  
26 plead to in the future – that was the only marker really I wanted to raise on that. We do  
27 have some brief submissions in relation to our appeal and the role of H3G's intervention  
28 which would like to make, orally probably.

29 MR. PICKFORD: Madam, could I just say that subject to what Ofcom says, we did have some  
30 very, very short responsive points but we may not have to make them at all because, of  
31 course, Ofcom may make them for us.

32 THE CHAIRMAN: Well perhaps you could use the next 10 minutes, Ofcom, to liaise with your  
33 confreres in the room to try and make sure that you cover in your reply the points that they  
34 want to make. So we will hear Mr. Sharpe briefly and then we will hear Mr. Holmes, and

1 then we will see where we are up to at that stage. So if we come back at 5 past 5, thank  
2 you.

3 (Short break)

4 THE CHAIRMAN: Yes, Mr. Kennelly?

5 MR. KENNELLY: Madam, I know that you were not expecting to see me, but I will be very  
6 brief. There was one point of clarification I wanted to make in relation to where Mr.  
7 Scott's questions were coming from, and it relates to the labelling for this word "NPZ",  
8 because in our supplementary submissions at p.2, we appear to be saying that NPZ is  
9 advocated as an appropriate remedy to address market distortions in the mobile sector  
10 including both mobile-to-mobile, and fixed-to-mobile, and that may have given rise to  
11 some confusion which Mr. Scott referred to. As I said earlier, the basis for a case on  
12 mobile-to-mobile and fixed-to-mobile is slightly different. The economic theory is slightly  
13 different, the calculations are slightly different, so it is not strictly correct to say NPZ can  
14 just be extended to fixed-to-mobile, and the reference for the economic methodology is in  
15 the main bundles before the Tribunal for the SMP appeal, it is bundle C1A, p.217 and it is  
16 the article of Mr. Harbord and Panozzi of 30<sup>th</sup> November 2007. They summarise there the  
17 calculation for fixed-to-mobile (p.13) and the calculation for mobile-to-mobile is at p.14.  
18 Those are the references for the Tribunal and I hope that provides clarification.

19 THE CHAIRMAN: Yes, but just to repeat a question which I think I asked you earlier, but just  
20 to be sure I know what your answer is, if you succeed on the NPZ ground, as regards  
21 mobile-to-mobile, then you say that fixed-to-mobile should be based on a cost  
22 methodology which results in the cost being about 0.6 to 0.8 ppm. If you do not succeed in  
23 relation to the mobile-to-mobile pricing, if you do not succeed on your NPZ, whether that  
24 is a zero or a 0.4 figure, then you go from your mobile-to-mobile to your alternative case  
25 which is that you should have had more CARS costs and there should have been a bigger  
26 differential and a different depreciation model, etc. You would then argue that the prices  
27 that you arrive at for mobile-to-mobile should also apply to fixed-to-mobile?

28 MR. KENNELLY: Yes, that is correct, and that is the point that I made earlier today. We revert  
29 to that position if we fail on our primary.

30 THE CHAIRMAN: So the fixed-to-mobile prices are always cost-related, it just depends on how  
31 you determine the costs, but the mobile-to-mobile are either cost-related in your alternative  
32 case, or are just reduced to zero, or a nominal amount if you succeed on your NPZ ground?

1 MR. KENNELLY: That is correct, subject to the point that we have cost arguments in favour of  
2 mobile-to-mobile as well. We argue for NPZ and mobile-to-mobile on the basis of costs'  
3 arguments as well as the competition arguments that we have pleaded.

4 THE CHAIRMAN: Yes, but it is not derived from costs, it is just supported by the fact that it is  
5 also close to being costs.

6 MR. KENNELLY: Yes, that is correct, but the analysis is in the article to which I referred the  
7 Tribunal and the reference you have.

8 THE CHAIRMAN: Well now I hope everyone is clear as to what the alternatives of your case  
9 are. Thank you. Mr. Sharpe?

10 MR. SHARPE: Madam Chairman, members of the Tribunal, I hope to be very brief. I shall  
11 begin by disappointing my learned friend, Mr. Pickford. It is not part of our presence here  
12 today to take sides between the various parties. Our position is one of studied neutrality.  
13 We are not here to attempt to influence you as to the terms of what it is that we should be  
14 determining. I will make no submissions on the merits or whatever.  
15 We are not neutral, however, in seeking two objectives. One is clarity, and the other one is  
16 finality; at the last CMC I submitted that we needed both. For neutrality's sake  
17 clarification, expansion or indeed formal amendment of the H3G cases proceeds. It is very  
18 likely there will be new evidence, and appropriate orders made in respect of that new  
19 evidence. It is inevitable, in the face of that, that the Commission's timetable will be  
20 threatened. I lay a marker there, and I think it is a fairly obvious point, one that it would be  
21 useful to bear in mind. That is not a case for not permitting any application, it is a  
22 consequence of that action and I inform you to that effect.

23 In relation to clarity, in an ideal world what the Commission seeks as a result of this  
24 hearing today is essentially a piece of paper – or pieces of paper – which have within them  
25 either a ratification of the paper we have already received with no amendments or changes;  
26 or, clearly described deletions and/or amendments to the supplementary statement, to the  
27 witness statement. I think the model probably stands or falls in its entirety – that will be a  
28 matter for you to determine. But my submission here is this, anything less than total clarity  
29 in relation to a document would simply store up trouble and add to the Commission's  
30 uncertainty.

31 I am sure that the Tribunal is more than aware that perhaps the best way to proceed would  
32 be for the Tribunal to make a sufficiently detailed judgment so that the parties can,  
33 informed by the judgment, go forward and come back to you with an agreed document with  
34 any deletions that may or may not be appropriate. We would expect to see that, though we

1 probably will not want to make any comments, and we would respectfully submit that  
2 would be the way forward.

3 As far as finality is concerned, this goes back to the question of timing – the longer this  
4 process takes, the more in jeopardy the Commission’s timetable will be, and you are very  
5 much aware that the plenary session we had anticipated to include H3G has had to be  
6 postponed – we are now five weeks into the Reference. It is at least likely that the  
7 Reference itself may be subject to amendment, quite apart from the possibility of new  
8 evidence. So you do not need me to emphasise the necessity for some degree of speed after  
9 which we may be in some considerable trouble in due course in relation to the timetable.  
10 You made a point earlier about the plenary material and the read across, that seems entirely  
11 appropriate, if I may say so – anything else would be a sledge hammer to crack a nut – and  
12 if we go wrong I dare say others will remind us.

13 There was a point about evidence raised just before our short break. The Tribunal itself  
14 made an order in relation to evidence and documentation. I am referring to your order  
15 made on 25<sup>th</sup> February, which in relation to the appellants gave them until 5 o’clock on 7<sup>th</sup>  
16 March of this year to submit evidence. I am instructed that the WIK Report, and so on, was  
17 submitted somewhat after that – I think a week later. It is not a narrow procedural point,  
18 because the Commission really has to treat all parties equally. All parties had to observe  
19 that deadline and here we are faced with evidence which was later. You can, of course,  
20 make a supplementary order to that effect and allow them the ability to put it in with their  
21 evidence to the extent you regard it as going to an admissible issue, on which I make no  
22 comment.

23 The issue I want to emphasise is that the way the Commission is proceeding (and wishes to  
24 continue to proceed) is as follows: we do not want, we do not welcome or invite a  
25 ceaseless barrage of new paper at irregular intervals. The Commission is at the stage now  
26 when it has begun to isolate the issues which it thinks is important, and in due course will  
27 be contacting the parties for specific targeted pieces of evidence in relation to the issues  
28 which arise, and that is how we wish to proceed. That does not mean to say, and let me  
29 emphasise this, if something of importance or relevance does emerge, and the parties are  
30 terribly keen to let us know about it, we are not going to say: “Inadmissible, we do not want  
31 to know”. What we would like to do is for them to make us aware of that evidence and we  
32 will consider whether we wish to seek it, and to use it. We think that is the appropriate way  
33 forward and respectfully we would wish you to endorse that.

1 There is one further point, which perhaps does not need emphasis, but when we go from  
2 today there will be, under any scenario, the opportunity for the parties to reply to each  
3 other's submissions. We would hope in your judgment that you would make it abundantly  
4 clear to all parties that they should not regard the reply as a suitable extra opportunity to  
5 develop the themes that they may have been prevented from developing today. There is  
6 just the possibility, I put it no higher than that, that the temptation may not be resisted.  
7 Madam Chairman, those are my submissions and unless I can help you on any specific  
8 matter.

9 THE CHAIRMAN: So as far as the WIK Report and the ERG Report, those are things which  
10 you think the best way to proceed in relation to those and anything like that that occurs in  
11 the future, namely published material which may be relevant to the deliberations, the best  
12 way to proceed would be for the parties to write to the Competition Commission and draw  
13 your attention to the existence of it in a neutral way, and then you look at it and decide  
14 whether you want to ask either them or anybody else to comment on it.

15 MR. SHARPE: That is the way forward and that is how the Commission wants to proceed. It  
16 also reflects the inquisitorial approach that now is very much with us at the Commission.  
17 The alternative and, as I said, the fear we have is an excessive use of the photocopier and a  
18 good deal of information which, frankly may not be relevant or important.

19 THE CHAIRMAN: Yes, Mr. Sharpe, we are a bit concerned about whether question 7 of the  
20 Reference is adequate, either on the case that was understood before the latest round of  
21 supplementary material, or certainly if the case which has been put forward today is  
22 allowed to proceed, in particular I think it refers to retaining fixed-to-mobile charges which  
23 might suggest that they would be the same, that if the NPZ for mobile-to-mobile was  
24 accepted, what would then be the price for fixed-to-mobile, whether it is assumed in the  
25 question wrongly that that should be the current rate set in MA3, or MA4 – whichever one  
26 it is.

27 MR. SHARPE: Certainly, if you are minded to accept the amendment application, which is in  
28 the alternative, we will, I think, require a careful look at question 7 and possibly others  
29 actually – I flagged that a moment ago. Certainly question 7 is absolutely clear and needs  
30 amendment.

31 In the absence of a formal amendment it is at least possible, the way in which H3G is now  
32 expressing its case – and I make this as a personal observation, I had not comprehended  
33 earlier when the Reference was drafted – if you are minded to accept that as an appropriate  
34 interpretation with its consequences for the admissibility of the supplementary matter, then



1 I think we are going to have to look at question 7. What I would submit is that if we are  
2 going to go down that road there should be an invitation to the parties to look at all the  
3 reference questions to see whether any of them require amendment in the light of the  
4 admissible, or to be admitted material, and not just focus only on question 7.

5 THE CHAIRMAN: Thank you. Mr. Holmes?

6 MR. HOLMES: Madam, thank you. I discussed during the short adjournment whether it was  
7 possible to run points on behalf of the interveners as well as Ofcom. I think there is a broad  
8 consensus as to the points that needed to be made, but some of the other parties may have  
9 additional points to make, and it probably would not be appropriate for Ofcom as the  
10 Regulator to speak on behalf of the interveners, so after I have concluded my closing  
11 submissions, they may have additional points to add – but I hope that is not the case, there  
12 did seem to be a broad consensus.

13 The first point relates to the suggestion that Ofcom has misunderstood the case as pleaded  
14 by H3G, and that NPZ is intended only now to refer to mobile-to-mobile rates in the  
15 supplemental submission. I am grateful to my learned friend, Mr. Kennelly, for pointing  
16 out what he described as a “mistake” in para.1.2(c)(i)(a) on p.2 of the supplemental  
17 submission. Madam, in our submission it would be wrong to characterise that as a mistake,  
18 because if one looks throughout the supplemental submission one finds NPZ described as a  
19 label for M2M and F2M rates, and if I could give you the references to that: one sees it at  
20 para.3.1 of the supplemental submission where it is stated that NPZ can take various forms.  
21 H3G proposes the prices for M2M and F2M calls should fall to the level of fixed call  
22 termination.

23 I would refer you then to Mr. Russell’s statement, on p.8 under the heading H3G’s  
24 proposed solution NPZ. He states in para.32:

25 “One option for achieving NPZ is to reduce interconnection rates to zero whether  
26 just for calls originating on mobile networks, or for all calls.”

27 And in Mr. Westby’s statement at para.6 he states:

28 “Although 0 ppm MCT might be implemented quite easily if applied to all operators, both  
29 mobile and fixed line I conclude that there are a number of practical implementation  
30 considerations to be addressed.

31 Later in that paragraph he states:

32 “As an alternative I was asked to examine a situation close to NPZ in which all  
33 MCT rates for all MNOs for calls originating on any network were fixed at the  
34 same uniform level.”

1 So I think it is hard to describe Ofcom's reading of NPZ in the supplemental submission as  
2 any kind of ----

3 THE CHAIRMAN: Well now we know what their case is and the question we have to decide is  
4 whether they should be able to proceed with that.

5 MR. HOLMES: Madam, the second point I would make is that in relation to fixed to mobile it is  
6 simply not credible to suggest that the references to "appropriate cost methodology" and to  
7 "suitable cost based model" in the appendix are references to anything other than LRAC  
8 (Long Run Average Cost). I was left in some confusion as to what H3G's alternative case  
9 exactly was, but if one looks at their notice of appeal in bundle A, at para.3.2(c)(i), it  
10 emerges there quite clearly that the cost measures proposed for fixed-to-mobile MCT rates,  
11 the only cost measure proposed for fixed-to-mobile rates is Long Run Average Cost. Do  
12 you see that, madam, 3.2(c)(i):

13 "The level of fixed-to-fixed mobile rates should be set by the Competition  
14 Commission so that the level of the MCT rate paid by fixed operators to all UK  
15 MNOs is based on Long Run Average Cost."

16 There is no alternative pleaded to that case, madam. We say that the cost measure was  
17 Long Run Average Cost. The attempt to hang a new marginal cost measure on para.4.7 of  
18 the appendix, and the reference there to suitable cost based model is simply unsustainable  
19 to rely on four words as allowing H3G at any subsequent stage of these proceedings to  
20 advance a wholly different cost model to that which was set out in their notice of appeal as  
21 amended we say does not wash.

22 Madam, it was also suggested that LRAC is somehow equated with marginal cost, and this  
23 seemed to be in reliance on a footnote to be found in the commentary to the appendix to  
24 H3G's amended notice of appeal (footnote 6, p.3 of the commentary to the appendix).

25 Madam, you see there the statement: "Ofcom assumes that the level of network common  
26 costs are negligible, however, so this should not materially alter our conclusions." Well,  
27 madam, Ofcom nowhere in the statements suggests that common costs are negligible. It  
28 suggests that they may be difficult to measure, but it nowhere suggests they are negligible.  
29 We have never had any supporting indication as to why H3G reached the conclusion that  
30 common costs were negligible, and you saw from the passage which my learned friend, Mr.  
31 Kennelly, read from annex 17 of the MCT statement that Ofcom clearly regarded common  
32 costs as necessary and appropriate to be counted in determining the LRIC measures, as it  
33 was then called, the "FAC measure" as H3G now refers to it.

1 Madam, it is also quite clear from the submissions in the appendix, that H3G did not at that  
2 time consider that LRAC resulted in very low levels of termination charge. On the  
3 contrary, if one looks at the figure on p.11 of the commentary you will see there a bar chart  
4 with various components, somewhat difficult to read, but you will see the PC cost measure  
5 which, as I understand it, is the third of the three lines in the chart, is the LRAC model that  
6 H3G relies upon. Just to make clear that PC and LRAC are the same thing, the Tribunal ill  
7 see on p.8 in the final paragraph on that page the statement that “PC generates prices equal  
8 to LRAC at every point in time.” So PC is LRAC, and the rates there are in the third row,  
9 as you will see, well above the 0.4ppm rates which are now proposed. LRAC was the only  
10 costs’ measure. All references to cost-based models in the notice of appeal must be read as  
11 references to LRAC and LRAC does not generate the current marginal cost rate of 0.6 to  
12 0.8 ppm, which is now contended for.

13 Madam, it was also suggested that mobile-to-mobile was never argued, indeed, the  
14 alternative approach to remedy was never argued to be zero or a net neutral position, but  
15 something approximating to that a the figure above zero would achieve broadly the same  
16 result and is therefore to be encompassed within NPZ. In support of that proposition, my  
17 learned friend, Mr. Kennelly, drew attention to the reference to glide-paths as an alternative  
18 approach to remedy, to show that zero was not the only approach. The reference to that is  
19 4.4 of the appendix – you will see there:

20 “In the alternative it could be considered as part of the glide-path approach.

21 While fit for purpose MNP is introduced in the UK. (see below)”

22 Madam, it was suggested that this showed that a zero rate was never proposed. One might  
23 imagine a rapidly declining glide-path to take one towards zero. Madam, we say that  
24 cannot be what H3G meant by this rather obscure passage, which actually falls to be read in  
25 the light of submissions that were made during the prior consultation process.

26 Madam, if I may, I know that I have taken us for extensive periods this morning to the  
27 submissions and the responses during the consultation process, and if I might take us again  
28 to H3G’s response of 22<sup>nd</sup> November 2006, to the third consultation, p.193. On p.60  
29 (internal numbering), p.252 (bundle pagination) you will see a figure labelled “Averaged  
30 net neutral glide-path”. You will see that this does not show a rapid glide-path towards  
31 zero. On the contrary, it shows rates which remain extremely high for the net neutral rate  
32 excluding “MMP effect” as it is referred to, but none of the lines come anywhere near zero  
33 during any of the quarters of the charge control. So the net neutral approach for which  
34 H3G was contending by means of glide-paths ----

1 THE CHAIRMAN: But these are not glide-paths linked with the NPZ remedy, are they?

2 MR. HOLMES: Madam, we are instructed that they are. If you will give me one second so that  
3 I can take instruction, I will take you to the relevant passage. (After a pause) Madam, the  
4 suggestion is, if you will see over the page at p.251, under the heading "8.2.2 An  
5 appropriate glide-path for H3G", the second sentence there set out:

6 "H3G has calculated what glide-path the charges might ensure, that over the price  
7 control period as a whole, it was a neutral competitive position with regard to its  
8 direct competitors".

9 Then one sees the heading: "Average net neutral glide-path" and Ofcom at least interpreted  
10 this to be the glide-path approach which was proposed by H3G in para.4.4 of its price  
11 control appendix. I agree, madam, that para.4.4 of the price control appendix is a rather  
12 obscure passage in the appendix, but ----

13 THE CHAIRMAN: I the vertical axis not pence?

14 MR. HOLMES: Yes, madam. This shows that we do not have here a steep glide-path that  
15 produces zero pence per minute in order to overcome the neutral competitive distortion  
16 between the mobile network operators ----

17 MR. SCOTT: I confess that when I read 4.4 I read it in a rather different way, that what was  
18 contrasted was in the first part of 4.4 this remedy would potentially be applicable  
19 indefinitely, i.e. zero indefinitely. By contrast the suggestion was that we should start with  
20 zero while we were sorting out MNP and then move to a positive figure; that was how I had  
21 read that. I had not read it in the context to which you have now taken us, which does put a  
22 very different complexion on it.

23 MR. HOLMES: Well, sir, clearly it is not for me to say what was in H3G's mind when it wrote  
24 this passage, but it appeared at least to Ofcom, in the light of the proceeding consultation  
25 process, with which of course my client was very familiar, having discussed with H3G over  
26 a number of months what would be the appropriate approach to remedy, that this neutral  
27 glide-path approach might not have been intended to refer to a very steep glide-path leading  
28 to zero termination rates in a very short period of time. So madam, that is my point in  
29 relation to net payment zero as regards the M2Ms.

30 To go back to the broader submissions that I was making. On any view, what is being  
31 proposed here is not what one finds in the appendix, there is a totally different cost  
32 methodology being applied, and moreover although it was suggested today that the fixed-  
33 to-mobile, and the mobile-to-mobile rates were some happy coincidence, that they  
34 coincided at roughly the same level of 0.4, 0.6, 0.8 ppm, in fact there are arguments of

1 principle advanced by H3G to explain the appropriateness of aligning the rates of fixed-to-  
2 mobile, mobile-to-mobile, and fixed call termination rates at a single level, because it is  
3 said to avoid arbitrage, and it is said to avoid competitive distortions between fixed  
4 network operators, and mobile network operators. So there is a principled case in support  
5 of this new reciprocal remedy which brings all termination rates, or the vast majority of  
6 termination rates payable in the UK at the wholesale level under a single overarching  
7 charge control, and that is nowhere to be found in the amended notice of appeal.

8 The fourth point I would make, madam, is that the references to competitive distortion and  
9 efficiency effects to which my learned friend referred you in the course of the appendix and  
10 the notice of appeal are to be read in their context. H3G were identifying on each occasion  
11 specific efficiency effects, specific competitive distortions. Those terms indeed are to be  
12 found in the statutory tests that have to be applied by Ofcom in formulating the charge  
13 control, and it would be surprising if one did not find those general terms used in any  
14 appeal which was lodged against a price control remedy. The mere fact that those terms  
15 are used does not then enable a party to advance any further competitive distortions or  
16 efficiency effects which may occur to it.

17 Madam, this brings me to my next point: many other new arguments are advanced in  
18 support of the bill and keep model, this new approach to remedy which unifies  
19 fixed-to-mobile and mobile-to-mobile rates. My learned friend did not really address those  
20 new arguments. Insofar as he did he seemed to suggest that new arguments could be raised  
21 not new grounds, without the need for an amendment. If that was his submission it is, of  
22 course, not in accordance with Rule 11, and I would also remind the Tribunal of the  
23 comments that were made at the CMC on 25<sup>th</sup> February which invited all new issues to be  
24 raised – new arguments, new grounds – without distinction.

25 It was then suggested, and I assume that this was really in response to the consultation  
26 point, that H3G did not regard mandated RPP as the same thing as bill and keep. Well,  
27 madam, I went through the consultation documents at some length and we saw there that  
28 mandated RPP was to be achieved by a zero MCT rate, that is to say the bill and keep  
29 solution that was proposed.

30 As regards additional work, Mr. Kennelly attached great importance to the full defence  
31 which Ofcom has served in the price control proceedings. Madam, the passage on which  
32 he relies responds only to NPZ as regards mobile-to-mobile, as that case was originally put  
33 in the notice of appeal as a amended. It does to deal with the broad bill and keep based  
34 arguments, and that is where we say the additional work lies, that is where we say the

1 prejudice lies. Certainly H3G has not attempted to arrive at its own marginal cost  
2 estimates, that is not a process it has ever undertaken. None of the other parties besides  
3 H3G has done so. It has taken H3G a considerable period of time during these appeal  
4 proceedings to arrive at its own marginal cost estimates. That would be a significant  
5 project in its own right, and to do it properly would take a considerable period of time.  
6 Also, no reference was made to the consumer surveys on retail impact, which would need  
7 to be done we say in order to respond properly to the bill and keep arguments. Nor has  
8 Ofcom attempted to assess the academic economic merits and, madam, the fact that Ofcom  
9 in a surfeit of conscientiousness has addressed in outline points that were made by H3G,  
10 while making clear that these points had not been raised in its view in either H3G's notice  
11 of appeal, and that those points were not responsive to any point raised in BT's notice of  
12 appeal, should not be used against them now in order to justify H3G admitting a whole host  
13 of new arguments which we say have not been addressed in anything like the detail that  
14 H3G would wish to do so if they were recognised to be within the scope of these  
15 proceedings.

16 It was also suggested, madam, that Ofcom would need to undertake international  
17 comparisons in relation to mobile-to-mobile net payment zero. Madam, no international  
18 comparisons have been advanced by H3G in its original or amended notice of appeal or in  
19 the appendix thereto. So those arguments will lonely need to be addressed if permission  
20 were granted to introduce the new material. This is not work which Ofcom would need to  
21 undertake anyway.

22 I think the Tribunal has the point but the fact that the European Commission may be  
23 planning something is, if anything, an argument against admitting the new material and  
24 allowing these proceedings to be transformed at a late stage into an assessments of the  
25 merits of bill and keep, without all of the usual consultation procedures which would  
26 proceed such a finding. I would remind the Tribunal of the point to which I drew its  
27 attention this morning, that in the context of the consultation process H3G argued against  
28 bill and keep on the basis that it would require a co-ordinated approach at the European  
29 level, so that is another good argument against doing this in the context of the Competition  
30 Commission proceedings.

31 Turning to the statement of intervention, I believe Professor Yarrow, or Mr. Richardson  
32 have strayed outside BT's notice of appeal. We say that cannot be relied on. BT did not  
33 attempt to rely on it in support of their appeal. If one looks at the supplemental material  
34 they have served, they seek a remedy of 3.73 ppm, exclusively on the basis of their

1 conventional pleaded case in relation to spectrum costs and all of the other points they  
2 raise. They do not rely on Professor Yarrow's arguments concerning marginal cost and  
3 they make no reference to on-net/off-net in support of the remedy which they seek.  
4 BT therefore have recognised that these statements are not a part of their appeal properly  
5 pleaded and have not sought to make anything of those arguments in the proceedings  
6 before the Competition Commission.

7 As regards the WIK Report and Morgan Stanley, we rely on the point made by my learned  
8 friend for the Competition Commission, and we also say that those materials are not  
9 relevant unless H3G is permitted to amend its case. They are relied on for points specific  
10 to the supplementary submission and the new approach which is set out there. If the new  
11 approach falls away then WIK and Morgan Stanley have no relevance to these proceedings  
12 and should therefore be disregarded.

13 Finally, my learned friend, Mr. Kennelly, urged the Tribunal to adopt a principle of charity  
14 in construing the notice of appeal as amended, and now the supplementary submission.

15 H3G is not a small enterprise, it is not lacking in professional advisers, it is not lacking in  
16 expert economists, it made substantial submissions supported by expert evidence  
17 throughout the consultation process, and its notice of appeal was also prepared with the  
18 assistance of expert economists, and one of the world's largest law firms. Occasions such  
19 as today cost the parties who attend an enormous amount of resources in order to discuss  
20 what may or may not be meant by random phrases scattered through the documents with  
21 which we have been grappling. Madam, we would urge you to take a firm line in relation  
22 to H3G's pleadings, in order that there is not a continual process of discussion and debate  
23 as to what obscure passages may mean and to look at the overview of what they argued in  
24 their notice of appeal, and not allow a few ambiguous phrases to permit them now to  
25 expand their case greatly in a way that would cause substantial prejudice after Ofcom has  
26 served its full defence, at a late stage of the proceedings, and in relation to matters which  
27 were not originally argued and which are now being debated at the European level.

28 Madam, those are my submissions.

29 THE CHAIRMAN: Thank you very much, Mr. Holmes.

30 MR. PICKFORD: Madam, we wholeheartedly endorse those submissions. There were three  
31 minor points of clarification if I may ----

32 THE CHAIRMAN: Well I am not sure it is your turn, Mr. Pickford. You have already spoken  
33 and there are some people who have not spoken at all.

1 MR. PICKFORD: Abundance of caution in case you were about to say something more final  
2 than you were going to say.

3 (The Tribunal confer)

4 THE CHAIRMAN: Miss Lee, is there anything you would like to say?

5 MISS LEE: There are one or two brief points I would like to make about our appeal. One of  
6 them is a practical point which is that if the Tribunal may not have time to rule tonight on  
7 the scope of H3G's SOI in our case, and indeed the full one which has arrived back at BT  
8 but we have not seen yet, in relation to that obviously BT has a particular problem in that it  
9 is due to reply by 6<sup>th</sup> May, so it needs to know very soon what it needs to be replying to in  
10 BT's own appeals – that was the first point.

11 Generally, we agree with the approach taken by Ofcom in relation to the intervention in  
12 BT's appeal in that a large part of it does seem to us to go beyond the scope of the four  
13 corners of BT's own appeal. We, in our letter, (folder 1, tab 34) had taken a broad  
14 approach to saying that some of the points that H3G seemed to be making simply seemed  
15 to us to be setting out what the scope of their position was in their own appeal, but that  
16 when one got to s.5 of the statement of intervention there there were detailed arguments  
17 developed which do seem to us to go beyond the three points that BT has raised in its own  
18 appeal, namely, spectrum costs, admin costs and network externality.

19 Section 6 of H3G's SOI we do take a slightly different point on because we consider that  
20 that goes to the externality point and we think that some of what H3G says is actually  
21 responsive to our appeal. It is very difficult when considering s.6 because some of the  
22 points do raise the causes of traffic imbalance and to us those seem clearly to go beyond the  
23 scope of what H3G is entitled to say because we adopt the point made by Ofcom, that it  
24 should not be a back door to introducing points that H3G are not allowed to raise in their  
25 own appeal. But we do think that some of the points about distortion that relate to the  
26 position of fixed operators, and also to H3G as a mobile operator, are within the general  
27 scope of what we say on externality, and we think some of what H3G says should be  
28 admitted at a point of intervention.

29 Going back to the general points: on s.5 BT does not think it is responsive to its appeal,  
30 does not see why H3G needs to raise these points in its appeal since if they are legitimate it  
31 can raise them in its own appeal and we should not have to plead to them twice.

32 Secondly, there was a point made specifically in relation to relief by my learned friend, Mr.  
33 Kennelly, who said that it was open to parties to seek their own relief in an intervention.

34 We do not read the Tribunal's Ruling of 18<sup>th</sup> March as going that far; I think it left



1 flexibility to the Competition Commission but at the end of the day said that it is not  
2 necessarily the case that people can seek their own relief, and we still adhere to our view  
3 that it would not be appropriate, H3G can either support our relief or they can make  
4 arguments against it, but they could not advance a broad general case. Indeed, that is why  
5 they have served their own notice of appeal so that seems relevant to us.

6 In relation to the specific points made about the evidence of Mr. Yarrow and Mr.  
7 Richardson, various points were made that they may be beyond the scope of our appeal; we  
8 do not accept that. I think it is clear from our appeal what our three grounds are, and in  
9 relation first to Mr. Yarrow's points, obviously it is his expert report and he gives his views  
10 about the appropriate principles to regulation as an expert would and he sets them out.

11 Those views do not alter the fact that BT has challenged three particular things really using  
12 Ofcom's cost model. Secondly, the comments that he makes do seem to us to overlap with  
13 some of the comments that Ofcom itself makes in the defence, and in the MCT statement  
14 relating to the question of what the appropriate goal is of regulation and whether it is  
15 setting appropriate price signals, or whether it is recovery of efficiently incurred costs. We  
16 do not think that they are so broad so as to be ignored in relation particularly to our case on  
17 spectrum. We do consider that they form part and parcel of our appeal.

18 In relation to Mr. Richardson, the point that Mr. Scott made about stating factual points  
19 about distortion that seemed to us to be entirely right, and it is not that Mr. Richardson then  
20 goes on to make inferences about the courses of traffic imbalance or the use of on-net/off-  
21 net price discrimination in any way. So we consider, again entirely within the scope of  
22 BT's appeal it does not provide a springboard for H3G to introduce broader questions about  
23 the marginal pricing approach or about on-net/off-net price discrimination.

24 Those are our submissions in relation to that evidence. The only question I really leave  
25 with the Tribunal is a plea that we know what we should do in relation to our reply in  
26 relation to 6<sup>th</sup> May. Thank you.

27 THE CHAIRMAN: Now, Miss Bacon and Miss Demetriou, do you have anything that you  
28 would like to add? Miss Bacon?

29 MISS BACON: I have three very short points, the latter two of which are just practical  
30 considerations. The first point arises out of an exchange that you had with my learned  
31 friend, Mr. Holmes, at the start of his reply. Mr. Holmes made a submission which we  
32 entirely endorse, but our reading of the supplemental submissions put in by H3G is  
33 completely different to the reading that Mr. Kennelly put forward today. We had  
34 understood that he was suggesting a remedy that applies across the board, M2M, F2M, and

1 you made the comment, which I did not quite understand: “Well now we know what their  
2 case is.” Just for clarification our understanding is that what we have today is an  
3 application for permission to amend along the lines that Hutchison has set out in its  
4 supplemental submission and its witness statements. What we are not dealing with is an  
5 application that H3G might in the future make to amend its case in a completely different  
6 direction, along the lines expressed by Mr. Kennelly. So at the end of the day what we  
7 have to decide is not whether Mr. Kennelly’s submissions today fall within the scope of  
8 their original notice of appeal, but whether the pleaded case in their supplemental  
9 submissions falls within that. So that is just a clarification from our part; I am not sure if  
10 you meant anything different.

11 The second and third issues are also practical matters. If Hutchison’s application to amend  
12 fails, we have a real concern as to what we have to plead to on NPZ and that was something  
13 that we raised in our letter to the Tribunal.

14 From our perspective, whatever Mr. Kennelly said about the alternative cases, and I must  
15 confess I got completely lost as to how many alternatives there were, but from our  
16 understanding from the pleaded case, which is the only written case we have in front of us,  
17 is that Hutchison is no longer proposing a zero NPZ remedy, and that is as explained in the  
18 witness statement of Mr. Westby and Mr. Russell. They are no longer proposing what they  
19 originally advocated in their notice of appeal which is net payment zero, or zero pence per  
20 minute. Now if that is the case we do not need to plead to this. If there is some remaining  
21 case at the end of it, then I am not sure what it is, because Mr. Kennelly said today that  
22 essentially it was all one and that what they were saying today was a refinement of what he  
23 said earlier. So our position and our understanding is that Hutchison has abandoned its  
24 original NPZ case and replaced it with something different. If that is the case, if they fail  
25 today then we do not have to answer any of this in our statement of intervention. I just  
26 raise that as a practical concern as to what my happen following your ruling on the issue.  
27 The third point is again a practical question which you raised earlier today, how we dissect  
28 the arguments as pleaded in the supplemental submissions and do we have to go through  
29 paragraph by paragraph what Hutchison has said and try and blue pencil it. In our  
30 submission you will have seen from our schedule that we would propose a somewhat  
31 broader brush approach. We read most of what Hutchison has said in its supplemental  
32 submissions as going to its new NPZ argument – what it terms NPZ, but which is  
33 reciprocal low MCT rates, and on that basis we would submit a broad brush approach. We  
34 would not suggest going through line by line and trying to work out what is the old NPZ?

1           What is the new NPZ? We read this as all falling squarely within the new NPZ argument,  
2           and on that basis we would say, as we said in our schedule, that simply large sections of the  
3           witness statements, and most of the supplemental submissions should be struck out.

4           That is all I had to say in addition to what Mr. Holmes has already very eloquently said.

5   MISS DEMETRIOU: Madam, I do not want to add anything substantive, but I do – since we are  
6           here – just want to register Orange’s very strong concern about the prejudice that is being  
7           caused by this very late application in terms of cost and expense to the intervening parties,  
8           and to say that really no good reason has been put forward by Mr. Kennelly today to  
9           demonstrate why these matters are raised so late when the notice of appeal was lodged in  
10          May – almost a year ago – and amended again in November. No good reason has been put  
11          forward to explain why it is only being dealt with now. Indeed, on the contrary he has  
12          relied in his favour on the fact that much of this work was done before November. So in  
13          those circumstances I do echo what Mr. Holmes said and urge the Tribunal to adopt a firm  
14          line in this case. I do not have anything to add to the points made by Mr. Holmes, and the  
15          other intervening MNOs, which we endorse.

16   THE CHAIRMAN: Thank you very much. Mr. Pickford, please be very brief.

17   MR. PICKFORD: Madam, I will be very brief – I only have two and a half points now. The half  
18          point is on the first point that Miss Bacon made, which is a plea for clarity, because I can  
19          quote from Hutchison’s supplementary submission ----

20   THE CHAIRMAN: Well let me just ask Mr. Kennelly. My understanding was that you strongly  
21          resisted any suggestion that you had abandoned NPZ in its pure form of zero ----

22   MR. PICKFORD: Sorry, that was the second point that Miss Bacon made. The first point she  
23          made concerned something different, but I am happy to get clarification on that too.

24   THE CHAIRMAN: Would you like to answer the question I put, Mr. Kennelly?

25   MR. KENNELLY: Madam, yes. I refer my learned friends – all of them – to our written answer  
26          on this point. It is for us to abandon our case and we will decide when to abandon our case.  
27          We do not abandon our case in favour of zero pence per minute. It may not be practical in  
28          the end before the Competition Commission, and that is why we flag other practical  
29          solutions to achieve the same goal. Rightly or wrongly we do not abandon the zero pence  
30          per minute ----

31   THE CHAIRMAN: But if you were to have made no headway with us today so that you are put  
32          back effectively in the position that you were in before you lodged your supplemental  
33          material, then other parties would still have to respond on the NPZ as it appears in your  
34          amended notice of appeal as people understood it before you explained it to us today.

1 MR. KENNELLY: Certainly, madam, yes, we would expect full responses on that point and we  
2 would argue it before the Competition Commission also.

3 THE CHAIRMAN: Yes, Mr. Pickford?

4 MR. PICKFORD: Thank you, madam. The half point is that Hutchison's supplemental  
5 submissions currently say in terms that s.3 sets out the precise form of the remedy; that is  
6 what it says. The precise form of the remedy is that Hutchison proposes that prices for  
7 M2M, and F2M calls should fall to the level of fixed call termination. We have now been  
8 told that that is not the remedy they are seeking and quite clearly there needs to be some  
9 clarification given in relation to this. We have proceeded on the basis of what is written  
10 **here** and what has been said today is wholly different to that.

11 Secondly, the Tribunal's reasoning on on-net/off-net price discrimination, it might benefit  
12 from a very short point of clarification, and we have indeed today in the bundle of  
13 authorities which Hutchison has provided, the Tribunal's ruling on refusal of permission to  
14 appeal to the Court of Appeal. If the Tribunal would turn very, very briefly to para.13 of  
15 that ruling, at tab 3 of the authorities.

16 THE CHAIRMAN: Yes.

17 MR. PICKFORD: If the Tribunal would be kind enough to turn to par.13(e). In my submission  
18 this has been slightly mischaracterised by Mr. Kennelly. "The reference in the price control  
19 appendix to the on-net/off-net in relation to market shares", and if one goes to the end we  
20 see the Tribunal saying: "H3G refer to this in order to cast doubt on the accuracy of the  
21 market share forecast used by Ofcom." Then: "Countering this point would not require  
22 Ofcom to undertake the investigation analysis referred to in paragraph (c) above." If we go  
23 to (c) above we see that there are three things that the Tribunal noted would need to be  
24 considered and the first of those is: "An analysis of the tariff structures of the other MNOs  
25 to see if there is indeed a differential between on-net/off-net retail price as H3G allege." So  
26 it is not merely the repercussions of the on-net/off-net price discrimination to the extent that  
27 it exists, it is the very fact of it and if one goes further back ----

28 THE CHAIRMAN: Yes, I seem to remember it was because the tariff structure, and if you are  
29 on a monthly contract then you get a certain number of minutes per month then you may  
30 pay exactly the same whether it is on-net or off-net.

31 MR. PICKFORD: Absolutely, madam, and that is the point that is being made in para.37 of the  
32 first ruling that the Tribunal is referring back to. So the very existence of the differential to  
33 the extent that it exists would be a matter in dispute, in issue, and is not accepted and that  
34 was quite clearly contained within the Tribunal's reasoning there.

1 The third and final point is that Mr. Kennelly suggested that we offered no particulars  
2 whatsoever of the extra matters that we say would need to be undertaken. To my  
3 knowledge I offered six – I do not need to remind the Tribunal of what they were, unless  
4 the Tribunal would like me to – but certainly we did offer particularisation of the additional  
5 matters.

6 THE CHAIRMAN: Well that will appear in the transcript.

7 MR. PICKFORD: I am grateful.

8 MISS McKNIGHT: I have only two very small points. First, I would like to support what  
9 Ofcom has said in reply but I would like to go back to bundle F3, to which Mr. Holmes  
10 took the Tribunal, at pp.250, 251 of the bundle numbering. Mr. Holmes was seeking to  
11 clarify para.4.4 of the original price control appendix to the notice of appeal. You need not  
12 look at that but I will just remind you that in explaining that the NPZ remedy did not  
13 necessarily entail a zero balancing payment, but might have entailed something immaterial,  
14 Mr. Kennelly took us to 4.4 and pointed out that it says either you can have NPZ  
15 indefinitely, or in the alternative it could be considered as part of a glide-path approach,  
16 while fit for purpose MNP is introduced in the UK and takes effect. So he saw this as  
17 possibly a short term measure until one of the key factors of the alleged distortion is  
18 addressed.

19 I think it is quite clear, having heard Mr. Holmes, that what H3G was saying in response to  
20 the earlier consultation was exactly this point, and glide-path did not mean gliding from  
21 0.6 down to zero, but clearly meant some interim flexing of the cost-reflective charge  
22 controls to achieve a net payment of zero in light of actual traffic balances. The point that  
23 Mr. Holmes made is quite right, that p.251, para.8.2.2 does make clear that H3G is looking  
24 for a glide-path which would achieve a neutral competitive position. The graphs over the  
25 page show that he has in mind very high pence per minute charges. The point I want to add  
26 is that if one goes on to look at the top of p.253, H3G goes on to say that:

27 “H3G notes that Ofcom’s recently published proposals for amending general condition 18  
28 in relation to MNP will not take effect until 2009.”

29 – well into the proposed price controlled period. He goes on to say therefore you have to  
30 take account of this continuing distortion in the glide-path. So it is quite clear that the  
31 reasoning in the pages of this response to consultation, exactly mirrors the reasoning in  
32 para.4.4 which is the glide-path which is contemplated is a high pence per minute glide-  
33 path pending resolution of the alleged problems of MNP. That is my first point.

1 Just one more point and that is I note that Mr. Kennelly's submission is that when H3G put  
2 in its notice of appeal and just said that if we were to end up with NPZ for mobile-to-  
3 mobile charges, there should be a suitable cost-based fixed-to-mobile charge control. It is  
4 now his case that H3G did not know what it meant by a suitable cost methodology at that  
5 stage, and it admits that it is only later that it has elaborated what would be a suitable cost  
6 methodology. I do not see how that can comply even with the requirements that the put in  
7 a proper outline of their price control case, since I think the Tribunal has made clear that  
8 whilst there was a permission to elaborate on the price control matters, post the notice of  
9 appeal, the notice of appeal was intended to comply with the Tribunal rules which require a  
10 succinct statement of the facts and arguments on which the appeal is based, and on his own  
11 admission they did not know what case they were going to advance at that stage.

12 We say the only possible reading of the notice of appeal in a manner that would bring it  
13 into compliance with the rules is to read it as meaning that the only cost based methodology  
14 in contemplation is either Ofcom's methodology, or Ofcom's methodology as adjusted in  
15 light of the specific criticisms made in the alternative case. Nothing we have heard today  
16 makes us think otherwise and we consider that what is now proposed is such a material  
17 departure from anything that was contemplated that it would self-evidently require a  
18 massive amount of work and result in what Professor Bain suggested was a radically  
19 different approach, which the European Commission is only now beginning to contemplate.

20 Thank you.

21 THE CHAIRMAN: Thank you very much. No one else is jumping up? So thank you to  
22 everybody for sitting late, we decided to sit late this evening rather than go over to  
23 tomorrow morning, not least because our shorthand writers are not available tomorrow, and  
24 may I take this opportunity to thank them for working late; of course, that means that it  
25 may take a little longer to get the transcript than would normally be the case but that will be  
26 got to you as soon as possible. We have in mind, of course, Miss Lee's point about the  
27 need to clarify the position as soon as possible, given that the timetable for the further  
28 proceedings before the Competition Commission is ticking away, but this is a complicated  
29 matter and we will notify you as soon as we have come to a decision. Thank you very  
30 much.

31 \_\_\_\_\_