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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1093/3/3/07

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

12<sup>th</sup> November 2007

Before:  
MARION SIMMONS QC  
(Chairman)  
MICHAEL BLAIR QC  
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**T-MOBILE (UK) LIMITED**

Appellant

- v -

**THE OFFICE OF COMMUNICATIONS**

Respondent

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

Mr. Rupert Anderson QC (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared for Hutchison 3G UK Limited, the potential intervener

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**CASE MANAGEMENT CONFERENCE**

1 THE CHAIRMAN: Good afternoon. Unusually I am not going to make any opening remarks.  
2 I think we can go straight to the agenda unless anybody has any other suggestions. (*No*  
3 *response*) The first item is the forum of the proceedings. I think that is England and Wales  
4 – yes? Permission to intervene - there is the H3G permission to intervene. Our view is that  
5 you should be granted permission to intervene unless anybody is saying differently?

6 MR. PICKFORD: Madam, we certainly do not object to permission being granted. We simply lay  
7 down a marker that the application contains quite a lot of discussion of what H3G perceives as  
8 the deficiencies of mobile number portability. That is not an issue in the appeal and obviously  
9 I am sure H3G will limit its intervention to matters that are actually in issue.

10 MR. KENNELLY: Madam, we are grateful for my learned friend's agreement for us to intervene.  
11 We would contend that the matters relating to MNP are crucial to the context of the appeal,  
12 and as Ofcom has acknowledged in its investigation of the matter and therefore we will be  
13 addressing it in the statement of intervention, but strictly limited to the issues between the  
14 parties of course.

15 THE CHAIRMAN: Well we will see when we see the statement of intervention, but certainly I  
16 wondered how these points might arise in the appeal, so it has to be made very clear how they  
17 do arise in the appeal?

18 MR. KENNELLY: Of course, and we will not duplicate any of what Ofcom say; it is appropriate for  
19 us to follow Ofcom and we are here to support Ofcom in its defence of the DCC decision, and  
20 that will of course inform what we say in our statement of intervention, but there are context  
21 issues where we can add valuable material to what Ofcom may say in its defence to the appeal.

22 THE CHAIRMAN: Well you are party to the dispute and you are the referring party, so it is rather  
23 difficult to say that you do not have an interest.

24 MR. KENNELLY: Indeed, I am very grateful.

25 MR. ANDERSON: We do not oppose, as you know from our letter, any intervention by H3G. We  
26 have not been formally informed by anybody else that they wish to intervene but there may be  
27 others because item 2 includes likely to intervene by the deadline on 15<sup>th</sup>.

28 THE CHAIRMAN: Yes, and the deadline is the 15<sup>th</sup> and that is not being extended – Thursday of  
29 this week as I understand it – we have not had any other applications, but we will see up until  
30 Thursday.

31 MR. ANDERSON: If there are other applications of course we reserve our position, but it may be  
32 possible to deal with at least interventions from obvious parties on paper.

1 THE CHAIRMAN: Yes. I do not know if anybody is here today, or whether they want to reveal  
2 their hand. (*No response*) Nobody wants to reveal their hand anyway. We cannot do any  
3 more about interventions, but the date is the 15<sup>th</sup>.

4 The issues likely to arise?

5 MR. ANDERSON: It is not my appeal but we would certainly identify the Tribunal's own summary  
6 of the appeal as a very good description of the issues thus far. There is, of course, an  
7 application to amend the notice of appeal ----

8 THE CHAIRMAN: Yes.

9 MR. ANDERSON: -- which we say would broaden the scope, but at the moment there is probably  
10 little more that can be said on identifying the issues, at least until the defence has been filed.

11 THE CHAIRMAN: I think we have two or three points on this, and they arise in relation to the  
12 issues in the appeal. They also arise in relation to the question of the date of the defence, I  
13 think. The first thing is that we are not clear as to the point which is actually being disputed in  
14 para.54 in the notice of appeal. I am looking at the original version because we have not  
15 looked at the amended version. It is not clear to us whether the ground of appeal is that Ofcom  
16 failed to have regard to the question of an industry-wide approach when deciding that it was  
17 appropriate for them to handle the dispute, i.e. that effectively one is appealing the decision to  
18 handle the dispute rather than the decision on the termination of the dispute.

19 MR. ANDERSON: Yes.

20 THE CHAIRMAN: And it is not clear as to whether that is what is being said. In para.54 it is  
21 pleaded that this matter was raised by T-Mobile at the time. We do not know what effect that  
22 has. Section 186(4) requires Ofcom to give its reasons for deciding to handle the dispute as  
23 well as giving its reasons for deciding not to handle the dispute, but I do not think we have the  
24 reasons so one cannot tell whether on the face of it, it was taken into account, although it does  
25 look as if it was put before them because of the fact that it was pleaded that it was raised by T-  
26 Mobile, so that is an issue that probably needs to be clarified.

27 MR. PICKFORD: If I could clarify what was intended to be pleaded, it is as the Tribunal has just  
28 stated. The former pleading that Ofcom failed to have regard to the extent of its powers at the  
29 time of deciding to handle the dispute and that is as set out at the end of that paragraph.

30 "It appears from Ofcom's assessment of its own powers that Ofcom failed to have  
31 regard to this possibility in its assessment."

32 And that is in its assessment at the time of handling the dispute.

33 THE CHAIRMAN: Not deciding the handling?

34 MR. PICKFORD: Yes, at the time of deciding to handle the dispute.

1 THE CHAIRMAN: Right. So that does raise the question of whether you can appeal that point now  
2 or whether you are estopped once Ofcom go on to the handling dispute. I think this is one of  
3 the points raised in Orange.

4 MR. PICKFORD: It is a point that is raised in Orange. I am sure Mr. Anderson will be able to  
5 clarify that. My understanding is that Ofcom's position is that one can take all of the points  
6 that might be relevant including jurisdictional ones going to whether the point should have  
7 been handled at the very end of a dispute when they finally determine it so as to prevent people  
8 from having to bring an initial appeal and then a subsequent one.

9 THE CHAIRMAN: The only question is whether they took into account the question of the  
10 industry-wide approach.

11 MR. PICKFORD: Well, it is whether they took it into account properly, so it is whether they took it  
12 into account and whether they gave proper and sufficient regard to it if they did take it into  
13 account.

14 THE CHAIRMAN: Of course that may come out or should come of the reasons for handling the  
15 dispute, which we have not seen.

16 MR. PICKFORD: Madam, as far as I am aware, but again Mr. Anderson I am sure can correct me,  
17 the summary of the reasons for handling the dispute are included in the publication that Ofcom  
18 puts on its website.

19 THE CHAIRMAN: We have not researched that.

20 MR. PICKFORD: Which is the competition bulletin, and a copy of that is included at annex 3 of the  
21 appeal. (After a pause) There is an update note, and then there is an end of update note, and  
22 then it continues: "H3G is in dispute with each of the MNOs as a result of a failure to agree a  
23 reduction in the Donor Conveyance Charges. It continues over the page ----

24 THE CHAIRMAN: The "End of update note"?

25 MR. PICKFORD: Yes, it begins after, as I understand it, end of update note, that is Ofcom's  
26 explanation as to ----

27 THE CHAIRMAN: As to why they were taking on the dispute.

28 MR. PICKFORD: As I said, I am sure Mr. Anderson can give greater clarification, but my  
29 understanding is that when Ofcom decides to handle a dispute what it issues is an update on its  
30 competition bulletin, and this is what it issued to describe its reasons. If there is another  
31 document that sets out further reasons I am sure Mr. Anderson can assist.

32 MR. ANDERSON: If I may?

33 THE CHAIRMAN: Yes.

1 MR. ANDERSON: All the documents are not before you because the documents explaining why we  
2 assumed jurisdiction were contained in a letter sent to the parties when we originally sent the  
3 request for the review to the parties they then wrote back and commented explaining why they  
4 did not think it was a good idea, and we then replied to that.

5 THE CHAIRMAN: And one of the points that T-Mobile made was this point?

6 MR. ANDERSON: Well it did not in fact make this point. The point they made was that as a matter  
7 of remedy you should employ an industry-wide solution.

8 THE CHAIRMAN: That is why I was not sure that this was a point that goes to jurisdiction, or  
9 whether it just goes to the remedy wide ----

10 MR. ANDERSON: I think it would be helpful if they were to clarify because although they may end  
11 up in much the same position if they are right on both, they are two different points.

12 THE CHAIRMAN: Yes, but what has just been submitted is that they are saying that there was no  
13 jurisdiction – no, what they are saying is that ----

14 MR. ANDERSON: What they are saying is that we should not have accepted these disputes because  
15 there were alternative means of resolving them, namely, an industry-wide solution. They are  
16 also saying there is a defect in these decisions because the remedy should have been not to  
17 back date, but you should amend condition 18 for the industry as a whole. So they are two  
18 points. It was only the latter of the two points, as I understand it, that was raised initially.

19 THE CHAIRMAN: Right.

20 MR. ANDERSON: But that would need to be clarified and we will deal with it in due course, but I  
21 think they are two slightly different points and it is not abundantly clear from that particular  
22 paragraph which of the two, or whether it is both.

23 THE CHAIRMAN: Which is why we have raised it.

24 MR. ANDERSON: Yes, absolutely.

25 MR. PICKFORD: If I can reply to that? There are indeed two separate points being made, and they  
26 are the two separate errors identified at error 1, which is paras. 52 to 53 and then error 2, which  
27 is para.54. Error 2 at para.54 concerns Ofcom’s failure to have proper regard to the extent of  
28 its powers when deciding to handle the dispute.

29 THE CHAIRMAN: Not to the remedy?

30 MR. PICKFORD: Not to the remedy, and error 1 concerns the extent of its powers when  
31 determining the dispute and imposing the remedy. We had considered that they had been set  
32 out clearly, but if further clarification is needed obviously we are happy to provide it.

33 THE CHAIRMAN: I did look at the amendment to see whether that paragraph had been amended to  
34 make it clear. The reason that I think it is not clear is when you look back at what the errors

1 are in para10, it does not very clearly come out from that. So if those are the three grounds it is  
2 not clear from that that one is saying they should not have taken on this dispute.

3 MR. PICKFORD: No, para.10 is merely a very broad summary of the nature of the appeal, but the  
4 grounds themselves are set out at (a), (b) and (c) in the paragraphs that follow.

5 THE CHAIRMAN: Well that is not very clear either – is it (a), (b) and (c) under 3 from p.9?

6 MR. PICKFORD: Yes, “Grounds of Appeal”, subsection 3 sets out the grounds.

7 THE CHAIRMAN: Yes, then you get 54?

8 MR. PICKFORD: Yes.

9 THE CHAIRMAN: Which is error 2, and error 2 is that they failed initially to take this into  
10 consideration when they were deciding whether to determine the dispute.

11 MR. PICKFORD: Yes, error 2 within subsection (b).

12 THE CHAIRMAN: (b)(1) yes.

13 MR. PICKFORD: There is (b)(1) and (b)(2).

14 THE CHAIRMAN: Yes, and this is (b)(2).

15 MR. PICKFORD: They are also set out in the table of contents if one goes to there for an overview  
16 of all of the grounds to see how they sit together – section III: Grounds of Appeal sets out  
17 section A, three sub-errors, section B, two sub-errors; and finally, section C. So there are a  
18 total there of six grounds of appeal that are pleaded. Paragraph 10 was not intended to  
19 individually encapsulate each ground. It was simply intended, because it was in the  
20 introductory section, to give a broad flavour of the nature of the issues raised.

21 THE CHAIRMAN: Right, we will have to come back to that in a moment because that affects your  
22 application for an extension of time?

23 MR. ANDERSON: Well in a sense it does. The only point I was making was it was not abundantly  
24 clear from para.54 that the two points were being made, but it is when you read the entire  
25 document. I think we were certainly working on the basis that those two points were being  
26 taken.

27 THE CHAIRMAN: Well you certainly wrote a letter which suggested that that point was being  
28 made.

29 MR. ANDERSON: Yes, and of course, those two points are picked up in your own summary of the  
30 appeal, where you identify Ofcom misdirected itself –

31 “2(a) Ofcom misunderstood its role in relation to determination of disputes under  
32 sections 188 and 190 of the Act and misdirected itself in law by failing to have regard  
33 to the possibility of determining the dispute via the modification ...”

1 (b) Ofcom failed to have proper regard to the full extent of its powers to decline to  
2 handle a dispute on the basis that an alternative means ...”

3 THE CHAIRMAN: Yes, but our summary is not conclusive of what they be in the real document, so  
4 I needed to clarify that.

5 MR. ANDERSON: Of course, I accept that.

6 THE CHAIRMAN: Going on from there, we just were thinking the point through a little bit further,  
7 and we note (and this is something really for consideration hereafter) that s.186(6) together  
8 with section 188(2) effectively removes any discretion on the part of Ofcom where Ofcom  
9 decides unilaterally not to handle the dispute, but then the dispute is not resolved within the  
10 four months and the matter is then referred back to them. In this case more than four months  
11 has gone by, so we just wonder whether those provisions have any relevance to the point that is  
12 being made in para.54 now that you have elucidated it, because if it had been referred back to  
13 them they would have had to have decided it in any event.

14 MR. ANDERSON: I see the point, we will have to think about it because it may be whether the fact  
15 that we did take jurisdiction somehow suspends the operation of the timetable, we will need to  
16 think about it.

17 THE CHAIRMAN: It is some sort of background as to how you interpret the section; we noticed it  
18 and we thought we ought to raise it. What effect it has – if any – we do not know, but it just  
19 seemed to us that as it was in our mind we ought to raise it.

20 MR. ANDERSON: It is very helpful.

21 THE CHAIRMAN: We will come back in a moment to whether or not the preliminary point in  
22 December has an effect on the timetable, so let us just leave that over for a moment. As I  
23 understand it, it is case 1080, the Orange case – yes. Another issue is from which date should  
24 the determination apply? We wonder whether certain clauses of the agreement ought to be  
25 considered and they are in particular – the ones that we have looked at – 8.1, 9, 22.2, 32.1 and  
26 32.4, 32.5, 32.6 and part 3 of annex D. I will not take you through all those, it is a matter of  
27 having a look at them and seeing how they may or may not have relevance to the way that  
28 Ofcom were looking at that point.

29 The next issue which we thought we would raise is on the question of retrospective  
30 determination and we wonder whether s.190(2)(d) may have some relevance because it does  
31 look there that there could be over payments and under payments which have to be repaid, and  
32 therefore that does suggest that there is some power for retrospective determinations.

33 MR. PICKFORD: Madam, I do not know if now would be a convenient moment just to address and  
34 perhaps clarify that point. The allegation made in the grounds of appeal is not that there could

1 be no power at all but that retroactivity is only appropriate in very limited circumstances, and  
2 the particular circumstances were not ones that arose in this case.

3 THE CHAIRMAN: But is that your subjective analysis?

4 MR. PICKFORD: No, the subjective objective analysis is the contractual point, the point about retro  
5 activity, which is ground A3, we say as a matter of Community law there are only very strict  
6 circumstances in which you can have retroactivity.

7 THE CHAIRMAN: Yes.

8 MR. PICKFORD: And we are not saying necessarily that they could never arise and there could be  
9 no power as a matter of statute, if that is of any assistance, just to clarify the point we are  
10 making.

11 THE CHAIRMAN: Yes, but it does appear that s.190(2)(d) indicates that there may be retroactivity.  
12 I have not looked at these cases so I am not going to comment at all on these cases. The other  
13 question is looking at the framework directive which is where all this came from, and I have  
14 not looked at that to see what powers of retroactivity are included in that. We understood what  
15 you are saying here but the question is whether or not the legislation has any effect on that.

16 MR. PICKFORD: Yes, madam, we will certainly have regard, as I am sure Ofcom will to the points  
17 raised.

18 THE CHAIRMAN: I think that is on the issues, unless you have anything to raise on the issues.

19 MR. ANDERSON: Other than the issue in the Orange appeal.

20 THE CHAIRMAN: Yes, that goes to the question of the timing and the timetable.

21 MR. ANDERSON: Yes, it does.

22 THE CHAIRMAN: So the next matter on the agenda is whether any further documents are  
23 necessary and also (5) which is any issues regarding disclosure. As I understand it there may  
24 be an issue as regards disclosure, but that is awaiting the defence?

25 MR. PICKFORD: Yes, madam. We certainly do not propose to make any application for disclosure  
26 at the moment. I would just say in relation to Ofcom's current stance, which is that they say:  
27 "We will strongly resist any application for disclosure of the form set out", we are slightly  
28 surprised by that because we understand that Ofcom has not yet had the chance properly to  
29 consider the merits of our appeal, and obviously Ofcom has a duty of candour as a public  
30 authority and also has a duty not to fetter its discretion prior to having actually considered  
31 whether it is appropriate or not in the particular circumstances of this case.

32 THE CHAIRMAN: Of course, documents which go backwards and forwards discussing before you  
33 make a decision are not relevant – one should be looking at the decision and the reasons given  
34 for the decision.

1 MR. PICKFORD: Certainly, the decision is the principal document, but that in our submission does  
2 not mean that disclosure may not be appropriate in certain circumstances, and we say it may be  
3 appropriate here, but we are willing to see what Ofcom say in their defence. The reason why  
4 we say “It may be appropriate” is that we say it is not actually clear on the face of the decision  
5 whether Ofcom chose to act in the way it did in deciding to handle the dispute and/or in  
6 determining the dispute because it was not clear what options were actually open to it in law,  
7 or whether it was clear what options were open to it in law, but it exercised its discretion in a  
8 particular way. So it may be that disclosure is of some assistance in probing that particular  
9 issue, but we are happy to wait until the defence is served to see what they have to say.

10 THE CHAIRMAN: On that point we need to see the reasons why they decided to handle the  
11 dispute, which is in a letter which we do not have before us today.

12 MR. PICKFORD: We are happy to see what they say in their defence. It may be that some of the  
13 reasons are in documents that we have not seen in the case, disclosure may be appropriate  
14 again.

15 THE CHAIRMAN: What they cannot do, and therefore you should not be entitled to disclosure of  
16 it, are documents which are not elucidating the decision, but are discussing whether or not they  
17 should make the decision.

18 MR. PICKFORD: We say one category of document that might elucidate the decision is a document  
19 which may also contain a discussion of how they make the decision and that is in relation to  
20 the point I have just made, but as I say it is premature at the moment.

21 MR. ANDERSON: I think the only point of saying what we did in our letter was simply to put T-  
22 Mobile on notice that a request that is as wide as “... wish to seek disclosure from Ofcom of all  
23 documents in Ofcom’s control relevant to its internal thinking on...”

24 THE CHAIRMAN: I think the words “internal thinking” are the words that make one a bit  
25 concerned about what the disclosure is that is being requested.

26 MR. ANDERSON: In due course, if further disclosure is appropriate or necessary a more specific  
27 request with more obvious reasons for it would be needed than what we currently have which  
28 is stated to be the request they will be making subject to our defence.

29 MR. PICKFORD: Madam, it was not an application, it was merely in order to put Ofcom on notice  
30 – it was intended to be of assistance, but obviously ----

31 THE CHAIRMAN: It obviously has not been!

32 MR. PICKFORD: If it has not been then we will revisit it in due course if necessary.

33 THE CHAIRMAN: Well if it is revisited then the words “internal thinking” possibly ought to be  
34 revisited.

1 MR. PICKFORD: We will certainly consider that, although we suggest that there might be  
2 circumstances in which internal thinking is relevant, notwithstanding dropping ----

3 THE CHAIRMAN: Well let us just see what happens. Confidentiality – this is raised, I think, in  
4 Ofcom’s letter last week, and I think it is raised in relation to two matters, one the  
5 determination and the other is the witness statement. In relation to the witness statement there  
6 is a confidential and non-confidential version?

7 MR. ANDERSON: Yes.

8 THE CHAIRMAN: In relation to the determination, as I understand it, we only have the non-  
9 confidential version?

10 MR. ANDERSON: Yes.

11 THE CHAIRMAN: And I think what Ofcom are saying is that we do not need, for the purposes of  
12 this, the confidential version.

13 MR. ANDERSON: The confidential information, as I understand it, and I have only personally, I  
14 think, seen the non-confidential version, there does not at the moment appear to be any  
15 challenge to the actual figure of the determination.

16 THE CHAIRMAN: No, I think it is agreed that 0.1p was put up to you as the right figure.

17 MR. ANDERSON: Yes, and the excisions in the determination relate to the underlying costs from  
18 which that was derived and we do not believe that will be an issue so that should not be a  
19 problem. The excisions in Mr. Miller’s witness statement relate to an impact on T-Mobile in  
20 particular -----

21 THE CHAIRMAN: Well we do not have to deal with that for the moment.

22 MR. ANDERSON: No. For our part we are perfectly content for the Tribunal to see the confidential  
23 version of the determinations, but we would be unhappy for that version to be ----

24 THE CHAIRMAN: Well we cannot see something that the parties do not see, so we would then  
25 have to resolve that if it became necessary.

26 MR. PICKFORD: Madam, I may be able to assist because it is our appeal, and we do not rely on the  
27 confidential version, so in that case I do not think any issue arises. Mr. Anderson is not quite  
28 right, we are not challenging in any way the specific figure of 0.1p.

29 THE CHAIRMAN: No, and when we come to dealing with the witness statement we will have to  
30 think about how we deal with it.

31 MR. PICKFORD: If I could just potentially assist the Tribunal in relation to that, the purpose of the  
32 witness statement is very limited indeed. It is merely to demonstrate for the benefit of the  
33 Tribunal and Ofcom that this is a real issue for T-Mobile which has a material impact on it.  
34 Beyond that it does not actually go to any specific grounds of appeal and so we would suggest

1 that there is no need for any of the other proposed interveners or any other potential interveners  
2 to see that particular information.

3 MR. KENNELLY: Madam, for the sake of completeness, we do not contend that we need to see it or  
4 ought to see it at this stage. It is not in issue.

5 THE CHAIRMAN: Any directions relating to evidence? I would have thought we do not know yet?

6 MR. ANDERSON: We are not seeking any today.

7 THE CHAIRMAN: No. So we get to the timetable, and this is where the question of the other cases  
8 becomes relevant.

9 MR. ANDERSON: Well there are essentially three reasons why Ofcom is seeking an extension in  
10 time to serve its defence, and they are: first, the workload that Ofcom is currently facing,  
11 secondly, the existence of a preliminary issue in another case which has now been listed for  
12 hearing on 11<sup>th</sup>/12<sup>th</sup> December in the Orange case; and thirdly, a pending application to amend  
13 the notice of appeal, that application raising what we would believe to be a new ground – it  
14 certainly broadens the scope of the appeal – and we need time to consider that.

15 THE CHAIRMAN: Does that mean we are going to have to have another case management  
16 conference in this in relation to the new ground of appeal – are we going to be able to deal with  
17 that on paper?

18 MR. ANDERSON: We simply only saw it a few hours ago and I have not taken instructions fully on  
19 it. It may be that we consent, it may be that there is an issue, but it may well be possible to  
20 deal with it on paper. But, as I say, we are simply asking for a little longer to consider the  
21 terms of the draft amendment. One can appreciate it is clearly closely associated with the  
22 points that have been raised, but it is a broader point. It arose out of discussions about the  
23 scope of your powers in relation to this dispute and the desire to ensure that this Tribunal is the  
24 forum in which the matters are ventilated. We simply were a little surprised to find an actual  
25 draft in front of you today with a request, so a slight misunderstanding that arose over the  
26 weekend has been clarified and we just need a little more time to deal with it.

27 THE CHAIRMAN: I have not looked at it so I cannot help.

28 MR. ANDERSON: No, but it is a further matter that needs to be resolved, which is relevant we  
29 would say to further time.

30 As far as the work load is concerned, and I understand that that may not be the most common  
31 basis for a Regulator asking for further time, but the particular circumstances are that we have  
32 14 appeals before the Tribunal at the moment.

33 THE CHAIRMAN: How many of those are live?

34 MR. ANDERSON: Well I think they are all live.

1 THE CHAIRMAN: No.

2 MR. ANDERSON: (After a pause) I am told about eight to ten. The principal ones are: the mobile  
3 call termination appeal, which is an appeal by Hutchison 3G against Ofcom's significant  
4 market power finding and the imposition of a charge control. The level of the charge control  
5 has been appealed by BT, that as been referred to the Competition Commission but of course  
6 that does not get Ofcom off the hook because it still has to appear in those proceedings.

7 THE CHAIRMAN: Yes.

8 MR. ANDERSON: I have a document here that summarises some of the deadlines that have been  
9 set by the Tribunal in some of these cases. If I could hand that up because of course there is  
10 another ----

11 THE CHAIRMAN: As I understand it, I think T-Mobile and H3G are involved either directly or as  
12 interveners in all the seven cases, is it?

13 MR. ANDERSON: All the mobile phones ----

14 THE CHAIRMAN: Yes, the mobile phone companies.

15 MR. ANDERSON: The termination appeals and the termination rates' dispute appeals, and it is one  
16 of the termination rate disputes' appeals in which Orange has taken the preliminary point.

17 THE CHAIRMAN: Yes.

18 MR. ANDERSON: In addition to the actual appeals before the Tribunal, there is also the pay-tv  
19 investigation that Ofcom is undertaking. The consultation on number portability itself, the  
20 review of general condition 18 in which we are due to issue a statement at the end of this  
21 month.

22 THE CHAIRMAN: When you issue the statement is that the end of that, out of interest?

23 MR. ANDERSON: Yes, it is the end of that process.

24 THE CHAIRMAN: How does that impact on this? You may not be able to say how it does.

25 MR. ANDERSON: Could you bear with me just one moment?

26 THE CHAIRMAN: Yes.

27 MR. ANDERSON: (After a pause) It is one of the mechanisms that has been suggested to us as a  
28 way that these disputes could have been resolved, but I am not in a position to say what impact  
29 it will have because the statement is not due to be issued until the end of the month.

30 THE CHAIRMAN: No, that is why I said you may not be able to tell us, but hypothetically if the  
31 situation was that it determined that across the board it should be whatever price it should be  
32 then how does that impact on this appeal?

33 MR. ANDERSON: I am told the rate itself is not part of the consultation.

1 THE CHAIRMAN: It is a question of whether or not it is done in the way it is done, or whether  
2 there should be ----

3 MR. ANDERSON: A move to direct connection.

4 THE CHAIRMAN: Yes, which means that there would be no charge?

5 MR. ANDERSON: Yes, so it may have an impact, I cannot say that it will have an impact. There  
6 are of course other cases – the Rapture appeal, freedom of information appeal in the High  
7 Court, there is Floe in the Court of Appeal coming up in the early New Year.  
8 The point is that the particular problem that Ofcom is faced with at the moment is that the team  
9 involved in mobile phone termination rate appeals in particular, the consultation and the ----

10 THE CHAIRMAN: Are all the same people?

11 MR. ANDERSON: They are the same people, and if you see from the document I have handed up to  
12 you, there is quite a tight timetable between now and Christmas, and then the hearings in the  
13 mobile call termination appeals and the overlapping issues in the termination rate disputes’  
14 appeals coming on at the end of January. We are really hard pressed to meet the current  
15 deadline when the time for serving an appeal would otherwise expire, subject of course to the  
16 notice of appeal being amended - that in itself might be a reason for further time.  
17 Another point arises in the context of the Orange appeal, and if I could just hand up a clip of a  
18 few documents that I have handed to my learned friends? (*Documents handed to the Tribunal*)  
19 The first document is an extract from Orange’s notice of appeal, the relevant ground is the  
20 ground set out in 32(a): “The appellant contests ...”

21 THE CHAIRMAN: Yes, can I just ask, is this a confidential document?

22 MR. ANDERSON: It is not confidential to anybody because these two parties have seen it ----

23 THE CHAIRMAN: Are parties to it, and we have seen it.

24 MR. ANDERSON: Yes, I have checked that, so I am not revealing anything that they have not  
25 already seen.

26 THE CHAIRMAN: Right, and it has already been in open court or not?

27 MR. ANDERSON: This case has, yes. I do not know whether this has been read out.

28 THE CHAIRMAN: Maybe we ought to read it to ourselves rather than read it out, for that purpose.

29 MR. ANDERSON: Of course, yes. If I could invite the Tribunal to read paras. 32(a) and then  
30 para.41? I am told they were in fact read out.

31 THE CHAIRMAN: They were?

32 MR. ANDERSON: I am told so.

33 THE CHAIRMAN: Well the other parties are here – some of the other parties ----

34 MR. KENNELLY: My recollection is that they were read out and they were discussed.

1 MR. PICKFORD: That is also my recollection.

2 THE CHAIRMAN: All right, then I think we are probably safe.

3 MR. ANDERSON: (After a pause) I cannot remember what order I have given the clip of papers  
4 up to you but the next document ought to be the Order of the Tribunal of 6<sup>th</sup> November.

5 THE CHAIRMAN: No, the next document is the letter.

6 MR. ANDERSON: The letter from the CAT.

7 THE CHAIRMAN: The order, is that exhibited to the letter, or it happens to be on the same tag?  
8 (After a pause) What is being contested here is not that there is no dispute, but that when you  
9 were considering whether there was a dispute you ought to have taken into account something  
10 which you allegedly failed to take into account.

11 MR. ANDERSON: That is perfectly true, but the point that is being made – it is perhaps apparent if  
12 one looks at the extracts from the case management conference in Orange itself which are  
13 included in **there**. The point that is being made, if you look at, for example, on p.3 at line 16:  
14 “The first argument is that there was no dispute within the proper meaning of that  
15 word in the circumstances of this case because Orange and BT agreed to the  
16 termination rate, there was agreement and having agreed to the rate it was  
17 impermissible, we say, for BT in effect to generate a dispute reference by issuing its  
18 own charge notice objecting to the charge which had previously been agreed.”

19 THE CHAIRMAN: Yes. I do not know what the agreement between Orange, and whoever it is, is,  
20 but the agreement here is 0.8p or anything you determine.

21 MR. ANDERSON: Yes.

22 THE CHAIRMAN: So that the agreement specifically has this question about what you determine in  
23 it.

24 MR. ANDERSON: I am told that the Orange agreement had a similar provision. I am not saying  
25 that this preliminary issue would necessarily resolve this case, simply that it might well do,  
26 because the point that Orange is seeking to argue is that dispute only means an initial refusal to  
27 grant access. Once you have granted access and a party serves a notice to vary, that is not a  
28 dispute within the meaning of the Act. I am not here to argue whether they are right or wrong,  
29 but the Tribunal has identified that issue as the preliminary issue to be determined and, if  
30 Orange is right, it may well be the case that that determines not just the dispute between  
31 Orange and H3G in that case, but it would be of more general application. This was a point  
32 which was put to Mr. Roth, and you will see at p.6 of the transcript, it starts at line 21:  
33 “THE CHAIRMAN: I am sorry, I am not following this, Mr. Roth. You are saying  
34 that point (a) ...

1 that is the point I have just indicated to you, the point in para.41 of the notice of appeal:

2 “You are saying that point (a) whether there is a dispute, namely the point that Orange  
3 make that BT had agreed to the rates and then issued their own notice using their  
4 terminology “generate dispute”, you say that if that is right and that in those  
5 circumstances there is no dispute within the meaning of s.185, that then would knock  
6 out all the appeals regardless of the parties?

7 MR. ROTH: Correct, because as we understand it in all cases there was already an  
8 agreed rate which one party was seeking to change, and as the argument is expressed  
9 by Miss Demetriou in their notice of appeal the ground is that where there is already  
10 an agreement between the parties of the rate being charged and then one of the parties  
11 to the agreement serves a change notice seeking to vary it that does not give rise to a  
12 dispute. That is the ground as we understand it. I hope we have not misunderstood it,  
13 but that is our understanding of the ground being advanced, and Miss Demetriou is  
14 helpfully nodding.”

15 THE CHAIRMAN: But that must depend upon the agreement between the parties?

16 MR. ANDERSON: Well it must, but it may be a more general point that Orange are arguing and it  
17 seems to be that where parties have agreed a rate simply serving a notice to seek to vary the  
18 rate, which is in effect what has happened here, is not a dispute within the meaning of the Act  
19 and I understand they intend to cite the sort of provisions that all appear to be directed towards  
20 ----

21 THE CHAIRMAN: And are T-Mobile and H3G supporting?

22 MR. ANDERSON: No, as I understand it nobody is supporting Orange. The point about the debate  
23 between the Chairman and Mr. Roth there was that the other parties in that appeal were saying:  
24 “We are not taking this point, it does not affect us”, and the point Mr. Roth is making, which in  
25 my submission he is correctly making, is that the mere fact that the other parties are not taking  
26 the point is neither here nor there. If it is a good point it means that Ofcom did not have  
27 jurisdiction to make a determination.

28 THE CHAIRMAN: If you look at 185(1) – I think I have had this point before in another case and  
29 we managed to avoid it – it is because it says: “This section applies in the case of a dispute  
30 relating to the provisions of network access ----”

31 MR. ANDERSON: Yes.

32 THE CHAIRMAN: -- and the question is whether or not it relates to access. Then it goes on: “This  
33 section also applies in the case of any other dispute if it relates to rights or obligations

1 conferred or imposed by or under this Part or any of the enactments relating to the management  
2 of radio spectrum ... and it is not an excluded dispute.” So, that does not apply.

3 MR. ANDERSON: As I understand it, the scope of the Orange issue is on the meaning of the word  
4 “dispute”. That is what they are challenging, whether or not in the circumstances where you  
5 have an agreement and a party is seeking to vary it, and the other party does not agree to it  
6 whether that is a dispute within the meaning of s.185. That is the preliminary issue ----

7 THE CHAIRMAN: Well I think that depends on the facts, but anyway ----

8 MR. ANDERSON: Well it may or may not. The decision of the Tribunal may be to reject Orange’s  
9 position. It may be that it is of very specific application or it may not be, because the nature of  
10 the argument that Orange is running is that the meaning of a dispute is much narrower than  
11 where a party to an existing agreement seeks to vary the terms of that agreement, and that is, of  
12 course, what happened here. H3G served a notice to review, T-Mobile said “no”. They then  
13 sent an amended version of the agreement designed to alter their rate, and then referred the  
14 matter to Ofcom, and Ofcom assumed jurisdiction. If Orange is right in what they say there  
15 may well be a compelling argument that it must follow that this is not a dispute and, if that is  
16 so, we have no jurisdiction to make the determination we made.

17 In the overall circumstances of the existence of that preliminary issue being heard relatively  
18 soon, and the Christmas break, and Ofcom’s workload, and the application for notice to appeal  
19 those cumulative reasons are why we say it would be appropriate, and ask the Tribunal to grant  
20 us until January in which to serve our defence in this case.

21 THE CHAIRMAN: Is there something in here that explains why they say there is not a dispute?

22 MR. ANDERSON: Well I can only go by what is on the public record.

23 THE CHAIRMAN: Mr. Roth was appearing for Ofcom, so where does Orange say what the point is.

24 MR. ANDERSON: In the Tribunal’s letter of 9<sup>th</sup> November, you will see there is a section  
25 beginning “(A) The Orange appeal”.

26 “Although the Tribunal is ordering the hearing of a preliminary issue set out in the  
27 enclosed order drawn on 8<sup>th</sup> November, the Tribunal has decided that it would not be  
28 appropriate to stay the rest of the appeal. The first preliminary issue included in the  
29 order encompasses both limbs of what was described as ‘ground 1’ namely ...”

30 Then point 1:

31 “Ground 1(a) being that there is no ‘dispute’ because the disagreement between  
32 Orange and BT arose in the context of an attempt to vary an existing commercial  
33 agreement, and not at the point when access to facilities was being granted.”

34 The point described by Orange’s counsel at p.15, line 29 to p.16 to line 30 ----

1 THE CHAIRMAN: So it does relate to what I said before, as to the provision of network access.

2 MR. ANDERSON: It may be that that would be a basis for distinguishing. If Orange win it may be  
3 that there is a basis for distinguishing the Judgment, or the decision of the Tribunal in that case  
4 from this case, but it may well not be, because the actual challenge is a challenge to the  
5 meaning of the word “dispute”.

6 THE CHAIRMAN: No, if you look at ground 1(a), if that is what it is,  
7 “... there is no dispute because the disagreement between Orange and BT arose in the  
8 context of an attempt to vary an existing commercial agreement and not at the point  
9 when access to facilities was being granted.”

10 MR. ANDERSON: But that proviso may not be the determining proviso.

11 THE CHAIRMAN: I see.

12 MR. ANDERSON: If one turns to p.15 of the transcript of the case management conference, which  
13 is the section referred to, line 24:  
14 “THE CHAIRMAN: I think, before you get on to those points, unless this is going to  
15 be one of your points, all parties would benefit from a repetition by you of what you  
16 see ground 1 as being.”

17 THE CHAIRMAN: It sounds like they had as much difficulty as I am having.

18 MR. ANDERSON: Yes, and indeed me, because I can only go by what is in these documents.  
19 “... It has been described as ‘potentially narrow’, ‘potentially wide’. Perhaps there are  
20 two different points that you are taking, but if you are able to explain once again what  
21 those points are I think that would be useful.

22 MISS DEMETRIOU: Madam, yes, of course. There are two elements, as we see it,  
23 to Orange’s ground 1, and they were fairly summarised by Mr. Roth, and they are in  
24 particular what he termed as ground 1(a), being that in circumstances where the  
25 parties have contractually agreed upon a termination rate, then attempts following that  
26 agreement to renegotiate do not constitute disputes within the meaning of ss.185-191  
27 of the Act. So ‘disputes’ means an initial dispute, an initial failure to agree a rate, but  
28 once a rate has been contractually agreed any attempts afterwards to alter that  
29 agreement do not fall within the scope and meaning of ‘dispute’ in the Act.

30 THE CHAIRMAN: So you are saying that where one party serves an OCCN on the  
31 other party, if they cannot agree as to whether that new rate should apply, that is not  
32 something over which Ofcom can have jurisdiction under s.185?”

33 THE CHAIRMAN: What is an “OCCN”?

34 MR. ANDERSON: An Operator Charge Change Notice.

1 THE CHAIRMAN: Which we do not have in this case?

2 MR. ANDERSON: Well we have the review notices.

3 THE CHAIRMAN: The same sort of thing.

4 MR. ANDERSON: Yes.

5 “MISS DEMETRIOU: That is exactly right. So we say that the purpose of the

6 dispute resolution procedure is to break initial deadlock, because initial deadlock

7 might preclude access to networks. We say that Ofcom then has other regulatory

8 powers under the SMP provisions to cure commercial agreements where those

9 agreements have anti-competitive effects. Otherwise, this is all down to the

10 commercial bargain struck by the parties.”

11 THE CHAIRMAN: But the agreement we have is terminable on three months’ notice in any event?

12 MR. ANDERSON: Is that right?

13 THE CHAIRMAN: Yes, well you will find that out when you get ----

14 MR. ANDERSON: Oh, I am sure I will, yes.

15 THE CHAIRMAN: It is terminable on three months’ notice, so if they could not agree to modifying

16 or amending the agreement, all you have to do is serve a three month notice, and if you do that

17 you are cutting somebody out of access.

18 MR. ANDERSON: I cannot answer that because I simply am not sufficiently familiar with the

19 agreement, for which I apologise, I was only instructed at the very end of last week.

20 THE CHAIRMAN: It is all right.

21 MR. ANDERSON: I do not think I can put it any higher than there is a distinct possibility that if

22 Orange are right in their argument on that preliminary issue as to the meaning of a dispute that

23 could have a material influence on the scope of this appeal. It might not have – even if Orange

24 wins the Tribunal might conclude that win on the basis that there is something very specific

25 about initial access agreements that mean that in that context the dispute does not include

26 varying the terms of a contractual arrangement. But there must at the very least be a real risk

27 that if Orange win on the basis that a dispute within that Act does not encompass an attempt or

28 a desire by one party to alter the change of an agreement by the route they chose, which was to

29 serve a notice to review the contract, that that is not a dispute either, and if that is the case we

30 did not have jurisdiction to make the determinations and, as I am sure the Tribunal is well

31 aware in the context of its own jurisdiction, it does not matter whether or not one of the parties

32 is actually advancing the point if we did not have jurisdiction we did not have jurisdiction and

33 the parties could not confer it on us by agreement. That is the point, and that is why we think it

34 would be sensible ...

1 THE CHAIRMAN: You mean the Chapter III dispute resolution procedure would be extremely  
2 narrow.

3 MR. ANDERSON: It would.

4 THE CHAIRMAN: One needs to look at the framework Directive, which I have not looked at  
5 properly, but it would appear to be much wider than that.

6 MR. ANDERSON: It may well be why the Tribunal has seen fit to set aside two days for this  
7 preliminary issue.

8 THE CHAIRMAN: To try and understand what it is.

9 MR. ANDERSON: Yes. I sense that I have not been quite as helpful as I might have been.

10 THE CHAIRMAN: No, no, it is not your point.

11 MR. ANDERSON: It is not our point but it is, I think, relevant for the Tribunal to consider in the  
12 context of this request for permission to postpone the date for service of our defence. But I put  
13 as my first ground of course the difficult work load that Ofcom is faced with at the moment –  
14 it is particularly intense at the moment leading up to Christmas – and the existence of the  
15 application to amend and broaden the scope of the appeal with T-Mobile’s request for  
16 permission to amend the notice of appeal. That is about all I can say, or I would just be  
17 repeating myself.

18 THE CHAIRMAN: You had a third reason did you not?

19 MR. ANDERSON: No, no ----

20 THE CHAIRMAN: Just two reasons?

21 MR. ANDERSON: There are three reasons: the application to amend, the Orange preliminary point  
22 and the work load.

23 THE CHAIRMAN: Right, well let us see what everybody else says.

24 MR. ANDERSON: I think Mr. Blair has a question for me?

25 MR. BLAIR: It may be you cannot help any further, but there is not in this case, as I see it, any point  
26 about initial deadlock, but there may be a point about deadlock later on, as to whether a  
27 disagreement has reached the point of becoming a dispute. Do you think that would be  
28 involved in any sense in the Orange case if that is indeed a matter raised in any of the grounds  
29 of the appeal in A?

30 MR. ANDERSON: I will just take instructions on that because I am not myself involved in the  
31 Orange case. (After a pause) As I understand it, it is likely to be an issue in the Orange case as  
32 to whether that “initial deadlock”, as you call it, is a dispute or not. I think in Orange they did  
33 reach deadlock in that sense.

34 MR. BLAIR: Thank you.

1 MR. PICKFORD: Madam, we certainly do not wish to be unreasonable, and we are quite willing on  
2 our part to allow Ofcom some kind of extension if the Tribunal considered it appropriate; we  
3 are quite happy to take a pragmatic view on that front. But if I could just make a couple of  
4 comments.

5 In relation to workload, T-Mobile is in all the very same major pieces of litigation that Ofcom  
6 is involved in and for our part this particular appeal on donor conveyance charge is one that we  
7 would wish to see progressed in an expeditious fashion and not simply kicked into the long  
8 grass because we say that we are prejudiced on a daily basis, weekly basis and a monthly basis  
9 by the particular decision that Ofcom has come to and obviously we would wish the Tribunal to  
10 revisit it as soon as possible so that Ofcom can do so. We certainly do not want the appeal to  
11 get kicked off into the long grass.

12 THE CHAIRMAN: It is only between you and H3G is it not? So if too much money was paid one  
13 way or the other it would be repayable, you would only ----

14 MR. PICKFORD: No, madam, it is not, that is one aspect of our appeal. The other aspect of our  
15 appeal is that we say that one of Ofcom's failings was failing to impose an industry-wide  
16 solution, so one of the problems that T-Mobile currently faces is that it has a decision by  
17 Ofcom which reduces the donor conveyance charge payable in respect of H3G and T-Mobile,  
18 but there is no reciprocation with all the other mobile operators.

19 THE CHAIRMAN: And that would date back to when the decision was made, would it not, unless  
20 they made it retrospective.

21 MR. PICKFORD: The question of when it dates back to is quite a difficult one, there are all sorts of  
22 issues that potentially arise in relation to that. We certainly fear that we are potentially  
23 prejudiced by delay in this appeal, and it is also obviously good conduct for any appeal to bring  
24 it on sooner rather than later.

25 Secondly, in relation to the Orange appeal, we would suggest that despite the detail that Mr.  
26 Anderson has just gone into, that issue can actually be dealt with very, very swiftly indeed if  
27 the Tribunal would kindly turn up the letter that Mr. Anderson included in his bundle of  
28 documents – it is a letter dated 9<sup>th</sup> November from the Registrar at the Competition Appeal  
29 Tribunal. On the second page is the paragraph to which Mr. Anderson has already referred: “A  
30 The Orange appeal”,

31 “Although the Tribunal is ordering the hearing of a preliminary issue set out in the  
32 enclosed order drawn on 8<sup>th</sup> November, the Tribunal has decided that it would not be  
33 appropriate to stay the rest of the appeal in that case or any of the appeals in the  
34 termination rate dispute proceedings.”

1 So even in that particular case the Tribunal has made quite clear that whilst it is hearing as a  
2 preliminary issue ----

3 THE CHAIRMAN: The other cases continue.

4 MR. PICKFORD: The rest of all the other points in the cases continue, so it is not a reason, the  
5 Tribunal has decided in that case, to delay anything, it is hearing it as a discrete, preliminary  
6 issue, but everything else continues. So that we say is the simple point to be made in relation to  
7 Orange.

8 Thirdly, in relation to our application to amend, obviously I appreciate that it is not appropriate  
9 to deal with that today in view of the slight misunderstanding between Ofcom and T-Mobile in  
10 relation to it, but what I can say in relation to it is of about three or four sentences in length, and  
11 it should not add very substantially to Ofcom's difficulties in terms of dealing with this appeal.  
12 As I said at the outset, we do appreciate that Ofcom has a fair work load, and we wish to be  
13 pragmatic, but those issues have to be balanced against ----

14 THE CHAIRMAN: The problem is, is it not, that if it raises a new ground of appeal then we have to  
15 go through this "exceptional circumstances" provision in the rules. If it does not raise a new  
16 ground of appeal then it is much more flexible.

17 MR. PICKFORD: Yes, well we say it certainly does not raise a new ground, and we had understood  
18 – maybe mistakenly – that Ofcom were of that view. It may be that they take a different view  
19 now and they are going to say that it is a new ground.

20 THE CHAIRMAN: Not having seen it I do not know if it affects the whole of their defence, or only  
21 a little bit of their defence.

22 MR. PICKFORD: In my submission it would affect a minute portion of their defence if it were  
23 allowed. Certainly, it is the case that the reason why T-Mobile originally tried to expedite the  
24 hearing of it and thought that it might be possible to do it this afternoon is that it would  
25 obviously make everyone's life easier if they knew where they stood and so we could move on  
26 swiftly.

27 THE CHAIRMAN: Do you think we ought to look at it?

28 MR. PICKFORD: I am very happy for the Tribunal to look at it.

29 THE CHAIRMAN: *De bene esse*, just to have a look and see ----

30 MR. ANDERSON: If I could just explain a little bit by way of background. This amendment arose  
31 in the context of T-Mobile awaiting a response from us on a letter before action seeking  
32 Judicial Review, the purpose was to try and avoid two sets of proceedings and have matters ----

33 THE CHAIRMAN: Very sensible.

1 MR. ANDERSON: Yes. I have certainly explored formally with my learned friend on Friday a way  
2 forward, what I was not expecting was a formulated amended notice of appeal because I would  
3 need to consider that with those in Ofcom. I hear my learned friend saying it affects a minute  
4 part of our defence, but equally it is intended to cover all that they would otherwise have been  
5 seeking Judicial Review in relation to.  
6 The essential point, and I am very happy for my learned friend to take ----  
7 THE CHAIRMAN: What is the Judicial Review point?  
8 MR. ANDERSON: The point, as I understood it, was that they are effectively contending that if  
9 Ofcom is right that their dispute determination powers are limited then they will be contending  
10 – irrespective of the dispute determination point – “you have failed to act generally under your  
11 obligations under Article 30 of the Directive to introduce an industry-wide alteration to General  
12 Condition 18” ----  
13 THE CHAIRMAN: And you are not doing that in the paper that is coming out in a week’s time or  
14 whatever – apparently.  
15 MR. ANDERSON: Not to deal specifically with this point. But the purpose of the amendment now  
16 is to broaden the challenge to the determinations into a more general allegation that we failed to  
17 act and that in itself is an appealable failure to act. That is essentially what the amendment is  
18 about.  
19 THE CHAIRMAN: Certainly, it is very sensible if one can avoid another set of proceedings.  
20 MR. ANDERSON: That is why I am not standing up today saying: “We oppose this application to  
21 amend”, we just need a little more time.  
22 THE CHAIRMAN: So if there is a way of resolving this so that one avoids another set of  
23 proceedings, and one can find a jurisdiction in this Tribunal to do it, that seems to be a very  
24 sensible course.  
25 MR. ANDERSON: But from our initial reaction to seeing it, and as I say we have not had a chance  
26 to discuss it ----  
27 THE CHAIRMAN: You think it is too wide?  
28 MR. ANDERSON: Well ---  
29 THE CHAIRMAN: You do not know?  
30 MR. ANDERSON: We do not know, but it is not obvious to us that it would not involve us  
31 embarking on a much broader defence than the current one, but we will review it and we will  
32 respond.  
33 THE CHAIRMAN: So it may well be what you are saying is that it is a broader defence, but you  
34 would say that it was within our jurisdiction to avoid going off?

1 MR. ANDERSON: That may well be the position, yes. But it is a factor that is material to the  
2 question of further time in which to file the defence, certainly. I do not know if my learned  
3 friend had more to say because I had a couple of points in response to him, but I will wait until  
4 Mr. Kennelly has finished.

5 THE CHAIRMAN: Do you have anything more.

6 MR. PICKFORD: Madam, it depends on whether the Tribunal wants any further explanation of the  
7 application to amend. What I was going to say in relation to it is that it would be clearly of  
8 assistance, notwithstanding that it cannot be dealt with this afternoon, if we were able to deal  
9 with it relatively swiftly, not least because if it is not going to be something that the Tribunal  
10 considers it has jurisdiction to hear, and Ofcom is happy for it to hear, we may have to bring an  
11 application for Judicial Review and it would be unfortunate to have to do that ----

12 THE CHAIRMAN: And then poor Ofcom has got another case that they have not got resources for.

13 MR. PICKFORD: Quite, so we are certainly eager for that matter to be resolved as swiftly as  
14 possible. It may well be possible to do it on paper. If Ofcom consents to it one imagines that it  
15 can be dealt with on paper.

16 THE CHAIRMAN: Or you might be able to agree a form of words, because it looks as if there is  
17 some co-operation between you on this point.

18 MR. PICKFORD: Perhaps, yes. If, however, it is ultimately contentious, it may be that we have to  
19 have a CMC on the matter which would be, we would say, very unfortunate.

20 THE CHAIRMAN: Very unfortunate. Now, can I just ask you, you say you are pragmatic about it,  
21 but you do not want this to be left until the end of all the other cases?

22 MR. PICKFORD: Yes, certainly, T-Mobile's interests are in it proceeding swiftly.

23 THE CHAIRMAN: Absolutely, so what do you suggest the timetable should be?

24 MR. PICKFORD: For example, if Mr. Anderson suggests that the amendment is going to  
25 substantially change the nature of the appeal they have to meet they could have six weeks from  
26 today – that would be entirely ----

27 THE CHAIRMAN: That would take us to Christmas, would it not, or more?

28 MR. PICKFORD: That would take us I think to Christmas. We do not take a strong position on a  
29 particular date, other than ----

30 THE CHAIRMAN: The hearing of the other six appeals is going to take place between 29<sup>th</sup> January  
31 and 6<sup>th</sup> February, is that right?

32 MR. PICKFORD: Yes, that is correct – or close to those dates.

33 THE CHAIRMAN: Are you saying that the hearing of this appeal should take place after that date?

1 MR. PICKFORD: Yes, we are content for the hearing of this appeal to take place after that date.  
2 Obviously, we simply want to ensure that the various steps ----

3 THE CHAIRMAN: So what we could do is to work backwards from that – work out a date after that  
4 date for the hearing of this appeal, and then work backwards to when it would be appropriate  
5 for a defence to be put in.

6 MR. PICKFORD: That might be one approach, obviously what we do need to guard against is the  
7 possibility, as has already been mooted, that there might be, for example, a contested disclosure  
8 application and we would need to ensure ----

9 THE CHAIRMAN: Yes, well you will have plenty of time ----

10 MR. PICKFORD: -- that any interim steps ----

11 THE CHAIRMAN: -- it cannot be before 6<sup>th</sup> February so we would have plenty of time to do that  
12 and that would be a limited application so that would not disturb the timetable too much.

13 MR. PICKFORD: What we are saying is that we are not proposing to make any application at all  
14 until we have seen Ofcom's defence. What we would wish to guard against is the possibility  
15 that everything is worked backwards from a final date without leaving sufficient time between  
16 the submission of the defence and the final hearing to deal with any interlocutory matters that  
17 may or may not arise. That would be our only concern.

18 THE CHAIRMAN: If we did work backwards then we could see whether it would work. After 6<sup>th</sup>  
19 February how long do you think everybody needs to prepare this case, assuming that everybody  
20 is busy doing the case between 29<sup>th</sup> January and 6<sup>th</sup> February.

21 MR. PICKFORD: In our submission not particularly long, we think it is very unlikely to involve any  
22 contested issues of fact. Obviously we have to see what Ofcom has to say in its defence, but it  
23 seems most likely that it will be questions of law and they can be dealt with relatively swiftly  
24 perhaps in a hearing ----

25 THE CHAIRMAN: Two weeks after?

26 MR. PICKFORD: -- two weeks afterwards.

27 MR. ANDERSON: Madam, before you start looking at diaries, may I just say that I can understand  
28 the logic of working backwards in that way, but I am simply not in a position to agree or  
29 disagree with my learned friend when he says it will only be narrow points of law, and there  
30 may not be much because we simply do not know the result of this broadening of the case to  
31 encompass what might otherwise have been a JR will have. We are really up to our neck in  
32 work until Christmas, and we would respectfully ask the Tribunal to look at it from the point of  
33 view of how much time it is reasonable to give us and work forward, rather than plump for a  
34 date in February and work backwards, because we do not know what may need to be done in

1 between, whether there will be any other interventions, whether we want to put in some  
2 evidence, whether a disclosure application on our internal thinking is successful.

3 THE CHAIRMAN: Yes, I do not think you understood me, Mr. Anderson. What I was trying to do  
4 is to work backwards to see if that was reasonable within the timetable, or whether we needed  
5 to move it further.

6 MR. ANDERSON: Oh I see, I apologise then.

7 THE CHAIRMAN: I was just trying to see where we were going, but since I have no diary at the  
8 moment I cannot work that one out.

9 (The Tribunal confer)

10 THE CHAIRMAN: I think it may be helpful if I gave you an indication of how the Tribunal  
11 considers the point that is being made by Ofcom that their resources are very stretched, and that  
12 therefore their opportunity to work on this particular case is curtailed. We are very concerned  
13 about that submission; we understand the submission and we have sympathy with the  
14 submission internally, but in relation to particular cases we find that submission very difficult,  
15 because each case must be looked at on its own merits. For one party to say “Actually I am  
16 involved I a whole lot of other things and therefore I do not have time to look at this particular  
17 case” is not very attractive.

18 On the other hand, since the other parties are all involved in all these cases, it seems to us that it  
19 is a matter for the parties. If it can be sorted out, and Mr. Pickford says they are taking a  
20 pragmatic approach about this, save that they want this to be dealt with expeditiously and not to  
21 be just stayed until their resources are there, if one can find a pragmatic approach, which is  
22 within agreement of all the parties then that seems to us to be something that we take into  
23 account and, with the background and the understanding of the problem, would probably  
24 support in this particular case.

25 The question, therefore, and that is why I was putting it the way I did, and I thought possibly I  
26 ought to reveal what our thought process was, is if one looks to see when this case can be heard  
27 and then works back one can then see how that pragmatic approach can be adopted.

28 Is that helpful, Mr. Pickford?

29 MR. PICKFORD: Yes, madam. Could I just take a moment to seek instruction?

30 THE CHAIRMAN: Yes.

31 MR. PICKFORD: (After a pause) Might it be appropriate for me to ask for two minutes from the  
32 Tribunal to speak with Mr. Anderson and it may be we can deal with the matter in a way that  
33 will assist all of the parties?

34 THE CHAIRMAN: That may be very helpful. We have not heard from Mr. Kinnelly?

1 MR. KENNELLY: Madam, this might be an appropriate moment, since I will be very brief.

2 THE CHAIRMAN: Yes.

3 MR. KENNELLY: The first point is that we also take a pragmatic approach and since we are the  
4 appellant in the major appeal, which would be occupying Ofcom, we have a particular  
5 sympathy for their position, and therefore I support what Mr. Anderson says in that regard.  
6 Secondly, in relation to the prejudice which T-Mobile alleges it suffers, because of this DCC  
7 decision I refer the Tribunal to para.5.33 of Ofcom's decision which is challenged, which sets  
8 out how T-Mobile can mitigate any such prejudice by negotiating with the other parties the  
9 0.1p per minute rate. That is the point that has been put to T-Mobile and it is for them to  
10 mitigate, and Ofcom have given them the indication of what they ought to do, so it is not as  
11 stark as Mr. Pickford says in our submission.

12 Madam, those are my only points.

13 MR. ANDERSON: Could I just, before the Tribunal rises, come back on that last point that the  
14 Tribunal put to Ofcom, the concern that the Tribunal expressed? We would not be adopting the  
15 approach we are today adopting in our request for an extension were it not for the fact that the  
16 parties to this appeal are also heavily involved in those other appeals. It is in order to ensure  
17 the overall management of all these cases in which these parties are involved that we  
18 considered it appropriate to make that point to the Tribunal. We would not, of course, normally  
19 be coming to this Tribunal asking for time simply because we had a heavy workload, it is the  
20 interplay between the mobile operators, H3G and Ofcom that we are bringing to your attention.  
21 The other point, just by way of reply to my learned friend, Mr. Pickford, was that on this  
22 Orange preliminary point, the Tribunal did not stay those other cases. Just two small points: it  
23 raises much greater, more difficult problems in that case, and they combined those appeals with  
24 the termination appeal, so it was a much larger animal if you like that was being brought to a  
25 halt. We are only asking for time in which to serve the defence, we are not asking for a stay.

26 THE CHAIRMAN: No, that is very helpful. All right, shall we rise for a moment and see whether  
27 there is some agreement as to a timetable. I am at the moment involved in a hearing on the 14<sup>th</sup>  
28 and 15<sup>th</sup> February and I have a feeling but I am not sure – I can check – that I may have  
29 something in the week of 25<sup>th</sup> February, but that may not stop me doing this because you may  
30 pip me to the post – or pip the other people to the post.

31 MR. ANDERSON: Can I ask how the Tribunal is placed in early March, for example, the week  
32 beginning 10<sup>th</sup> March?

33 MR. BLAIR: Does it look like a day, a day and a half, two days?

34 THE CHAIRMAN: Two days?

1 MR. PICKFORD: Sir, think it is probably a two day appeal, but obviously Mr. Anderson is in the  
2 early stages yet – he may disagree.

3 THE CHAIRMAN: But one can normally do these cases in two days.

4 MR. ANDERSON: I would have two days certainly, whether or not we could squeeze it into one  
5 day I am not sure at this stage.

6 THE CHAIRMAN: We can have one day with one day in reserve.

7 MR. KENNELLY: We agree two days seems appropriate, to be safe.

8 THE CHAIRMAN: Apparently 12<sup>th</sup> and 13<sup>th</sup> March would be particularly good. I think that is all  
9 right for me.

10 (The Tribunal confer)

11 MR. ANDERSON: 12<sup>th</sup> and 13<sup>th</sup> is ----

12 THE CHAIRMAN: Is good for everybody?

13 MR. ANDERSON: Sounds like it, yes.

14 THE CHAIRMAN: Right, well if we adjourn for a moment and see if you can work a timetable out  
15 that does sound like that gives quite a lot of flexibility. So if one can work a timetable which  
16 gives enough time for the defence and enough time for any reply, and enough time for  
17 submissions and for you to raise any disclosure arguments, then we will hopefully have taken  
18 account of anything we can at the moment foresee.

19 MR. PICKFORD: I am grateful, madam

20 (Short break)

21 MR. PICKFORD: Madam, we are very grateful for the Tribunal allowing us that time and I think we  
22 have arrived at an agreement on a proposed timetable. It would be as follows: subject to the  
23 Tribunal's approval we would propose that Ofcom serves its defence on 18<sup>th</sup> January 2008.

24 THE CHAIRMAN: Yes.

25 MR. PICKFORD: That H3G serves its statement of intervention on 1<sup>st</sup> February 2008.

26 THE CHAIRMAN: I thought that Ofcom wanted the statement of intervention first so that they  
27 could put in the ----

28 MR. ANDERSON: Only in respect of any intervener who is intervening on T-Mobile's behalf,  
29 because H3G is intervening on our behalf so it seems sensible for them simply to augment.

30 THE CHAIRMAN: Yes, otherwise we have duplication.

31 MR. ANDERSON: Yes, yes.

32 MR. PICKFORD: Obviously we have allowed a fairly generous period in relation to Ofcom's  
33 defence currently, so if there are interveners who crawl out of the woodwork in the next two  
34 days hopefully the Tribunal should be in a position to set a timetable in relation to them.

1 THE CHAIRMAN: When do you think we ought to set a timetable, because we could do that in any  
2 event? You could say that if they are going to support you they ought to come in before; if  
3 they are going to support Ofcom they ought to come in afterwards, that is what is being said.  
4 How long ----

5 MR. PICKFORD: I would suggest perhaps if interveners were allowed either two or three weeks  
6 from the final date from intervention.

7 THE CHAIRMAN: 6<sup>th</sup> December, that would give everybody plenty of time.

8 MR. PICKFORD: The slight difficulty of course we face is not knowing the identities of the  
9 Interveners, it may be that they have a fairly obvious interest in which case it is unlikely that  
10 anyone will contest whether they should be permitted to intervene. Of course, there may be  
11 interveners who do not have such an obvious interest in which case their interventions might  
12 be contentious.

13 THE CHAIRMAN: And then we may have to have a case management conference.

14 MR. PICKFORD: Yes, if one is actually to set a realistic date by which they should provide  
15 statements of intervention, I would suggest that three weeks, 6<sup>th</sup> December, would be more  
16 sensible, because that would allow us slightly more leeway.

17 THE CHAIRMAN: So what we could say is that if permission is given to intervene and the  
18 intervener supports T-Mobile, then the notice of intervention should be filed by 6<sup>th</sup> December.

19 MR. ANDERSON: I understand what the Tribunal is trying to do. The difficulty as I see it is there  
20 may be a category of intervener whose intervention is disputed, but is in fact seeking to  
21 intervene on behalf of T-Mobile, then time needs to be take up to resolve whether or not they  
22 are given permission ----

23 THE CHAIRMAN: That is why I said “If they are given permission”.

24 MR. ANDERSON: There will be some who may be given permission quickly because they are  
25 unopposed and obvious, and there may be some who are not, who would have to come back to  
26 the Tribunal and persuade you that it is appropriate for them to intervene, by which time some  
27 of their three weeks will have been eaten up.

28 THE CHAIRMAN: Yes, unless the Tribunal otherwise orders. All we want to do is to signal to  
29 those interveners who have not yet put their cards on the table that if they are going to do so  
30 then there is a timetable in which to do it – whether or not it goes in the order may be  
31 immaterial. What we would be thinking about is if they were clearly going to be given  
32 permission then they should put their statement of intervention in by 6<sup>th</sup> December, and those  
33 supporting Ofcom may be granted leniency. If they can show that they are the same as H3G

1 then they can put their statement of intervention in after – by 1<sup>st</sup> February – that is only so that  
2 there will not be duplication.

3 MR. PICKFORD: Indeed, madam, and the advantage obviously of allowing Ofcom a fairly  
4 generous period for its defence is that we have quite some margin of discretion in relation to  
5 when any potential intervener in support of T-Mobile might ultimately have to put in its  
6 statement of intervention should it need to be amended.

7 THE CHAIRMAN: Yes.

8 MR. PICKFORD: So after the statement of intervention by H3G and any other interveners in  
9 support of Ofcom, T-Mobile proposes to put in its combined reply and skeleton argument.

10 THE CHAIRMAN: As one document, not as two?

11 MR. PICKFORD: As one document.

12 THE CHAIRMAN: Reply in skeleton argument – skeleton argument to include any reply?

13 MR. PICKFORD: Yes.

14 THE CHAIRMAN: That is very good, yes.

15 MR. PICKFORD: On Wednesday 20<sup>th</sup> February.

16 THE CHAIRMAN: Yes.

17 MR. PICKFORD: Ofcom to provide its skeleton argument on Friday, 29<sup>th</sup> February.

18 THE CHAIRMAN: Yes.

19 MR. PICKFORD: And H3G having liaised already to avoid duplication, but given one day in fact  
20 until Monday, March 3<sup>rd</sup> to put in its skeleton argument.

21 THE CHAIRMAN: So they get the weekend.

22 MR. PICKFORD: Yes, just to ensure that there is no duplication.

23 THE CHAIRMAN: That is very generous of you.

24 MR. PICKFORD: They have agreed to do it.

25 THE CHAIRMAN: That will apply to any other intervener?

26 MR. PICKFORD: Yes.

27 THE CHAIRMAN: That gives us – what did we say – the 12<sup>th</sup> and 13<sup>th</sup> March?

28 MR. PICKFORD: Yes.

29 THE CHAIRMAN: For the hearing. We will do it in one day, with one day in reserve. So we do  
30 not encourage you to take two days over it. It may depend on how many interveners there are.

31 MR. PICKFORD: Indeed, madam, one aspect that we have not yet provided for is a potential date  
32 for skeletons of interveners in support of T-Mobile.

33 THE CHAIRMAN: Why can they not also come in on 1<sup>st</sup> March, so we have all the interveners on  
34 1<sup>st</sup> March?

1 MR. ANDERSON: 20<sup>th</sup> February.  
2 THE CHAIRMAN: Sorry. The H3G one was 1<sup>st</sup> March.  
3 MR. PICKFORD: 3<sup>rd</sup> March.  
4 MR. KENNELLY: The concern there is that these are interveners supporting T-Mobile, they will be  
5 putting in points to which Ofcom have not had an opportunity to respond.  
6 MR. ANDERSON: By that stage they will have filed their statements of intervention, they will have  
7 seen T-Mobile's reply and skeleton, so they should – as a matter of logic – be putting their  
8 replies and skeletons in some time between 20<sup>th</sup> and 29<sup>th</sup>?  
9 THE CHAIRMAN: Yes.  
10 MR. ANDERSON: Possibly on – I was going to suggest Friday, 22<sup>nd</sup> so they can be preparing their  
11 skeletons. The reason why we gave H3G just the one working day and a weekend was because  
12 they could do their preparation and then when they have seen what we have put  
13 in ----  
14 THE CHAIRMAN: They can cross it all out.  
15 MR. ANDERSON: -- they can just cross out all the stuff that is repetitious. So similarly the  
16 interveners in support of T-Mobile only need a day or so to do that, so they can serve theirs on  
17 Friday, 22<sup>nd</sup> February.  
18 THE CHAIRMAN: Or Monday, 25<sup>th</sup>, so they get the weekend.  
19 MR. ANDERSON: Well equally that deprives us of the weekend to take them on board.  
20 THE CHAIRMAN: So shall we say the interveners, other than H3G, to provide skeleton arguments  
21 ----  
22 MR. ANDERSON: I think it might be preferable to refer to them as “those intervening in support of  
23 T-Mobile” just in case somebody else comes up in the next two days in support of Ofcom.  
24 THE CHAIRMAN: -- supporting T-Mobile provide skeleton arguments 22<sup>nd</sup> February. Intervenors  
25 supporting Ofcom 3<sup>rd</sup> March.  
26 MR. ANDERSON: Yes. Within that timetable, as I say, we have spoken to my learned friend, any  
27 interlocutory matters ----  
28 THE CHAIRMAN: Yes, if they do not like that they can come back and tell us why they do not like  
29 it, but at least it will be in the order so we can have some timetable.  
30 MR. ANDERSON: But that timetable is also designed to embrace within it time for any disclosure  
31 issues to be addressed.  
32 THE CHAIRMAN: Yes. Well we have plenty of time for that and that should be a short hearing  
33 that can be absorbed within your resource problem.  
34 MR. ANDERSON: Yes.

1 THE CHAIRMAN: Since everybody is involved in all the cases it cannot be on a day that one of the  
2 other cases is active.

3 MR. ANDERSON: Yes.

4 THE CHAIRMAN: That sounds very sensible. Is there anything else on your side? Has H3G been  
5 served with the notice of appeal.

6 MR. KENNELLY: Madam, we have only the notice, we do not have the annexes; I understand that  
7 we need the annexes to the notice of appeal.

8 THE CHAIRMAN: Do I need to make an order?

9 MR. PICKFORD: No, madam, we are very happy to provide the non-confidential annexes to the  
10 appeal forthwith. The only outstanding point from our perspective is how we take forward T-  
11 Mobile's prospective application to amend. We would certainly be very grateful if Ofcom  
12 were able to indicate very soon whether they are going to contest the amendment or consent to  
13 it. Obviously we do not suggest that anything of that nature should be included in an order, but  
14 if Ofcom were able to give an indication of when they are likely to come back.

15 THE CHAIRMAN: There may be some liaison because if the wording appears to Ofcom not to  
16 quite cover the point they are trying to cover. It is very sensible if one can get it within the  
17 jurisdiction of this Tribunal so that you do not have two cases.

18 MR. PICKFORD: And the bottom line on that is that I believe if there was need for a Judicial  
19 Review it would need to be lodged by this Friday, so time is of the essence.

20 THE CHAIRMAN: Yes. Well, I assume, Mr. Anderson, you can ----

21 MR. ANDERSON: I am aware of that, yes, and we will get on to it straight away. We indicated in  
22 our letter that we would put in a formal response within seven days. Clearly we will need to  
23 liaise before that.

24 THE CHAIRMAN: Does that mean that we have to give permission before then?

25 MR. ANDERSON: Permission for?

26 THE CHAIRMAN: For the amendment.

27 MR. ANDERSON: One of the problems that we were having, we wanted to liaise with them was if  
28 there was a way of avoiding, or making it clear that it is not a new ground of appeal and  
29 therefore avoiding the exceptional circumstances.

30 THE CHAIRMAN: Yes, and then it becomes very easy, but we still have to give permission unless  
31 it is just a change of wording which it does not sound like it is.

32 MR. ANDERSON: It may not be, but it is difficult for the Tribunal today to give any ruling on  
33 permission.

1 THE CHAIRMAN: No, all I am concerned about is that if it does come within the exceptional  
2 circumstances then it is important that you get the ruling before Friday. If it does not come  
3 within exceptional circumstances it is much easier to rule, but again you need the ruling before  
4 Friday.

5 MR. ANDERSON: Well there is, of course, precedent for at least lodging an application for  
6 permission in front of the Administrative Court than having it immediately stayed.

7 THE CHAIRMAN: One does not want to have to go through that process unless of course that is  
8 ready to go.

9 MR. PICKFORD: It is not, madam, so we would obviously like to avoid it if possible.

10 THE CHAIRMAN: Yes. Would it be helpful if I was the person who ruled on this without the other  
11 members so that I can do it this week; that is a much quicker process. I will tell you I am not  
12 here on Thursday. You might be able to get hold of me, but I am not actually sitting in this  
13 building on Thursday.

14 MR. PICKFORD: Madam, we would certainly be very grateful, that would seem to be a very  
15 sensible approach. I am doing something else here on Friday, but I am sure I can fit it in, if we  
16 could try and do it by Wednesday that would be better.

17 (The Tribunal confer)

18 THE CHAIRMAN: The reasons for the decision to take the dispute, in other words, the initial  
19 reasons, which you say ----

20 MR. ANDERSON: You mean the reasons for assuming jurisdiction to determine the dispute.

21 THE CHAIRMAN: Yes, I am just wondering if those could be provided?

22 MR. ANDERSON: Yes. We will write a letter enclosing what we regard as where our reasons are  
23 to be found and copy that letter to the other parties.

24 THE CHAIRMAN: Yes, because that might be helpful because one does not know what is in it, but  
25 it might be helpful knowing where one is going at that point.

26 MR. ANDERSON: Of course we will do that, yes.

27 THE CHAIRMAN: The question that was being asked was as to whether whatever announcement is  
28 going to be made this week or next in relation to the consultation that has been going on, I  
29 assume that is going to be available on the website?

30 MR. ANDERSON: Yes. If there is anything arising out of it that we need to explain to you we will  
31 write and copy the parties in.

32 THE CHAIRMAN: Is there anything else?

33 MR. PICKFORD: Madam, not from me.

1 THE CHAIRMAN: So you are going to go and liaise and see if we can get some wording that  
2 everybody is happy with?

3 MR. PICKFORD: Indeed.

4 THE CHAIRMAN: All right. Thank you very much.

5 \_\_\_\_\_