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

Case Nos. 1245/3/3/16

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

25 May 2016

Before:

**HERIOT CURRIE QC**  
(Chairman)  
**PROFESSOR GAVIN REID**  
**BRIAN LANDERS**

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**

Applicant

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- and -

**GAMMA TELECOM HOLDINGS LIMITED**  
**CP GROUP**

Interveners

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—————  
**DAY SIX**

## **APPEARANCES**

Mr. Robert Palmer & Ms Fiona Banks (instructed by BT Legal) appeared on behalf of the Applicant.

Mr. Josh Holmes & Mr. Tristan Jones (instructed by Ofcom Legal) appeared on behalf of the Respondent.

Mr. Tim Johnston & Sarah Love (instructed by Charles Russell Speechlys) appeared on behalf of Gamma Telcom Holdings Limited.

Mr. Alan Bates (instructed by Towerhouse LLP) appeared on behalf of CP Group

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1 **Wednesday, 25th May 2016**

2 **(9.30 am)**

3  
4 **Housekeeping**

5 **THE CHAIRMAN:** Mr Palmer, just before you start we have got quite a long shift  
6 ahead of us this morning we thought what we might do, subject to whether this is  
7 convenient to parties, is adjourn after the evidence is finished and then adjourn again  
8 about halfway through the balance of the morning.

9 **MR PALMER:** Certainly, sir, if that's convenient to the Tribunal.

10 **THE CHAIRMAN:** Good morning Ms Love.

11 **MS LOVE:** I wanted to check, I believe that there should have been handed to you,  
12 before you departed yesterday, copies of note of supplemental submissions. In view  
13 of the amount to get through today, we thought it more prudent to address your  
14 questions, which we are grateful for, in writing. You should also have in front of  
15 you an intimidatingly large but not full bundle of the supplemental authorities in that  
16 note for your reference.

17 **THE CHAIRMAN:** We have not seen it but we have heard about it.

18 **MS LOVE:** I am grateful. I should add that Mr Palmer and Mr Holmes also had that  
19 note yesterday, so hopefully they have had the opportunity to see where we are  
20 (inaudible) in advance of their submissions.

21 In relation to the question of unredacting, we intend to review Mr Farmer's witness  
22 statement in the light of the information now unredacted from the CP group.

23 Obviously we have taken a limited approach to our own figures but had erred on the  
24 side of caution as regards negotiations with other parties. If there is more material

1 that we are happy to de-green, as it were, in the light of what Mr Bates' clients have  
2 put in the public domain then we will circulate that to you, sir. I hope that is the  
3 acceptable way forward.

4 **THE CHAIRMAN:** Thank you very much.

5 Mr Palmer.

6

7 **MR WILLIAM GODFREY (continued)**

8 **Cross-examination by MR PALMER (continued)**

9 **MR PALMER:** Good morning, Mr Godfrey.

10 **A.** Good morning.

11 **Q.** Direct routing. When Ofcom considered the issue of direct routing in the guidance, it  
12 did so in section 6, did it not?

13 **A.** Correct.

14 **Q.** We saw yesterday the guidance, obviously bundle 1, tab 8, at paragraph 6.3, that the  
15 analysis of direct routing incentives for OCPs to direct route was conducted as part of  
16 the consideration as to whether an OCP pays or RCP pays or any other option should  
17 be adopted?

18 **A.** Yes.

19 **Q.** So in substance at 6.95 of the guidance, where we see just above it the heading "Direct  
20 routing", what you are considering here is whether the provisional view expressed in  
21 the consultation proposal that the RCP pay rule should be maintained would  
22 adversely affect incentives to move to direct routing; that's right, isn't it?

23 **A.** That's what is said at 6.95.

24 **Q.** Yes, and the following section running up to 6.139 is the analysis of that. You told us

1           yesterday that section 6 proceeded on the basis, on the assumption, that LRIC pricing  
2           for APCCs would be adopted?

3   **A.** So I think that's broadly correct. I am trying to think if it was explicitly stated, but  
4           that was the reason for setting up the order of the sections 4, 5 and 6.

5   **Q.** So LRIC is already a given by the time we get to section 6 and this analysis of direct  
6           routing?

7   **A.** I think that would be broadly fair, yes.

8   **Q.** So there's no discussion in the guidance at all, is there, of the effects that the choice  
9           between LRIC and LRIC+ would have on incentives to move to direct routing?

10   **A.** I am trying to recall if that's correct. I thought section 4 had referred to section 6 and  
11           some of the impact on incentives. Footnote 73, for example, section 4 on page 34 --

12   **Q.** Footnote 73 is a footnote to paragraph 4.66, isn't it?

13   **A.** It is, yes.

14   **Q.** To put this in context, we are in the section dealing with effective competition and at  
15           4.66 you are recording a BT submission that it was unfair for large DCPs to only  
16           receive LRIC because the remaining customers have to bear all the fixed common  
17           costs associated with onward routing. BT submitted that wasn't:

18                   "... consistent with effective competition, because BT is a net exporter of  
19                   numbers and its competitive position is undermined by only receiving  
20                   LRIC. BT considered that the DCP should be able to charge for all  
21                   efficiently incurred costs associated with the provision of porting,  
22                   including those specifically excluded by GC18."

23           It's in that context that you note that BT also commented that RCP pays  
24           discriminated against new entrants because the OCP decides whether to employ

- 1 direct routing and their commercial interest is not necessarily the same as the RCP.
- 2 We discussed this and other comments in relation to direct routing in section 6. So
- 3 that's the context, I want to be fair to you, we can see it there.
- 4 **A.** Yes.
- 5 **Q.** That is not discussing, is it, the benefits or otherwise, or the effect on the choice of
- 6 LRIC or LRIC+ on incentives to direct route?
- 7 **A.** No, I think that's correct because it was BT's arguments in relation to the charging
- 8 rule, where the issue of direct routing and indirect routing arose. Footnote 87,
- 9 actually in section 4, says a little bit more on the cost standard, so footnote 87 on
- 10 page 39 says -- well, I'll let you read it.
- 11 **Q.** I am glad you are going to that because I was going to go to that next.
- 12 **A.** I thought you might.
- 13 **Q.** So you anticipate where you go. You are recording there the submission that BT
- 14 made that LRIC+ would help CPs take the correct economic decision on introducing
- 15 direct routing, ie BT was making the submission that the choice of cost standard
- 16 would affect incentives to direct route?
- 17 **A.** So that's what that footnote is referring to and I think the reason for structuring the
- 18 analysis that Ofcom presented here was to avoid addressing the same issue, so
- 19 incentives to move to direct routing, incentives to move to IP in more than one place
- 20 within the document, because we feared that that wouldn't assist readers of the
- 21 document in terms of the clarity of the argument.
- 22 **Q.** There's an omission here in Ofcom's analysis. You do not consider, even though it
- 23 was raised, the effect of the choice of cost standard on incentives to direct route?
- 24 **A.** So the detailed analysis, it's correct to say, is in the charging rule consideration.

1           Within the framework of the RCP paying, of course, the level of charge is relevant to  
2           the LRIC and LRIC+ question and so similar issues around incentives arise.

3           Indeed, I think some of Dr Maldoom's analysis identifies what would be the  
4           incentives if we went, for example, to a price of 0 for example. So there is some  
5           significant commonality in the issues around pricing and incentives of the parties to  
6           move to direct routing between those two sections.

7   **Q.** Whatever the extent of commonality, we can come to that in a moment, Ofcom did not  
8           consider that issue.

9   **A.** So the detailed reasoning, absolutely, is in section 6, which is not on the question of  
10          choice of cost standards.

11   **Q.** Thank you. As to commonality, the point that Dr Maldoom made about, by way of  
12          illustration, what would happen if you reduced the price to 0, he said there clearly  
13          would be an effect on incentives so his point was that at some point, as you reduce  
14          the price, there begin to be incentives not to direct route. That was the point he was  
15          making.

16   **A.** I find it hard to dispute that pricing wouldn't affect CP's incentives. Clearly prices  
17          will act on the incentives of both the buyers and the suppliers.

18   **Q.** I am grateful for that and indeed that's consistent with what with we heard from the  
19          CPs themselves.

20   **THE CHAIRMAN:** Mr Palmer, I may have missed this but can you point us to where  
21          it's recorded that BT argued in the submissions that --

22   **MR PALMER:** So it's at footnote 87 on page 39.

23   **THE CHAIRMAN:** Thank you.

24   **MR PALMER:** The submission is recorded:

1 "BT felt that LRIC+ would help CPs take the correct economic decision  
2 on introducing direct routing, both to ensure that consumers get the  
3 benefits of IP-to-IP calls as soon as possible, and that investment in  
4 legacy technology is minimised."

5 So I'm using the shorthand. What Ofcom say about that is we discuss direct routing  
6 in section 6 but then section 6 doesn't, in fact, address that question about the choice  
7 of costs standard; it only talks about the RCP pays versus OCP pays, et cetera, issue.

8 **THE CHAIRMAN:** Thank you.

9 Is it fair to say that we do not find anywhere in this document Ofcom expressing  
10 a view on what effect LRIC or LRIC+ respectively might have on incentives to go to  
11 direct routing?

12 **A.** So within the explicit confines of the choice of cost standard, I think that's correct.

13 As I say, the incentive effects will be similar to the consideration set out on who pays  
14 for the porting charges, which is why we referred out to section 6, but a detailed  
15 analysis of pros and cons on the costs standard isn't set out in any detail in section 4.

16 **THE CHAIRMAN:** Thank you.

17 **MR PALMER:** If we just bear in mind, in the context of what you have just said, we  
18 have agreed to section 6 proceeds on the basis that LRIC pricing for APCCs will be  
19 adopted.

20 **A. (Witness nodded)**

21 **Q.** You nodded for the transcript: that's a yes?

22 **A.** Sorry. Yes, I think that was the implicit assumption, I am not sure it was explicitly  
23 said as such in section 6. It was clear in section 6 that we considered the regime of  
24 onward routing and the incentives in that regard but I do not think it says: taking as



1           given the decision on LRIC in section 4.

2   **Q.** Can I just pick up a point from yesterday which is a bit of a stray point, it has no  
3           natural home in the context of rest of your evidence, but you gave evidence on the  
4           cost of capital point; do you remember that?

5   **A.** That's correct.

6   **Q.** I think your evidence was that a 1.5 per cent rate as assumed in Mr Morden's  
7           calculation was low for on a bond yield. You gave some evidence that when you  
8           convert an euro-denominated bond to sterling you get a 3 per cent yield --

9   **A.** That's correct.

10   **Q.** -- which you thought was the appropriate standard to adopt, that sort of bond by way  
11           of comparison?

12   **A.** I was just observing that the basis of the calculation was understating the relevant  
13           bond yield. I didn't give a view of the appropriate maturity or the other aspects of  
14           the debt financing.

15   **Q.** That 3 per cent that you refer to is the nominal rate; am I correct in that?

16   **A.** That's correct, that would be the nominal rate.

17   **Q.** What we need for this purpose is the real rate, in other words we need to subtract  
18           inflation, don't we?

19   **A.** That would -- I think that would depend upon whether the costs to be modelled, so the  
20           cash flow -- well, in this case the connection charge, whether that's expressed in  
21           nominal or real terms.

22   **Q.** If we subtract from the nominal rate to produce a real rate we do not just take the rate  
23           of inflation as it stands as of today; we need to take a longer term view, take  
24           a 10-year view?

- 1 A. So I think one of the other issues to address would also be the assumed rental. So the  
2 rental is currently expressed in nominal terms as well. So you can either do it in two  
3 steps, you can either do the nominal to real adjustment on the individual components,  
4 and then, if you like, do a real terms calculation, or you can just do it all at the end.
- 5 Q. If you do take a longer term view we are going to be talking about, what, 1.5,  
6 2 per cent inflation?
- 7 A. Certainly, the real rate would be lower than the nominal rate, on the assumption that  
8 one day inflation does recover to something above currently very low rates.
- 9 Q. If you did subtract at that level, you would end up with broadly what Mr Morden put  
10 forward at 1.5 per cent?
- 11 A. So if you wanted to do the analysis in real terms and you considered that only bond  
12 finance was appropriate, then clearly a rate lower than 3 per cent would be  
13 appropriate. Is it 1.5? I do not know, you would have to look at the inflation  
14 forecasts for that kind of horizon.
- 15 Q. Of course, we are not, in the context of the particular investments that we are talking  
16 about, going to be affecting Vodafone's equity, are we? We are not going to have  
17 shareholders running for the hills at the prospect of Vodafone investing in the sort of  
18 connections that we are talking about?
- 19 A. I think that's quite interesting because when we looked at, for example, BT's own  
20 pricing of interconnect circuits -- now, of course, Vodafone would only be  
21 purchasing or considering purchasing a subset of those -- but it is a relatively small  
22 part of BT's entire business, for example. So we didn't then segment between the  
23 costs of debt and equity finance. Of course one could because, if you like, each  
24 additional tranche of a very small investment is going to have a very small impact on

1 the overall capital structure of the firm.

2 But the point is when you are looking across a whole suite of investments, if you like,  
3 at the same time and the opportunity to deploy capital on different projections, then  
4 those broader opportunity costs of finance do become, in my view, relevant and, as  
5 I say, when looking at BT's returns on the interconnect circuits previously, I think we  
6 looked at rate closer to 10 per cent to being appropriate for that kind of  
7 infrastructure.

8 Of course, we are undertaking the current review of narrowband markets and voice  
9 interconnections so -- I mean, these are things that we will look at again, but I would  
10 be surprised if we departed from an approach where we looked at the cost of debt and  
11 the cost of equity within a weighted average cost of capital.

12 **Q.** What we have to bear in mind in context, Mr Godfrey, isn't it, is that we were talking  
13 about a handful of circuits not a product range?

14 **A.** I am not sure I quite see the distinction because the relevant issue is about a firm's  
15 investment and the cashflows it expects from that investment. The cashflows being  
16 a function of revenues that you get in and the cost that you lay out.

17 **THE CHAIRMAN:** Is the position, according to your evidence, that the same criteria  
18 apply irrespective of how large the particular investment is?

19 **A.** I think there's a degree to which you might say, well, if I was only ever considering  
20 one investment, then it's going to make a tiny impact on the overall capital structure  
21 and maybe I'll look at a very discrete discount rate for at that particular project. But  
22 I think where that runs into difficulty is where, if you like, arguably every investment  
23 can be just parcelled up in a very small way. So if you take that approach  
24 cumulatively, I think you will run into issues, vis à vis the entire capital structure.

1 And then it gets into rather subtle and complicated issues as to distinctions between  
2 marginal and average costs of capital.

3 **Q.** If you turn in bundle BT6 to tab 12, page 11, you can see there Mr Morden's  
4 calculation including 1.5 per cent, effectively treating that as being net of  
5 any inflation or tax implications, and you can see the financing cost for that  
6 1.5 per cent for IBC, table 3 with the £12.52, and under table 5, again the same figure  
7 for the IBC financing cost and the additional IEC financing cost of £2.52. So even  
8 if one were to double those figures to get to a net 3 per cent figure, we are still talking  
9 about very marginal sums, aren't we, in the context of the entire calculation?

10 **A.** I accept, within this calculation, the difference between 1.5 per cent and 3 per cent is  
11 relatively small. I think others have opined on the other aspects of the calculation,  
12 which I don't propose to go into.

13 **Q.** I am just talking about cost of capital with you.

14 **A.** Yes, absolutely.

15 **Q.** We can see that the difference just by comparing page 12 with page 13, we have put in  
16 bold and large where there is a difference. I can't read any of those figures out loud,  
17 they are confidential, but the change, where there is a change, is very, very small,  
18 isn't it?

19 **A.** The impact of going from 1.5 per cent to 3 per cent, yes, does appear relatively  
20 limited.

21 **Q.** Put that away, thank you.

22 Just a rag bag of other points to pick up with you. First of all, if we look in your  
23 witness statement report, I think you describe from your paragraph 12 onwards, up to  
24 17, that although the motivation for the guidance, ie the fact that Ofcom chose to

1 consider this issue and produced guidance on it, that was prompted by various  
2 representations being made to you by various CPs who were concerned at the effect  
3 of lowered termination rates, fixed termination rates, combined with APCCs?

4 **A.** That's correct. If I can put it one way, the tide went out on termination rates and  
5 revealed the rockier foreshore of porting charges.

6 **Q.** **An argument was put to you that, because termination rates had been reduced to**  
7 **LRIC, for that reason APCCs should be reduced to LRIC as well; that was**  
8 **an argument put to you?**

9 **A.** That was an argument put to us.

10 **Q.** But that, to be clear, is not an argument which found favour with you?

11 **A.** So our reasoning, if you like -- yes, I think it's fair to say that the trigger for looking at  
12 this was a number of stakeholders making that argument. I think our decision was  
13 to put porting charges on a LRIC basis for conveyance and non-conveyance, it was  
14 not predicated on the earlier decision to set termination rates on a LRIC basis.

15 **Q.** If we can go back to the guidance again, just to pick up one more point, in  
16 section 4 -- it's in a number of places but we will take paragraph 4.59 -- there is  
17 an argument in which Ofcom said that these charges and porting services were more  
18 akin to a two-way access service. That point appears in a number of places, doesn't  
19 it?

20 **A.** The reference to two-way access services does appear two or three times, I think, yes.

21 **Q.** I think there is some level of agreement on this. First of all, it's right, isn't it, that you  
22 agree with Dr Maldoom that porting conveyance is not a two-sided market?

23 **A.** So, in relation to the two-sided market, I would say porting charges are not necessarily  
24 a two-sided market in the classic sense of the term. The two-way access feature, ie

1 two parties providing the service to each other and where traffic flows between them  
2 matter, similar for example to certain two-sided markets like termination, is a point  
3 of similarity.

4 **Q.** Can we just look at your report on this point at paragraph 8(b). Do you recognise  
5 there that porting conveyance does not form part after two-sided market in the  
6 standard sense of the term; that's right, isn't it?

7 **A.** That's effectively it, yes.

8 **Q.** Nonetheless, you seem to contend that there's something to be drawn from this  
9 analogy, these words "akin to". I think the first point that you make is that BT is  
10 able to recover common costs elsewhere, ie from those customers that have not  
11 switched and ported away.

12 **A.** Either those customers or from other wholesale charges to other CPs.

13 **Q.** Yes, just for the Tribunal's note this is paragraph 151 of Ofcom's defence where it  
14 said:

15 "It's the ability to recover common costs from this different group of  
16 customers that Ofcom factored in, among other matters, to the decision  
17 to adopt a LRIC standard."

18 **A.** Paragraph 151?

19 **Q.** Yes, if you want to look at it, by all means.

20 **A.** Yes.

21 **Q.** That's not a helpful point, is it, Mr Godfrey? Just because BT has the ability to  
22 recover common costs elsewhere, doesn't assist us in answering the question about  
23 whether it's appropriate to lower the price of that particular service to LRIC, does it?

24 **A.** So to my mind, I think it does and if I might explain why. Imagine the situation of

1 direct routing, in that environment there is no conveyance for ported calls, so  
2 therefore the common costs would certainly need to be recovered from the  
3 donor -- what would otherwise be the donor CP's other customer base, either its own  
4 retail customers or wholesale customers. I think that's one important issue.  
5 I think another interesting comparison is if one had in mind, let's say, a competitive  
6 equilibrium of symmetric firms, similar size, similar flows of traffic, the porting  
7 charges would net out and so therefore the services would not be providing  
8 an opportunity to recover common costs. I pay to my rivals, they pay to me, so it  
9 doesn't provide, if you like, a vehicle to recover common costs in perhaps a way that  
10 situations of one-way access do.

11 **Q.** I won't go over ground that we discussed yesterday. Let me, in fairness to you, tie  
12 this in with the other point that is made at paragraph 151 of the defence. It might  
13 just be helpful to look at it. That's at tab 1, DF1, paragraph 151. You say:

14 "In addition, APCCs above LRIC amplify some of the competition  
15 effects of asymmetry of ported traffic between CPs in ways similar to  
16 (but not the same as) how termination rates above LRIC can amplify the  
17 impact of traffic differences on the competitive position between CPs."

18 That's the point which is summarising your evidence but that's the point that you  
19 wish to make, isn't it?

20 **A.** Correct.

21 **Q.** A short point that I am going to put to you, as I understand what is being said  
22 here, is that you are talking about new entrants having a higher proportion of  
23 ported numbers and so therefore being disproportionately affected by APCCs;  
24 is that right?

- 1 A. That's effectively the point.
- 2 Q. So the assumption being made is that that effect, that disproportionate effect on newer  
3 market entrants is material?
- 4 A. It's an observation about the effect. I think the point being made here is not talking  
5 about the materiality or scale of the effect.
- 6 Q. No, that's the difficulty, isn't it, because if one were to take this into account as  
7 a serious consideration, one would have to assess the materiality?
- 8 A. I agree that, having moved on from, if you like, the effects and theory, it's helpful to  
9 look at the materiality of the effects. I think an interesting point to observe is that  
10 the reduction in termination rates from LRIC+ to LRIC, I think, produced a similar  
11 order of magnitude of pounds per customer effect to some of the effects we are  
12 talking about here. The effect here is, I admit, smaller but they are not that far apart  
13 within the scheme of things.
- 14 Q. If one were to assume that there would be material effects, without actually assessing  
15 the materiality of them, that is a factor that Ofcom would have had to consider as  
16 well in its analysis of whether an RCP pays rule is appropriate at all?
- 17 A. Sorry, if I can clarify, have we moved on from the decision on the cost standard to the  
18 decision of the charging rule?
- 19 Q. I am saying if this is an important consideration, the effect on competition, on  
20 effective competition, the fact that there is an asymmetry and that newer entrants can  
21 be assumed to have a larger proportion of ported calls, and if you are concerned  
22 about the competitive dynamic underneath that and the effects of that on  
23 competition, you would have to assess that within the context of deciding whether  
24 an RCP pays rule is appropriate at all, wouldn't you?



1 A. I think it would. The impact on the entrant RCPs -- I think it probably goes without  
2 saying, it's relevant to look at the potential scale of the effect. That's effectively the  
3 information that Ofcom requested from the CPs during the review that lead to the  
4 guidance because it's that data that I rely on in my own evidence. So it wasn't new  
5 analysis that's prepared in my report, it's data that was already gathered for the  
6 purposes of the review.

7 Q. In the choice of OCP versus RCP, in that choice in section 6, do we see this point  
8 featuring?

9 A. The point being the scale of the effect on the RCP?

10 Q. Yes.

11 A. I am trying to recall whether it was or not or whether it just refers out to the broader  
12 overall impacts in section 7. I suspect it's the latter; I can't recall whether  
13 a quantification is presented in section 6. I have no doubt you will tell me if  
14 otherwise.

15 I think because there was an issue about how much we could disclose for individual  
16 CPs, I think a very broadbrush analysis was done in section 6, at 6.54, which I think  
17 we talked a bit about yesterday, so the 0.67 per cent there, I think, was, as I recall,  
18 the largest impact for any given CP.

19 Q. Yes, that's a helpful clarification of those figures. That figure, we assume, attaches to  
20 a particular CP but that's at the high end of the scale; different CPs will have different  
21 figures depending on their own networks and profile of their customers and the  
22 interconnection arrangements they make?

23 A. Hopefully, without disclosing any confidentiality, yes that would be the largest one.

24 From memory, most recipient CPs would have -- it's a figure a bit less than that but

1 not markedly less. Obviously the situation varies for different CPs.

2 **Q.** Lastly, can I just raise this point with you. I put to Mr Farmer that CPs can derive  
3 from their APCC rates the LRIC figures for LTC and ITC; do you remember that  
4 point?

5 **A.** Well, I remember the discussion.

6 **Q.** He agreed that that was possible and, indeed, it has been done by various witnesses,  
7 including Mr Perry. That, therefore, broadcasts to the market what the LRIC  
8 figures for LTC and ITC actually are.

9 **A.** I wonder if it's worth just clarifying the calculation that would be required because  
10 I think what is -- so if an APCC is set at LRIC, if that is a weighted average of, in  
11 theory, 10 possible call groups, even if you have got the underlying traffic and hence  
12 the weights of those different call groups, you have still got far more unknowns than  
13 you have got, if you like, equations to be able to solve out for. So, whilst, in theory,  
14 a CP might be able to make reasonable approximations by overlaying additional  
15 restrictions, things like inter-tandem conveyance charges being probably greater  
16 than the local tandem conveyance perhaps, I am not sure that you can precisely back  
17 out the figure, although I have not attempted that.

18 **Q.** Mr Rosbotham in his evidence, paragraph 33.2 -- do you want to have a look at that?

19 **A.** Which bundle?

20 **Q.** It's in the CP group bundle, tab 2.

21 **A.** Which paragraph?

22 **Q.** 33.2, it's on page 11.

23 **A.** Yes.

24 **Q.** It refers to Mr Young's witness statement and then says:

1 "Using the total cost and total minute volume data Vodafone was able to  
2 reverse engineer the components used in the APCCs and determine that  
3 the rates for conveyance are broadly in line with the rates that BT charges  
4 in its carrier price list for non-ported traffic streams."

5 We also have Mr Perry's calculations in which he performed a similar feat of reverse  
6 engineering and we also have Mr Morden's second witness statement in which he  
7 reverse engineers those rates in order to show their consistency with those rates  
8 applied for other products like CPS and indirect access termination, and so forth;  
9 that's right, isn't it?

10 **A.** That appears, yes, I think that's what Mr Rosbotham's describing here.

11 **Q.** That will affect, won't it, BT's negotiating position in respect of competitive services  
12 where inter-switch conveyance is required for non-ported traffic and termination  
13 markets in transit markets, as Mr Farmer accepted, indeed he seemed to be quite  
14 gleeful at the prospect, didn't he? He grinned.

15 **A.** I agree, it was met with some glee. What I find quite interesting is the opportunity  
16 that has to seriously affect the price you might negotiate because the buyers and the  
17 suppliers' incentives here are unchanged. The credibility of being able to leverage  
18 that information depends upon the outside options available to the CP. So if you  
19 can self supply at lower cost than the price you are being charged by BT, you will be  
20 incentivised to do that. If someone else is providing a transit service at a lower  
21 price than BT's offering, you would be incentivised to take that up.

22 Knowing the -- even if you could identify the very specific incremental cost of  
23 an individual element, to my mind, might give you slightly more information but  
24 how much more you can act on it I would question because the critical thing is it

1 depends on your outside options. I think the other observation I would make is that  
2 following the deregulation of these transit markets in the last but one narrowband  
3 market review, the information on BT's LRIC of the conveyance services was  
4 published in the regulatory statements. So that information was available for  
5 a period of time after those decisions, so I think CPs would have had, in any case,  
6 plus a lot of them have run their own TDM networks, reasonable knowledge of the  
7 underlying costs.

8 **Q.** Post-deregulation as it was, I'm told, left there for a little while but then it was  
9 withdrawn for good reason, I am going to put to you.

10 **A.** Well, absolutely, so once significant market power obligations had been removed in  
11 respect of a particular market, the regulatory reporting requirements fall away from  
12 that market.

13 **Q.** Yes. So that information no longer need be made available and is no longer made  
14 available?

15 **A.** It's correct to say that that's no longer publicly available. I believe it's still available  
16 to Ofcom on request.

17 **Q.** Ofcom is in a different situation.

18 **A.** Absolutely.

19 **Q.** Forgive me, if I look at your experience as you set out at the beginning of your witness  
20 statement, Mr Godfrey, I think it's right that you have always been, if I can put it  
21 broadly, on the regulatory side of matters rather than on the commercial side; is that  
22 right?

23 **A.** Yes. By and large, my experience has been as a competition or regulatory economist  
24 working at a competition authority or with an economic regulator.

1 **Q.** Business people know that you don't tend to go into a commercial negotiation  
2 displaying to the other side what your actual cost and, hence, what your bottom line  
3 is?

4 **A.** I would agree it's unlikely that parties would reveal their cost information in  
5 discussions. As to whether the other side would already have a reasonable  
6 understanding of what those costs might be if they operate in the same industry and  
7 possibly similar networks.

8 **Q.** Mr Farmer couldn't wait, that is the telling point, isn't it? He was rubbing his hands  
9 together with glee, grinning from ear to ear; I am not exaggerating, am I? I am not,  
10 you are grinning.

11 **A.** Mr Farmer did seem pleased with the prospect. I can't say more than that. You  
12 would have to ask him what more he would do with the information.

13 **Q.** From a commercial point of view that's extremely valuable information for other  
14 parties to have and its affect, that that is disclosed, is disrupting of the operation of a  
15 fully competitive market, isn't it?

16 **A.** As I say, I would like to know the opportunity or the alternative options available that  
17 greater enhance the buyer's ability to get a better deal, even knowing that.

18 **Q.** In all frankness, Mr Godfrey, did Ofcom consider this point when it reached its  
19 determination on the guidance that LRIC was appropriate?

20 **A.** I can't speak to the determination because I didn't oversee the economic analysis in  
21 that. In the guidance, because that was looking more generally at the mobile sector,  
22 the fixed sector, conveyance and non-conveyance, the very specifics of possibly  
23 revealing cost information on different call groups is not an issue that was raised or  
24 that we considered.

1 **MR PALMER:** We are very grateful for your assistance, thank you.

2 **Re-examination by MR HOLMES**

3 **MR HOLMES:** Sir, I have only a small handful of questions.

4 Mr Godfrey you were asked -- Mr Palmer referred you to footnote 87 in the guidance  
5 after you had referred him to it.

6 **A.** Yes.

7 **Q.** He suggested that there was an omission from Ofcom's reasoning and that Ofcom had  
8 omitted to consider an argument by BT that reducing porting charges faced by the  
9 RCP would reduce incentives to move to direct routing; do you remember that?

10 **A.** I do.

11 **Q.** Could I ask you first to review two passages in the guidance and then to give your  
12 comment on that? First is a footnote in section 6, footnote 148. This is in the  
13 context of section 6, it's on page 71; do you have that?

14 **A.** Yes, I do.

15 **Q.** Second is the discussion of the efficient incentives for direct routing at 6.119 to 6.121  
16 and, in particular, the conclusion at 6.121.

17 **THE CHAIRMAN:** Sorry, where are we on tab 3?

18 **MR HOLMES:** We are in BT1 tab 8, page 71 for the footnote to which I referred  
19 Mr Godfrey. On page 74, do you have that? Page 74 for the discussion of the  
20 efficient incentives for direct routing, depending upon the level of the charge for  
21 porting. 6.119 to 6.121, the conclusion in 6.121.

22 **THE CHAIRMAN:** Yes.

23 **MR HOLMES:** In the light of those passages, is there anything you would like to add to  
24 the answer that you gave to Mr Palmer as to whether there was -- whether Ofcom

1 omitted to consider the effect of the price of porting services on efficient incentives  
2 to move to direct routing.

3 **A.** I agree, and I think I -- perhaps I wasn't clear enough at the time but, as I say, the  
4 pricing signals faced by CPs in relation to whether they would move to direct routing  
5 are pricing signals that would come both from the choice of cost standard and  
6 obviously who pays. And the point I was trying to make was that, whereas the  
7 detailed reasoning on the response of CPs to those price signals is set out in section 6,  
8 which deals with the choice of cost standard -- sorry, deals with the question of who  
9 pays. In the earlier choice of cost standard for ported numbers --  
10 In the earlier discussion in section 4 on the choice of cost standard, we did endeavour  
11 to refer out to reasoning in section 6 which looks at the pricing incentives or the  
12 impact of pricing on incentives and decisions to move to direct routing.

13 **Q.** The second question concerns the reasons for moving to OCP pays. Mr Palmer took  
14 you to various particular paragraphs concerning Ofcom's reasons. Of course,  
15 OCP -- the decision not to move to OCP pays is not under challenge in these  
16 proceedings, but so that the Tribunal has the relevant context and understands the  
17 types of concern that were in Ofcom's mind, can I ask you please to review two  
18 particular paragraphs of the consultation on the guidance, where some of the  
19 reasoning is more fully set out and to comment on Ofcom's reasoning in support of  
20 sticking with RCP pays.

21 So this is at tab 6 of BT1, page 48, and if I could ask you to review 6.44 and 6.45 and  
22 then to comment on Ofcom's concerns in relation to a move to OCP pays; do you  
23 have those?

24 **A.** I do, I thought I would just quickly scan them. **(Pause)**

1 So my comment on that would be the benefits that porting engenders in relation to  
2 more customer switching and competition is likely primarily to be felt within either  
3 the fixed sector in relation to fixed porting or the mobile sector in relation to mobile  
4 porting.

5 One aspect of the distribution of benefits consideration might say: will callers to  
6 those customers benefit? The question arises as to whether, for example, callers  
7 from the US or France would benefit from greater competition in relation to calling  
8 customers in the UK. The main issue that matters there is the termination rates that  
9 they pay, which is subject to regulation anyway, and similar issues arise in relation to  
10 mobile to fixed calls and fixed to mobile calls, where Ofcom's view was that if the  
11 primary competition effect is going to be switching between fixed CPs or between  
12 mobile CPs as a result of porting, there might be some overlap, to an extent, in  
13 competition between the fixed and mobile sectors but our feeling was that the  
14 strongest effect would likely to be confined to either the fixed sector with fixed  
15 porting or mobile sector for mobile porting.

16 **Q.** One final question, you were asked about the concern that commercially sensitive  
17 information could be backed out of APCCs following the move to LRIC and you  
18 were taken to a calculation that was undertaken by Mr Rosbotham in relation to the  
19 APCCs before the move to pure LRIC. In your understanding, would it be  
20 sufficient to determine LRIC rates for LTC and ITC purely from the headline APCC  
21 rate and the total volumes of customers within -- volumes of minutes, rather, to  
22 which that APCC rate was applied for a given operator?

23 **A.** That was what I was endeavouring to capture in my reply to the question of the APCC  
24 being averaged across very many call groups. So even if you knew the LRIC for the



1 APCC at an aggregate level, because it spans so many different call groups, unless  
2 you have got the information on the LRIC of different parts of it, even with the  
3 weights of the different call groups, my feeling was, it would be difficult to back out  
4 precisely the incremental costs of different parts of it because one LRIC could be  
5 higher and one could be low, and an alternative could be flipped around with these  
6 multiple call groups.

7 So, as I say, while one might impose certain restrictions, like the assumption that  
8 certain call groups would have a higher cost than others, my understanding, although  
9 I have not endeavoured to do the calculation in any detail, was that it would be  
10 difficult to be precise on that. As I think has been pointed out to me, the calculation  
11 set out in Mr Rosbotham's statement here, I believe in relation to the published rates  
12 as applied prior to the -- that led to the motivation for challenging the rates that BT  
13 set and that led to the dispute.

14 **Q.** To your knowledge, has Ofcom expressed any view about whether BT would be  
15 required to publish the rates for individual call groups?

16 **A.** That is a good question. So, as far as I am aware, although I didn't work on the  
17 determination, I think the publication or the disclosure requirements, as I recall,  
18 weren't covered in relation to the detail of the LRIC of different call groups. All that  
19 was required was the APCC was reset based on the calculation set out in the  
20 determination that the underlying LRIC of the call groups was treated as  
21 confidential, effectively, and so not disclosed.

22 **Q.** One final question: are you aware that the confidentiality concern which BT raised in  
23 its skeleton argument, and subsequently with witnesses at this hearing, was raised by  
24 any party to the consultation on the guidance?

1 **A.** It would be fair to say that nobody raised publication or confidentiality issues in  
2 relation to the costs of conveyance or other parts of porting charges during the  
3 consultation that led to the guidance.

4 **MR HOLMES:** I am grateful thank you very much, Mr Godfrey.

5 **THE CHAIRMAN:** Mr Godfrey, thank you very much for your evidence -- I am sorry.

6 **MS LOVE:** I do apologise. I have one very minor point of clarification about the  
7 transcript yesterday, if I might be permitted.

8 **THE CHAIRMAN:** Yes.

9 **Further cross-examination by MS LOVE**

10 **MS LOVE:** Thank you. I'll read out the relevant section. If you just cast your mind to  
11 just after lunchtime yesterday, Mr Palmer asked you whether in principle Ofcom  
12 could have concluded that LRIC was appropriate for some aspects of the service but  
13 LRIC+ for others, and you said that was a possible distinction and you said:

14 "So you could for example have decided that LRIC was appropriate for  
15 line set up and switch conveyance but that LRIC+ was appropriate for  
16 inter-switch conveyance?"

17 You said that that fragmentation of different activities and costs would have been  
18 possible, not identified by parties at the time but distinction beyond conveyance and  
19 non-conveyance.

20 Mr Palmer then said it was not identified at the time but there's questions about what  
21 was in scope at the time.

22 Just pausing there, as far as you were aware at the time of the consultation and the  
23 guidance, was there a question mark as to whether inter-switch and switch

24 conveyance both fell within the scope of General Condition 18.5(a)?

1 A. That is a good question. As I was looking at it, at the time, I was envisaging  
2 a distinction between, if you like, the non-conveyance aspects, so the line set up, and  
3 so on, and between the conveyance aspects. I did not drill down more deeply into  
4 the distinction between switch and inter-switch conveyance as has, if you like, since  
5 arisen. In the exchanges that I saw with different CPs in the industry, it wasn't  
6 something that I was aware of as being a particular distinction that CPs thought was  
7 material at the time.

8 Q. Just one last point which is really for the record on the transcript. Mr Palmer's next  
9 question was whether that distinction was possible to make. Your answer on the  
10 transcript is: "I think that distinction should be made". My note was "I think that  
11 distinction could be made". Were you saying that the distinction between switch  
12 and inter-switch was a possibility or something that you were endorsing as a  
13 "should"?

14 A. Thank you for bringing that to my attention. I would see that as a "could" rather than  
15 as a "should".

16 **THE CHAIRMAN:** Thank you for your evidence, Mr Godfrey.

17 **(The witness withdrew)**

18 **THE CHAIRMAN:** So we move on now to closing speeches. I think, in that case, we  
19 have reached our normal starting time, so we'll have a 10-minute break and resume  
20 after that.

21 **(10.30 am)**

22 **(A short break)**

23 **(10.45 am)**

24 **THE CHAIRMAN:** Mr Palmer, can I ask if counsel has arrived at an equitable division

1 of the remaining time because we would like not to have to sit after 4.30, having  
2 started at 9.30.

3 **MR PALMER:** Sir, we have not had a subsequent explicit discussion of that. We may  
4 all need to trim the time that we were intending to take. As we originally envisaged,  
5 it was two hours for me, two hours for Mr Holmes, one hour for the interveners to  
6 cut up amongst themselves and then half an hour for me to reply.  
7 One of the difficulties with that timetable and the way that matters have progressed  
8 is, as you will recall, Ms Love took an hour in opening developing her additional  
9 point, which I have to say when we set that timetable wasn't something I anticipated.  
10 Let me start at least until we take the time to the mid-morning break, and then  
11 perhaps -- which we may have to keep quite short, but perhaps I can have that  
12 discussion with my colleagues and we will cut our cloth according to the time that we  
13 have.

14 **THE CHAIRMAN:** If we plan to stop for our break at about 11.55, would that be all  
15 right?

16 **MR PALMER:** Certainly, sir.

17 **THE CHAIRMAN:** Okay, we will do that.

18

19 **Closing submissions by MR PALMER**

20 **MR PALMER:** May I start by handing up two documents. That will hopefully assist in  
21 the trimming of the time. **(Handed)**  
22 There's two documents. One of them, the written notes of the submissions that  
23 I wish to make on the factual evidence that you have heard, reduced those to writing.  
24 I will skim through them with a bit of speed this morning but it's easier to give you

1 all the references in written form. Then, having done that, I will develop each of my  
2 grounds in turn and endeavour to explain how the conclusions, factual conclusions  
3 which we urge the Tribunal to arrive at, play in to the way in which we put each of  
4 our grounds.

5 So the other document is a version of the note that was handed up to you on Monday  
6 morning by Mr Holmes. It was originally Ofcom's note designed to explain further  
7 how different calls can be routed or are routed over the network under various  
8 different circumstances. So you will recall the context for the provision of that note  
9 was that, amidst the somewhat confused picture emerging from the opening of  
10 Mr Perry's evidence, I suggested that an agreed note could be provided.

11 Ofcom choose not to seek to agree a note but just put their note in. So what we have  
12 done is to put into that note BT's own view of the same points, and the changes are  
13 identified by highlighting, so that you can see, hopefully at a glance, where the  
14 difference of emphasis lies.

15 One point I would like to emphasise on that document straight away is that a theme  
16 that emerges from Ofcom's picture, as they present it, is that it would be  
17 comparatively rare that a call would be routed the same way in the ported context as  
18 a non-ported context. We say that that understates the position. In terms of  
19 following materially the same route in terms of costs, and so forth, it will, in fact,  
20 quite often be the position that the same sort of route is taken by a non-ported call as  
21 a ported call, where the originating CP is not a TalkTalk or a Sky, which has its own  
22 fully developed national network, but is already relying on transit, because smaller  
23 CPs won't have their own national network they will be reliant to the big carriers for  
24 some or all of their routes. So in those circumstances --

1 **MR HOLMES:** I hesitate -- it's simply to say that I do not think that would be  
2 contentious at all. It would be small CPs -- there won't be so much interconnection  
3 and therefore there will be more transit on the carriage of an ordinary call.

4 **MR PALMER:** So then the question becomes, well, what costs are they incurring? Of  
5 course, when they are transiting with a non-ported call they are paying for that transit  
6 at a commercial rate. The effect of this decision is that, as soon as it becomes  
7 a ported call, a significant part of those conveyance costs become pure LRIC.

8 **THE CHAIRMAN:** Might the answer to the question as to whether a cost is related to  
9 porting or to portability depend on precisely what route a particular call takes, with  
10 the result that some charges might be related to porting and others might not? I  
11 mean, at the moment, we have two, I think, binary alternatives but is there -- might  
12 different considerations depending on the precise factual circumstances apply and, if  
13 so, how is that to be sorted out?

14 **MR PALMER:** Sir, if I have understood your question correctly, the key point is that  
15 under Ofcom's current approach, when there is a ported call, the RCP pays for the  
16 switch conveyance and the inter-switch conveyance which follows delivery of that  
17 call by the OCP to the point at which BT identifies it as a ported call. It's the donor  
18 CP. I am using BT as the most common DCP but it applies to any DCPs.  
19 So the OCP is still paying for and still charging its customer for the call up to that  
20 point, obviously in the normal way. It also pays for the termination of that call by  
21 passing that on to the DCP, who passes that payment on to the RCP. So all of that is  
22 still a cost lying at the OCP's door. But, specifically in the context of a ported call  
23 but not in a non-ported call, that inter-switch conveyance and the switch conveyance,  
24 following the identification of a ported call is paid for by the RCP at these different

1 rates, at pure LRIC rates. That's the effect of the guidance.  
2 Whether that should be the effect is a live question in this appeal. Of course, we are  
3 not -- as Mr Holmes pointed out, we have not appealed and do not appeal it in  
4 context against the principle that it should be the RCP who pays for the post-bounce  
5 costs -- that's Dr Maldoom's words, the bounce. But we do so -- we do not dispute  
6 that, only on this explicit basis, that when you look at the analysis that Ofcom  
7 followed to arrive at that conclusion, it was effectively an analysis which arrived at  
8 the conclusion that that is okay because it's the RCP customer who has ported who  
9 gets the benefit of that arrangement, and the countervailing competition concerns  
10 that might arise are not sufficient to outweigh that principle.  
11 What we are saying about this -- the reason why we have focused to such an extent  
12 on that reasoning is, we say, what's sauce for the goose is sauce for the gander and  
13 you need to play that same reasoning back into the LRIC versus LRIC+ analysis.  
14 We say, for the reasons that you gave on the RCP pays decision, the competition  
15 effects, such as they are, are simply not material; they are very, very low order in the  
16 context of a fully competitive market. But if you are going to allege that they are  
17 material then: (a) you need to do the work to analyse how material they are; and (b)  
18 you would then logically need to play the resulting of that analysis back into the RCP  
19 pays analysis as well, to ensure that you were providing a consistent approach across  
20 both.  
21 So if we succeed on this appeal, and if the consequence of that success is that Ofcom  
22 must look at this again, and of course it's fully open to them, regardless of the scope  
23 of our present appeal, to re-examine that and to crosscheck their answers, if you like,  
24 both in respect of who should pay and in respect of how much of charge should be.

1 That would be a matter entirely for Ofcom to consider.

2 Just going back to this note which I have handed up, which I will leave the Tribunal  
3 to look at in due course, the other point which we emphasise, in terms of our  
4 difference of emphasis from Ofcom, is that Ofcom's emphasise throughout,  
5 particularly the latter stages of the analysis, beyond the first couple of pages, when it  
6 deals with what it calls the Effect of Porting is to emphasise the fact that it's the RCP  
7 who gets the charge in these various scenarios of ported calls and we say of course  
8 that's right, but that is a function of Ofcom's own decision and in itself it is not  
9 illuminating of whether the charge should be assessed at LRIC+ or pure LRIC. So  
10 that's that document.

11 If I turn to the other one, which is -- it's headed "Notes for BT's submissions on the  
12 factual evidence", I will take this at a pace, if I may, just drawing out the key points.  
13 It will be at the Tribunal's proverbial leisure to read through it in due course in more  
14 detail.

15 But we start off from the position that, common ground, no technical barrier to CPs  
16 interconnecting everywhere and, secondly, it's not an all or nothing choice, they can  
17 pick and choose which ones to interconnect to. Also common ground that, whether  
18 in fact they choose to do so or not, would turn on an assessment of the commercial  
19 viability of interconnection, given the alternative of taking ISC at a particular price.  
20 Obviously that's an inevitable part of that cost-benefit assessment, it depends what  
21 the price of inter-switch conveyance is.

22 Clearly, you vary that, you get a different answer to the commercial viability analysis  
23 and that provides a constraint for BT, the fact that if you put up the price you lose  
24 business, in effect, as the incentives become stronger to carry the traffic yourself, if



1 you are a CP. Furthermore, as we pointed out to Mr Godfrey yesterday, and as he  
2 accepted and is set out in Ofcom's own NBMR as well, BT cannot discriminate as  
3 between ported calls and non-ported calls by charging a higher price at route for LTC  
4 or ITC than it does for non-ported calls, because if it did that would fall within the  
5 definition of additional conveyance charges which have to be priced at 0.

6 Those are the constraints. If it wants to put up the price it has to do so across the  
7 board and that, of course, will have consequences and will encourage the use,  
8 amongst other things, of either direct interconnection or transit, to an alternative  
9 carrier.

10 In terms of interconnection at the DLE layer, the evidence that was put forward by  
11 Ofcom and by the CPs was essentially to the effect that there are practical constraints  
12 which means it's not fit for purpose as a product, it can't be done, won't be done, will  
13 never be done, not efficient for us to do so, and so forth. That whole stream of  
14 evidence has collapsed on analysis. There is nothing in the terms of the product, its  
15 design, which make it unfit for purpose and, indeed, it would be surprising if it was,  
16 given that TalkTalk use it everywhere.

17 Various criticisms have been made. The first is that it's the segregated route for  
18 ported traffic only. That point was presented by Mr Holmes in opening as being  
19 an indication that this was somehow sneaky behaviour by BT putting up the costs of  
20 its competitors, making it more difficult, complying with its obligation to provide  
21 portability, but somehow making sure it wasn't really going to be worth anyone else's  
22 while. That was a wholly baseless suggestion.

23 The evidence on that, we summarise, at paragraph 4. Opal said it wanted a mixed,  
24 not segregated, means of conveyance when it brought its dispute. Ofcom didn't pick

1 that up; it left that to the parties.

2 At paragraph 5, Ms Kennedy confirmed in her evidence the concerns at the time  
3 were explained to TalkTalk, or Opal, as it then was, directly. They were accepted  
4 and TalkTalk signed up to the product on that basis. The underlying reason is all  
5 about ownership of traffic. That is nothing to do, I emphasise, with the direction in  
6 which traffic is flowing. You may recall Mr Holmes re-examined Mr Perry about  
7 that point, making clear that traffic can flow in different directions at the same time  
8 along the same link. That's absolutely right; that's nothing to do with ownership.  
9 The key feature about this traffic is that you have, if you mix it on the same link, the  
10 DLE layer, you have a conflict of interest arising between BT as the DCP and  
11 TalkTalk, to use this example. They both have an incentive to use it to the  
12 maximum. When they do, it's the other person, it's the other CP who has to bear the  
13 consequences of overflow putting their costs up. That's an inherently unstable  
14 position.

15 Whatever one thinks of that, and whether one could devise a complicated solution to  
16 overcome it, the CSI product, Customer Sited Interconnect, which BT offers, does  
17 allow mixed-owned traffic to go down the same path at the same time but under very  
18 strictly controlled contractual terms over a link specifically designed by BT itself.  
19 As Mr Perry accepted, if that were to be adopted here, it would just simply lead to  
20 even greater expense.

21 That is the reason for the segregation but it's wrong to suggest that this is a simply  
22 an attempt, as we say in paragraph 6, to put up costs. What it means, in practical  
23 consequences for the cost-benefit assessment, of course, is that CPs have to identify  
24 what ported traffic there would be at that particular DLE specifically. We will come

1 to that later on, but that means ability to do that. It means that you have to conduct  
2 the cost-benefit analysis specifically looking at only that traffic and it's only if the  
3 ported traffic volume is big enough that you end up saving on the costs of ISC, that  
4 it's going to cost out for you, it's going to be viable. That's the consequence. It's  
5 not about fitness for purpose, though.

6 We say at paragraph 6 and I do not want to labour this too much, but it is important,  
7 it is telling that Ofcom pejoratively, we say, sought to present the APCC to the  
8 Tribunal at the outset of these submissions as a tax on ported customers, failing to  
9 recognise that this isn't a service that BT ideally would like to supply at all but when  
10 a call is delivered to it, as the original home of the traffic identifies it as being ported,  
11 it has no choice but then to convey it on and has no choice but to charge the RCP for  
12 it.

13 **THE CHAIRMAN:** "Tax" may be a pejorative word but is the point that simply  
14 an RCP, with a substantial balance of ported customers will pay out more in APCCs  
15 than it receives in fixed termination payments?

16 **MR PALMER:** Absolutely right. If you are a net importer of ported traffic you are  
17 going paying more APCCs, and we have seen that table that Mr Holmes went to in  
18 the evidence of Mr Godfrey -- I think it's table 7, from memory -- which shows the  
19 balance which varies. But the point about the tax, ie who bears the cost of that  
20 imbalance, is of course entirely a function of the RCP pays rule.

21 So if that is seen as a problem for reasons of competition, then the position that the  
22 answer lies in healing that arrangement, not in saying, therefore, we have to clamp  
23 down on BT's ability to recover its common costs of providing wholesale service  
24 across its network on equal terms, as it does to non-ported traffic.

1 **THE CHAIRMAN:** Whether or not you characterise it as a tax or make reference to BT  
2 not wanting to provide this service, it is the case that one way of addressing the  
3 balance would be to have APCCs set at a lower rather than a higher rate; is that  
4 correct?

5 **MR PALMER:** It is correct that if you charge less for APCCs it will cost its consumers  
6 less to provide to connect ported customers, of course that is right. The question for  
7 Ofcom ought to have been, if they are going to start from that assumption, as they  
8 did, that RCP pays, it ought to have been: are the effects of that charge for RCPs at  
9 the LRIC+ rate, as opposed to the pure LRIC rate, so material as to justify a departure  
10 from the ordinary principle that common costs should be shared equally across all  
11 services. That arises both from an economic perspective. As Dr Maldoom  
12 describes, you have this exceptional arrangement which has to be justified by  
13 defining and identifying an incremental benefit, which would be achieved from  
14 excluding common costs over than simply increased consumption. But it also, as I  
15 commented earlier, arises at a legal level as well, which is the proportionality, the  
16 necessity test, and I will come to that in due course.

17 I will turn to paragraph 8, simply make it clear that, again, Mr Perry's evidence  
18 presented to you was in terms of not commercial viability but of efficiency. Of  
19 course, it isn't an efficiency analysis which a CP undertakes when it decides whether  
20 or not to connect to take out this additional interconnection at a DLE level, it's simply  
21 a cost-benefit analysis and that was confirmed by all the witnesses. We have given  
22 you the reference at the foot of paragraph 8.

23 Once you pass the break-even point on that cost-benefit analysis, then additional  
24 minutes are essentially free and you are saving additional money, in effect, it's cost

1 saving they make, in the minutes above break even.

2 We make a point in paragraph 11 about the viability analysis, Mr Morden's figures.

3 We make the point that it assumes it will be necessary for a CP to add a new circuit.

4 Of course, that isn't always true. For the purpose of his assessment, he assumed it.

5 But where you are physically interconnected already, for example Vodafone is, to all

6 but one of the DLEs, then often what you will be able to do is simply free up capacity

7 and rearrange your circuits rather than actually having to purchase an additional one.

8 Further, Mr Morden's analysis doesn't allow for any savings made, of course, from

9 freeing up capacity at the tandem layer, or the savings that would be made beyond

10 the break-even point, of course. So he is already dealing with the worst case

11 scenario. It's not a rose-tinted picture as has been sought to be portrayed.

12 At the bottom of paragraph 11 it refers to Mr Morden there explaining the

13 rearrangement costs in relation to what will happen. It's about half the cost of

14 installing a new circuit. But it's still viable, even on that basis, for most of the

15 ported traffic. Mr Farmer is the only witness who produced an alternative

16 cost-benefit analysis, but he did so on the basis of average costs or DLEs, he didn't

17 consider the position on a DLE-by-DLE basis.

18 At 14 we make the point that Ofcom accepts it's likely to be commercially viable for

19 some CPs to use this product at some DLEs, I accept that much. It is also accepted

20 by Gamma. The fact that CPs other than TalkTalk are not using the product simply

21 means that those CPs are choosing to pursue different commercial strategies in the

22 light of their overall network optimisation. Mr Young explained that in his witness

23 statement, none of that was challenged.

24 Ofcom then takes three points to say, well, nonetheless this is all rose tinted, and

1 Gamma also raises a fourth point. We deal with those in turn. The amortisation  
2 period, first of all, Mr Morden took 10 years but he did take a more aggressive  
3 analysis as well of three years in his table 4. We say that the reasonableness of this  
4 approach is not undermined by Vodafone's particular approach. It says two years  
5 we consider that particularly aggressive, particularly conservative, if you like,  
6 particularly in circumstances where the Standard Interconnect Agreement (that the  
7 SIA) can make adjustment for system alterations and, of course, the point -- the  
8 profit, in effect, when you exceed the break-even point.

9 In terms of costs of capital, there's some debate about that, we've heard more today.  
10 Mr Farmer criticised it and he didn't suggest a rate himself. You heard evidence  
11 from Mr Godfrey about that this morning. Even if you take a nominal 3 per cent  
12 rate, which if you bear in mind the effects of inflation, it comes down again. But  
13 ultimately when you look at the actual numbers of amount of difference this actually  
14 makes to the cost-benefit analysis is slight, you remember we went to that this  
15 morning. It doesn't ultimately affect the overall analysis.

16 The third category of costs were the costs incurred by RCP, Mr Morden explained  
17 that porting traffic, which is not at present picked up at the DLE, will already go over  
18 a link on tandem exchange to the RCP, so to segregate the route to pick up calls from  
19 the DLE is work done almost entirely at the BT end. At the CP end the call will go  
20 to the same point, so there's no costs there. It's reasonable to assume it would go to  
21 the same switch, Mr Perry agreed, the RCP end.

22 Mr Rosbotham said that any necessary adjustment to the transmission would be  
23 affected by a few adjustments by keyboard, I have given you the reference for that.

24 In any event, to the extent that there's any new connections, this would be a purely

1 digital process affected by keyboard and we have given you the references for that.  
2 Mr Rosbotham suggested that there was an operational cost associated with  
3 managing physical circuits as opposed to VICs. He said "In all likelihood, extra  
4 people would be needed", but without making any assessment of that additional cost.  
5 Moreover, we make the point that no reference has been made to any operational  
6 costs associated with having to deploy physical circuits in his evidence. If they had  
7 been material we would have expected that. But, most importantly, where DLEs are  
8 co-located with tandems, you will recall from Mr Morden's second witness statement  
9 in table 7, what the balance of co-located versus non-co-located is, Vodafone will be  
10 able to interconnect at those DLEs, bar one, to collect ported traffic without installing  
11 any additional links, so Mr Morden's analysis is clearly overly pessimistic. In fact,  
12 it will cost out better, given that he has factored in the cost of an additional link every  
13 time.

14 Mr Farmer's cost-benefit analysis, you will recall, doesn't contain any internal costs  
15 and on cross-examination that emerged. It was because they would only be material  
16 in the most marginal of cases. So the material costs, in sum, is at the BT end of the  
17 circuit and not at the other. So we are talking about marginal differences which  
18 really make no difference to this basic proposition of the ability of these links at the  
19 DLE to be viable for CPs wishing to interconnect. There is a way of avoiding ISC if  
20 they choose.

21 The fourth point related to the need for IEC when co-located, that is DLEs being  
22 co-located with tandems. As correctly pointed out, Mr Morden's analysis proceeds  
23 on the basis that only an IBC will be required in building a connection. The CP in  
24 question connects to those existing tandems with fibre using an ISI in the building in

1 question. Mr Morden explained that and he said he assumed that CPs do not  
2 connect to any of the DLEs that are not located to tandems. That suggests he has  
3 overestimated costs where they are already connected.

4 Secondly, CPs are connected with fibre to those buildings where tandems are  
5 co-located with DLEs. He said that's a reasonable assumption because CPs are  
6 present in the busiest buildings and the largest DLEs will be in those buildings. He  
7 gave uncontested evidence about that, in terms of the proportions and he was aware  
8 that CPs go to 70 to 80 per cent of the tandem buildings with a ISI. That's reflected  
9 in Mr Farmer's evidence as to the position of Gamma, where he says around a quarter  
10 to a third of tandem switches, even if they are co-located with a DLE, would be  
11 a more expensive interconnect extension circuit. Those proportions are basically  
12 right.

13 Notably, again we emphasise it's a worst case scenario, given the assumption that  
14 a new link is required at all.

15 The next criticism of the practicality of implementing the DLE handover product  
16 was that no overflow would be permitted. That ignores the fact that the SIA makes  
17 it clear that that is under normal conditions, and Mr Morden gave unchallenged  
18 evidence about that. It's apparent that BT does allow a degree of overflow, in the  
19 region of 10 per cent. This uncertainty, you can seek clarification. Mr Perry  
20 accepted that overflow was permitted. Ultimately, although the question was  
21 "What do you mean by normal conditions", but that can be clarified between the  
22 parties as Mr Morden suggested and Mr Perry accepted.

23 But in practice, at paragraph 29, we say it's not an issue. There would rarely be any  
24 overflow given that the break-even number of minutes represents a low percentage



1 of the capacity at any given link and would only arise if the link is already running  
2 close to full capacity, in which case you are way beyond the break-even point.

3 VICs were said to be an obstacle, virtual interconnect circuits. But Mr Perry  
4 accepted that, given the need for a segregated route, the CP, using only VICs is in no  
5 different position to any other CP which needs to install a link, subject to any issue as  
6 it cost on the CP network. The CP would therefore be the same, subject to the point  
7 raised by Mr Rosbotham relating to apparent additional relation costs but, as we have  
8 covered, we say those are unlikely to be material.

9 Then the position of smaller CPs, and we say that position isn't undermined. Of  
10 course, smaller CPs have a problem with scale. That's true across their whole  
11 business model for any type of traffic, ported or non-ported. Mr Perry accepted that  
12 fairly. They were obviously going to be more dependent on wholesale providers,  
13 such as Gamma, who can aggregate traffic but you still then have the same  
14 competitive constraints in play for the provision of wholesale services. The more  
15 we increase the price, the more attractive alternative wholesale services would be to  
16 those seeking to aggregate smaller CPs.

17 Mr Perry accepted -- this is my paragraph 32 -- that the fact that smaller CPs are  
18 more reliant to conveyance services from other carriers of course doesn't prevent  
19 Ofcom from finding that inter-tandem transit and inter-tandem conveyance are  
20 effectively competitive. So the same logic applies. Of course, it won't be viable, in  
21 any given case, for especially a small CP to avoid inter-tandem transit or  
22 inter-tandem conveyance, because it's not going to be in a position to connect  
23 everywhere. But that's true for non-ported traffic, it doesn't mean that these are not  
24 contestable services.

1 Then we get to the question of information, so whether, in practical terms, CPs  
2 would be able to identify the particular exchanges, the particular DLEs where they  
3 could viably interconnect and save some money. Mr Morden wasn't challenged by  
4 the CP group on his evidence on this. What was merely put to him was that there are  
5 instances where the sample split between the DLE and tandem layer may not be  
6 representative. It certainly wasn't a problem raised by Opal in the context of the  
7 Opal dispute, and there's no evidence from Gamma that it considers there to be  
8 insufficient evidence to make an informed commercial decision, and Mr Perry  
9 accepted in his cross-examination that CPs would be able to rank DLEs in terms of  
10 attractiveness and, given the distribution of minutes across DLEs, that it was possible  
11 to get a clear view of where the commercially viable routes are going to be.

12 You will recall Mr Morden's methodology of using specific numbers relating to  
13 customers at a particular DLE but then using the national average split for that CP to  
14 determine the likely balance of traffic at that DLE.

15 Now BT, it's fair to say, has always proceeded upon the basis that that is more than  
16 enough, sufficiently, to inform a CP as to where to make that interconnection  
17 decision. It's not precise, it's based on forecast, it's based on an estimate; all of that  
18 is true but a sufficiently close estimate to make that decision in a reasonably  
19 informed manner and commercial basis. But, Mr Rosbotham for Vodafone gave  
20 evidence that, from Vodafone's perspective, that still wasn't enough to provide him  
21 with what he considered to be sufficient information for those purposes. But the  
22 evidence is that Vodafone had never asked BT for more granular information  
23 showing the volume of ported traffic delivered to any given DLE and that, we say, is  
24 surprising given: (a) that the information that would need to be requested is

1 CP-specific traffic information, it doesn't relate to sensitive matters such as, for  
2 example, BT's costs; and (b) Vodafone accepts that, with that information, it would  
3 be in a position to make a fully informed decision as to where to interconnect.

4 This boiled down to Mr Rosbotham opining that, if he had asked for such  
5 information it would not, in fact, have been provided to him. But there is no  
6 evidential support for that opinion that he offered and we make clear, for the  
7 avoidance of doubt, that BT would provide it, even though BT has not previously  
8 considered that the provision of such information is, in fact, necessary for CPs to  
9 make a sufficiently informed judgment.

10 Mr Moore, for Sky -- this point is not in my written notes so I will give you the  
11 reference, it's Day 2 of the transcript, page 69, lines 14 to 24. Mr Moore said that  
12 a report was produced by BT for Sky a few years ago but it was insufficient for Sky's  
13 purposes. He says:

14 "I know it was lacking sufficient information for us to improve that  
15 particular category of traffic."

16 He ported traffic at the tandem in that case. But, in fact, as Mr Bates has helpfully  
17 confirmed to me this morning, it appears to be common ground that Sky was  
18 provided, pursuant to its request, with a breakdown of ported minutes on  
19 a tandem-by-tandem exchange basis, which is what Mr Rosbotham said he would  
20 need to make that interconnection.

21 We have not previously put that document in evidence but, in the light of Mr Moore's  
22 evidence on that, we dug it out and had a look and what he requested was in fact  
23 provided; we can produce that to the Tribunal if necessary. It is not content that  
24 I rely on, it's the fact that BT is, in fact, responsive to such requests and does, in fact,

1 provide it when asked.

2 **THE CHAIRMAN:** Mr Palmer, going back to your paragraph 35, is it the case that the  
3 first time that BT has made it clear that it would be prepared to make this information  
4 available, that was done for the first time during this hearing, was it?

5 **MR PALMER:** Yes, if it's asked for.

6 **THE CHAIRMAN:** Yes.

7 **MR PALMER:** For two reasons, it's the first time that we have made that clear. The  
8 first is we have always taken view that the information which is already in the CP's  
9 hand is more than enough it allow them to make a sufficiently informed decision.  
10 It's Mr Rosbotham who for the first time has said that that is not enough even for our  
11 purposes, in response to Mr Morden's second witness statement on that.

12 **THE CHAIRMAN:** The consequence of that is that this Tribunal isn't in a position to  
13 make an assessment after hearing evidence as to whether the information that BT is  
14 now prepared to make available would be sufficient for purposes.

15 **MR PALMER:** You are, sir, because Mr Rosbotham confirmed that precisely that  
16 information would be sufficient for its purposes. He gave direct evidence on that  
17 point. That is in evidence. It is right to say that we have not approached CPs  
18 previously and said, if you ask for this information we will give it to you. I fully  
19 accept that. The reason for that is BT has never thought that information to be  
20 necessary. But if the contrary is to be put before you, as Mr Rosbotham did put  
21 before you, then we are entitled to point out they have never asked for it. Sky did  
22 ask for it; it was provided.

23 **THE CHAIRMAN:** The point I am simply making --

24 **MR PALMER:** The tandem layer, that is not DLE.

1 **THE CHAIRMAN:** -- is the Tribunal is not in a position to assess whether the relatively  
2 general description of what BT says it is prepared to provide would, in fact, be  
3 sufficient once provided.

4 **MR PALMER:** We say you are in a position to assess that because it's not relatively  
5 general information. What we are talking about is the specific volume of ported  
6 traffic which is handed over at each specific DLE. That's what Mr Rosbotham was  
7 saying that he would need for which he had not asked for and gave him the  
8 information during his evidence, obviously, and he confirmed that that was the  
9 information. He had not had a chance to check it and analyse it, I fully accept that.  
10 But that was the information he was talking about and that is why, for purposes of  
11 clarity, in response to Mr Morden's tables, which he gave in his second witness  
12 statement, which of course effectively gave you the headline, gave the Tribunal the  
13 headline information about what you can extract from this information on the  
14 DLE-by-DLE basis and how many, based on Mr Morden's assumptions, of the costs  
15 would be viable.

16 That is why Ofcom wrote to us, this is BT6 tab 12, and said: what are you basing this  
17 on? So that was explained and the information actually handed over, and there has  
18 been no point since saying: that won't do, that's not enough, that doesn't work. To  
19 the contrary, it has been absolutely confirmed by Mr Rosbotham that that is the  
20 information that he was talking about, that is the information that he would need.  
21 So there's nothing vague or general about this. It's a specific DLE-by-DLE volume  
22 of traffic which avoids the problem of taking an average as to how much traffic to  
23 a customer who was originally on that DLE might be routed to the DLE versus  
24 routed to a tandem. That was the problem. So the clear answer to that is individual

1 numbers and there is no ambiguity beyond that; that is sufficient.

2 **THE CHAIRMAN:** Thank you.

3 **MR BATES:** I am very reluctant to interrupt my learned friend's flow but, it might be  
4 convenient that I say something now since reference has been made to an e-mail that  
5 I sent this morning. At page 69, where Mr Moore's evidence is set out, this is on  
6 Day 4, he does say that the report was provided by BT but that he thought that it  
7 wasn't sufficient for Sky's purposes but he couldn't remember the precise reasons for  
8 that.

9 I appreciate that my learned friend is saying that he is not seeking to rely on the  
10 content of that report. Clearly, it would not be appropriate to consider that the  
11 content of that report was comprehensive or sufficient, without recalling Mr Moore,  
12 which I have offered to do, but I think my learned friend's decided that won't be  
13 necessary.

14 **THE CHAIRMAN:** Thank you, Mr Bates.

15 **MR LANDERS:** Just to understand that: are we saying that the information that Sky  
16 asked for is exactly the same as has now been given to Vodafone in this Tribunal?

17 **MR PALMER:** No, because Sky's interconnected at the tandem layer not at the DLE  
18 layer. So Mr Rosbotham's request was for information at the DLE layer.

19 Mr Moore's request was for information at the tandem layer. But in each case, what  
20 we are talking about is volumes of traffic being passed to the relevant switch.

21 So the point that we make, I think we emphasise for this purpose is there's this  
22 question which is being raised, we say, unrealistically. BT has never said it

23 wouldn't provide this information if asked for it. Our point is that when asked for it  
24 it is provided. Whether that then turns out to be sufficient for Mr Moore's purposes

1 when he asked for it is another matter, he can always come back and ask for  
2 something else. That's entirely up to him. But in the absence of any request for  
3 this information, we say it is not open for the CPs to complain or to suggest that this  
4 is information, which is somehow beyond the possibility that they can ask for and,  
5 therefore, they can never have sufficient information to make these judgments as to  
6 which switches to interconnect to. We say that's plainly wrong.

7 At paragraph 36, we address Ms Kennedy's table and we will see if any further  
8 reliance is placed on that by Mr Bates in his submissions, we say it's completely  
9 irrelevant and misconceived.

10 The next practical point, and the final one at the DLE layer, related to the  
11 decommissioning of DLEs, at the risk if you connect to a DLE it will subsequently  
12 be taken out of the equation. Mr Morden has explained on that that BT makes every  
13 effort to minimise the impact. CP group suggested to Mr Morden there was no  
14 mechanism for compensating a CP for its costs thrown away in investing in a given  
15 DLE but, in fact, there's a contract mechanism in place to cover any subsequent  
16 alterations required made by CP aimed at ensuring that a CP should not face any  
17 losses and, in practical terms, that means rather than just writing a cheque, BT assists  
18 in moving the link to a different position on the network, at no cost to the CP, to  
19 ensure that service continues unaffected.

20 Mr Farmer accepted that, in practice, the vast majority of costs incurred by the CP  
21 would be covered by BT's efforts to minimise disruption and at most the risk of  
22 system alteration notices being issued leading to an uncompensated loss from the  
23 unused economic (inaudible) question would feed into the cost-benefit analysis.

24 But that minimal risk, we say, has clearly not prevented Gamma, for example, from

1 interconnecting at the DLE layer, and we have given you the reference to  
2 Mr Farmer's cross-examination on that.

3 That then leaves the tandem layer, which we address from paragraph 39. It's  
4 common ground only small proportion of ported calls are not currently collected at  
5 the tandem layer, given the existing levels of interconnection so it's not clear to what  
6 extent Ofcom maintains its case that there are clear strategic and commercial reasons  
7 why CPs may not connect at the tandem layer to collect ported calls. Mr Morden  
8 wasn't challenged by either Ofcom or any of the CPs on the evidence that CPs have  
9 sufficient information to make an informed choice as to which additional tandems to  
10 interconnect to. But in any event, Mr Perry accepted that the CP will know inbound  
11 traffic to a DLE and which tandems are connected to it, the volume of ported minutes  
12 arriving there and the CP could then use that information to rank tandems in order of  
13 importance, Mr Perry accepted.

14 CPs could seek further comfort from other CPs, could ask BT for the information,  
15 Mr Perry accepted. Mr Perry also accepted that CPs could also build up a picture  
16 from BT's charges as to where other CPs are interconnected to improve the accuracy  
17 of the forecasting exercise. Once a link is installed, of course, it can be used for any  
18 traffic at the tandem layer and can be used to reduce a CP's transit costs.

19 **A point was raised in this context on data management amendment charges by**  
20 **Mr Rosbotham. He said there are contractual concerns there, which means**  
21 **an RCP may be reluctant. Again, this is an overblown concern, in our**  
22 **submission. There doesn't seem to be a concern shared by any other CP.**  
23 **That's the first point. Mr Rosbotham himself couldn't recall the last time he**  
24 **had received an invoice for such a charge. That's entirely consistent with**



1 **Mr Morden's evidence. Mr Morden explained it's very rare and it's sort of**  
2 **out of hours working, in effect, at night and that sort of thing.**

3 So the suggestion that, against that background, an RCP may not order a routing that  
4 it considers to be profitable for fear of an invoice unexpectedly being issued up to  
5 six years later is wholly unrealistic and if a CP did face any such uncertainty, I think  
6 unlikely, it could simply ask.

7 Mr Farmer accepted that routing plan changes can take place regardless of whether  
8 DLE handover is used or a CP continues to rely upon ISC. Therefore, he said he  
9 would be surprised, to use his words, if routing plan costs were a relevant factor for  
10 Gamma in deciding whether to purchase DLE handover and, in fact, his last invoice  
11 was in 2008, he told us, for levels of work that he acknowledged to be out of the  
12 ordinary.

13 That then takes us to the issue of third party transit: TP transit, we have referred to it  
14 for short. Of course, it's common ground that there's plenty of transit for  
15 non-ported calls and no distinction between carrying ported and non-ported traffic in  
16 the transit. Call to, a common ground now, that a potential transit provider faces the  
17 same cost-benefit analysis as any other CP. You will need to make that assessment  
18 of viability on the basis of installing a segregated link to collect ported traffic, which,  
19 of course, it can then aggregate from different CPs. That's at the DLE level.

20 Mr Perry accepted that a wholesale product could be provided for ported calls by any  
21 CP who has or took out reasonable levels of connection to BT switches so the  
22 constraint to BT is wider than just coming from TalkTalk. The fact that no one  
23 currently is providing such a service is not a material point. The relevant point is  
24 that BT is constrained in its pricing of the ISC element of APCCs by the ability of

1 a CP to provide such a service and, just now, Mr Morden said it would take a brave  
2 investment case to justify entering the market to provide a transit service given the  
3 current uncertainty over the level of APCCs in the marketplace, in light of this  
4 appeal. That's unsurprising because it's common ground that the price of ISC is, of  
5 course, central to any cost-benefit analysis that was done. So that's very much at  
6 large and uncertain pending the resolution of this appeal.

7 Ms Kennedy gave some evidence on behalf of TalkTalk as to assessment of the  
8 viability of it providing a transit service. What she said in her witness statements  
9 turns out to be completely unreliable. She said, in terms, that TalkTalk never  
10 considered it as an option until BT raised it in these proceedings. But when she  
11 gave her evidence she said for the first time that, in fact, they had considered it,  
12 specifically as an option 2 or 3 years ago and that it had only looked at it once and,  
13 indeed, not since BT raised the matter in these proceedings. As to the reasons that  
14 she gave for TalkTalk's decision not to pursue the possibility, none of it affects BT's  
15 logic of the case that this provides a constraint upon BT in terms of its pricing, and  
16 we set out reasons there, from (a) to (d), dealing with what she said, and I need not  
17 take time going through it all now.

18 Mr Perry at 49 accepted that CPs could share their traffic information and forecasts  
19 with potential transit providers and that transit providers, like any other CP, could  
20 choose to target specific changes to ensure that it is targeting exchanges expected to  
21 be comfortably above the break-even point.

22 Lastly, we say it can't realistically be suggested that the SIA contractual  
23 arrangements presents any barrier to offering a third-party transit service. It's  
24 apparent that Gamma is currently able to provide a transit service for ported traffic to

1 CPs with their own network capacities, albeit that a porting wholesale service is not  
2 offered as a separate product to the market, but it's common ground that the SIA is  
3 regularly varied as markets develop so, even if a variation of the SIA was needed,  
4 which we do not accept from BT's point of view, that could be done, and Mr Perry's  
5 evidence is that the real issue is whether the cost-benefit analysis for the potential  
6 third party transit provider stacks up.

7 So that's the factual evidence. There's one or two additional factual points that we  
8 wish to add. It was said by TalkTalk that there is reason to think that ported calls are  
9 not efficiently routed by BT. That was wrong, as she freely accepted, in her  
10 cross-examination. Again, she alleged one thing in her witness statement and  
11 accepted the opposite in her cross-examination. It's Day 4, page 53, lines 5 to 23.

12 The suggestion made in opening by Ofcom that the RCP loses control of the routing  
13 of a ported call is wrong, as matter of fact. Mr Morden explained that a ported call  
14 has two portions. The OCP will send the call to the DCP just as it would for any  
15 other call. That part of the route is controlled by the OCP and paid for by the OCP.  
16 Once the call reaches the DCP switch, let's assume it's BT switch, it's the RCP that  
17 tells BT where to take it from that switch to the point where it wishes to collect it.

18 So the OCP controls the first half and the RCP controls the second half. The RCP is  
19 involved at all is a function of the fact that it's the RCP pays regime.

20 Mr Morden also explained that, between the entry point on the BT's network and the  
21 exit point from BT's network, determined by the RCP a call can follow various  
22 routes between those nodes, but it's always charged as if it has been routed along the  
23 shortest route between those two points, which is why BT has every incentive,  
24 contrary to Ms Kennedy's evidence, to ensure that it's routed as efficiently as

1 possible.

2 So that's the factual background and the next task is to look at each of BT's grounds  
3 of appeal and to consider how, in the light of that evidence, those grounds should be  
4 determined.

5 For that purpose, I would ask the Tribunal to take to hand BT's skeleton argument.

6 I am going to go first to paragraph 4, which is just the high level summary of each  
7 ground, but just to introduce again each ground, bearing in mind the factual evidence  
8 we have just heard to see how it plays into each of those grounds.

9 The starting point is ground 1, which is essentially a legal issue as to what related to  
10 the provision of number portability means, but means in practice. They are  
11 arguing -- and I will develop this argument some more in a moment -- but on its  
12 proper construction Article 30 and GC18.5 are concerned with the treatment of costs  
13 directly associated with enabling number portability to be provided. It's not costs  
14 relating to number portability that appears in the words of Article 30. It's costs  
15 relating to the provision of number portability.

16 We say that's enabled by the provision of switch conveyance but beyond that there's  
17 a commercial choice as to how and where to collect the call, including whether or not  
18 to purchase ISC from BT, just as for any other type of traffic. So the key point is  
19 that conveyance, that's the inter-switch conveyance, is an incident of the call, not of  
20 the provision of number portability. It's demonstrated by the fact that TalkTalk  
21 doesn't consume ISC when it takes that traffic at the DLE handover. That's our  
22 central point: there are commercial choices to be made and, of course, whether it is  
23 commercially viable or not will vary from CP to CP, from switch to switch,  
24 depending crucially on the price of ISC as against the volume of ported traffic at each

1 switch for that CP.

2 Of course that is true, and BT has never suggested otherwise. But it can't be the fact  
3 that it's sometimes unviable to make a connection which determines whether or not  
4 this is traffic which is related to the provision of number portability. The provision  
5 of number portability is provided in the same way in every case, the traffic crosses  
6 the switch at which it is identified as being ported traffic, and then it's just matter of  
7 where it goes from A to B, which is a function of the interconnection arrangements  
8 made by each CP, not a function of the fact that it is then a ported call. That's the  
9 headline on ground 1.

10 The headline on ground 2 is, even if that distinction that we make is not sufficient to  
11 mean that the inter-switch conveyance is not related to the provision of number  
12 portability, there's still no basis upon which further regulatory intervention to change  
13 the applicable cost standard was justified. I emphasise the next sentence: charges  
14 for CPs had been agreed by BT and the CPs in question were based on the  
15 competitive market rate and were thus already cost orientated. There's no basis to  
16 think that the resulting charges undermine the objectives of Article 8 of the  
17 framework directive.

18 **THE CHAIRMAN:** Mr Palmer, as I understand it, that sentence is contentious.

19 **MR PALMER:** It is.

20 **THE CHAIRMAN:** You haven't invited us, I think, in your summary of the factual  
21 matters, to make any findings of fact in relation to that.

22 **MR PALMER:** That's because the facts on these are largely agreed and didn't require to  
23 be cross-examined by anyone on either side. The question for you is what you make  
24 of those facts, if I can put it that way. You will recall, sir, the evidence, and I am

1 particularly going to refer to Mr Morden's second witness statement. I will be  
2 reminded of the table number in a moment but where he tabulates the reverse  
3 engineered price of LTC and over the page ITC, comparing it to the LTC and ITC  
4 rates which were applicable to other services.

5 Against me, the CPs make the point that, following November 2015, those rates were  
6 then changed and varied. That postdates the dispute with which Ofcom is  
7 concerned. The reference is paragraph 69, table 8 of Mr Morden's witness second  
8 witness statement, and another, I think, is table 9 which relates to ITC rather than  
9 LTC.

10 The point made against me is that none of those specific rates were ever specifically  
11 agreed by the CPs because whenever they agreed to anything it was part of a bundle  
12 of services including switch conveyance at which the headline price was agreed.

13 We say that makes no difference at all. These are all prices which were reached in  
14 the context of commercial negotiations, which inevitably the focus was on the costs  
15 of different elements of each package and implied costs. Mr Rosbotham went to it  
16 earlier. He says he was able to derive that information as to what rate is being  
17 applied and whether it's consistent with that being applied to other services.

18 **THE CHAIRMAN:** If I could just ask you to pause for a second. The Tribunal, I think,  
19 will have to make findings of fact in relation to your submission that charges for ISC  
20 have been agreed by BT under CPs in question and I understand that to be  
21 contentious, not least because, as you have just said, it's asserted by Ofcom and  
22 others that none of those specific rates were ever specifically agreed. So my  
23 question would be: where do we find your summary of the facts that we ought to find  
24 in order to resolve this particular issue? A reference will do.

1 **MR PALMER:** I haven't put it in the summary of facts that I have handed up, so I will  
2 make it verbally. You have in Mr Morden's tables 8 and 9 the inferred rates. Those  
3 are rates which are reached in the context of a competitive market, accepted by  
4 Mr Godfrey that the price of ISC as part of the APPC is constrained by a competitive  
5 market. That was yesterday, Day 5 at page 108 lines 11 to 13.

6 In that context, the CPs, my submission is, are effectively signing up to those rates.  
7 You have the factual evidence that BT used to disaggregate and publish the relevant  
8 elements making it the price of relevant elements of the APCC charge, ceased to do  
9 so, because it's always a bundle. It's always a bundle and, of course, you never do  
10 buy inter-switch conveyance on its own.

11 **THE CHAIRMAN:** It would be fair on say, would it, that the proposition you advance  
12 in line 5 of ground 2 is something of a gloss on the underlying basis of factual  
13 evidence?

14 **MR PALMER:** It's not gloss, sir, I accept there has been no express agreement where  
15 the CPs have set down -- with one exception, I'm not going to go to it now but you  
16 recall the confidential evidence on this point, that's an exception to what I am about  
17 to say. But, otherwise, I accept that the CPs have never sat down and said: we agree  
18 the following price for ISC within this context.

19 Nonetheless, they have agreed other rates which, when you take as a whole and  
20 given that you can reverse engineer these prices, make absolutely express what  
21 prices are being levied.

22 **THE CHAIRMAN:** Yes.

23 **MR PALMER:** So the question for the Tribunal is whether that implied agreement is  
24 sufficient for this purpose or not; that's the issue that you have to determine on that

1 point.

2 **THE CHAIRMAN:** I think this might be a suitable time to have our very short final  
3 break this morning.

4 **MR PALMER:** Sir, I am grateful.

5 **(11.55 am)**

6 (A short break)

7 **(12.00 pm)**

8 **THE CHAIRMAN:** Mr Palmer, we have had a think about how to divide up the rest of  
9 the day. Our suggestion would be that you carry on until 12.30 which would give  
10 you would have given you approximately an hour and a half; Mr Holmes then has  
11 an hour and a half from 12.30 3 o'clock, the interveners half an hour each, 3 o'clock  
12 to 4 o'clock, and then your reply at 4 o'clock to 4.30.

13 **MR PALMER:** I am grateful for that suggestion. In our discussions, I think we are  
14 both of the view that we would need slightly longer than that. I must cover not only  
15 all the matters that Mr Holmes is going to cover but also, in particular, Gamma's  
16 extra point, which I must have some time to answer. Mr Holmes thinks he can't  
17 make do with anything less than two hours. I was going to suggest 1 hour 45 for  
18 him, and I was going to suggest that I finish in 40 minutes time at 11.45.  
19 The possibility occurred to us earlier that a slightly shorter lunch break, say 40  
20 minutes rather than 60, might allow us that little extra flexibility.

21 **THE CHAIRMAN:** Do your proposals involve shaving off some of the time that we  
22 have provisionally suggested for the interveners?

23 **MR PALMER:** Your suggestion for the interveners, which I think was -- I forget now.

24 **MR HOLMES:** One hour, I think.



1 **MR PALMER:** One hour in total, I was going to suggest was shaved slightly, because  
2 there's no need for repetition as between them, and Gamma's extra point we have  
3 already had an hour on, and you have had now had two skeleton arguments covering  
4 the point as well.

5 **THE CHAIRMAN:** Okay, we will restrict lunch to 40 minutes. So you would finish  
6 when, Mr Palmer?

7 **MR PALMER:** In about 40 to 45 minutes.

8 **THE CHAIRMAN:** So let's aim for 12.45. We can take it from there. If you could  
9 aim, in the first instance, for you to finish at about 12.45.

10 **MR PALMER:** Sir, I am grateful. So then I must proceed quickly.

11 **THE CHAIRMAN:** I think Ms Love wanted to --

12 **MS LOVE:** One matter that explains our lateness in arriving to the room relates to the  
13 point that you were advancing with Mr Palmer shortly before the adjournment about  
14 ground 2, and the proposition that these are prices that have been reached in the  
15 context of commercial negotiations with a focus on the cost of elements and that CP  
16 is somehow signed up to, I don't know, prices that were backed out.

17 We are not happy with the proposition that there was some implied agreement on  
18 different ISCs, presumably open-ended in duration. We have covered the point in  
19 Mr Farmer's evidence, paragraph 69, but if it would assist we make the offer now  
20 that Mr Farmer can be recalled, so whatever proposition Mr Palmer wants to rely on  
21 about what may or may not have been agreed can be put to him.

22 **THE CHAIRMAN:** I think we would like to avoid recalling --

23 **MS LOVE:** We agree, sir, but we need to make the offer so there is clarity.

24 **THE CHAIRMAN:** Thank you. The other matter, since you are on your feet, Ms Love,

1 is that you have provided a very helpful supplementary submission on the time bar  
2 point and I do not think we need to hear you any more on that, unless there are  
3 perhaps one or two key points but we you do not need to be taken through it.

4 **MS LOVE:** I entirely agree. I had not budgeted to spend my 5, 10, 15 minutes in that  
5 fashion.

6 **THE CHAIRMAN:** Okay, Mr Palmer.

7 **MR PALMER:** I am very grateful. Effectively that point about agreement in the  
8 contracts relates it my ground 2B, as set out in the grounds. I am not going to say  
9 anything more about that now, I am just going to introduce ground 2A. Even if you  
10 set aside that whole issue of contracts and whether there has been any agreement on  
11 them at all, still the bottom line position is that before Ofcom decides to restrict cost  
12 recovery from LRIC+ to LRIC basis, it must identify a regulatory problem, like -- or  
13 a manner in which the Article 8 objectives are not being satisfactorily achieved,  
14 bearing in mind it's common ground between BT and Ofcom that whether you  
15 choose LRIC+ or LRIC is equally consistent with the directive itself and with the  
16 General Condition 18.5. Both measures are cost orientated, based on incremental  
17 costs and reasonable. Both tick all those boxes. So if you are going to go further  
18 and say, although that complies with what must be done and under the general  
19 condition and the obligation on us as a regulator under Article 30 of the USD, it's not  
20 complying well enough, effectively.

21 There's a problem which LRIC+ pricing is failing to address, so we need something  
22 tighter. We say, for reasons I will come to, Ofcom didn't identify any such problem,  
23 so the need to promote effective competition, was insufficient to do that and, as such,  
24 in the absence of such a justification, the decision was disproportionate because it

1 was more restrictive than was necessary to achieve the relevant regulatory  
2 objectives.

3 That's ground 2A, which is not in any way contingent upon the success or failure of  
4 the contractual points.

5 Then ground 3, by way of introduction, is that, even if there was, in principle,  
6 sufficient concern identified to entitle Ofcom to change the cost recovery basis from  
7 LRIC+ to LRIC, it was nonetheless the wrong decision to make. We say that  
8 Ofcom failed to set up a framework in which it could analyse the effects arising from  
9 the choice of cost standard and, specifically, the impact on incentives for other CPs.  
10 Just pause there to make clear, that's not intended to be a suggestion that the six  
11 principles of cost recovery were somehow inapt to the task. It is that when applying  
12 those principles and, in particular, when assessing the effect on effective  
13 competition, what turned out to be the key principle in its application on the facts of  
14 these cases, Ofcom didn't analyse the effects or the relevant incentives to any  
15 sufficient degree.

16 In the absence of any evidence to support any alleged incremental benefit on the  
17 intensity of competition in the retail market, or otherwise, and the absence of any  
18 assessment of the associated costs of doing so, both in terms of the effect on prices of  
19 BT's other services, and the potential to create perverse incentives in the wholesale,  
20 conveyance and transit market, and taking into account the dampening of incentives  
21 to move to direct routing and migrate to IP based networks, but Ofcom's analysis is  
22 wholly deficient and, given now the acceptance by Mr Godfrey that in justifying  
23 a move from LRIC+ to LRIC, such an incremental benefit would have to be  
24 identified beyond the fact that dropping prices leads to increased consumption,

1 dropping prices would reduce the costs of those who pay them. You need  
2 something above and beyond that to justify that move, he accepted, the absence of  
3 anything being identified in that way, it's clear that LRIC+ ought to have been the  
4 appropriate standard to apply.

5 **THE CHAIRMAN:** Mr Palmer, I think all of us would like to ask you a question. We  
6 will try not to interrupt too much because of the time constraints, but if I could start  
7 and then defer to my colleagues. You appear to accept in your submissions under  
8 ground 3, that a criterion addressed by Ofcom was the impact on incentives for call  
9 providers to compete for ported customers, is that right, that's one of criteria that they  
10 used. You said, they did that, they didn't do it very well, they didn't set up  
11 a framework; have I understood that correctly?

12 **MR PALMER:** I am not sure you have, sir. I'm not sure what you are looking at.

13 **THE CHAIRMAN:** What I am looking at is my own notes where, under your summary  
14 of ground 3, you submitted that Ofcom failed to set up a framework which would  
15 enable them to assess the impact on incentives.

16 **MR PALMER:** Yes.

17 **THE CHAIRMAN:** So are you saying they didn't address that issue at all or are you  
18 saying they did it in an inadequate fashion?

19 **MR PALMER:** In an inadequate fashion because they didn't address all the incentives.  
20 To take an example, it was accepted by Mr Godfrey, that they didn't assess the  
21 incentives, the effect of the choice of LRIC over LRIC+, on the incentives of CPs to  
22 move to direct routing.

23 **THE CHAIRMAN:** All right.

24 **MR PALMER:** For example.

1 **THE CHAIRMAN:** I think I understand that. What I am proceeding to do is to  
2 understand the interrelationship, if any, between your ground 2A and your ground 3  
3 and I wanted to ask you this question: if, as you seem to accept, Ofcom addressed the  
4 issue of the impact on the incentives, however inadequately, but did in fact do so, is  
5 that or is that not a relevant regulatory objective which would address your  
6 complaint under ground 2A?

7 **MR PALMER:** The point under ground 2A is that they had to identify a deficiency in  
8 the current arrangements.

9 **THE CHAIRMAN:** Yes.

10 **MR PALMER:** We say they didn't do that. In the framework, when they choose in the  
11 guidance, when they chose between LRIC+ and LRIC, they analysed various effects  
12 but none in terms of materiality to say that this is something which needs to be  
13 addressed. Effectively, they exercised a free discretion, as they perceived it to be,  
14 we could just choose.

15 **THE CHAIRMAN:** That raises my question because if you accept that Ofcom  
16 addressed the issues of, I call it impact on incentives, is that not a relevant criterion  
17 which would permit them to consider taking action relevant to your ground 2A?  
18 You seem to be suggesting that under 2A, under your argument 2A that Ofcom just  
19 didn't identify any reason whatsoever for deciding to address the matter, but if they  
20 were concerned about impact on incentives, would that not satisfy your requirement  
21 under your ground 2A?

22 **MR PALMER:** No, sir, because the way you put it is, was that enough for Ofcom to  
23 consider whether to change the cost standard. Of course they can consider that  
24 question any time they like, but in choosing to make a choice, to interfere with

1 an existing arrangement which is cost-orientated, based on incremental costs  
2 unreasonable, Mr Godfrey agrees, if we are going to take a more restrictive approach  
3 to the recovery of BT's costs, the common costs, if you are going to exclude those,  
4 you need to have identified -- you can say we're going to set aside the role of any  
5 possibility of commercial negotiation of these matters -- you need to identify  
6 a problem which requires such intervention.

7 **THE CHAIRMAN:** Okay, thank you. Professor Reid?

8 **PROFESSOR REID:** Briefly, BT's not the regulator, BT's concerned with issues of  
9 innovation, efficiency and, quite properly, incentives. As I understand it the basis  
10 of LRIC+ always was that it was simply a mechanism for covering common costs.  
11 And in a way, for example, the evidence led by Daniel Maldoom is really about  
12 drawing out as it turns out the desirable incentive properties of it. So to me that's  
13 a kind of add on to the argument for having LRIC+ which was more of an accounting  
14 type of argument. To add on the incentive properties to it because it creates your  
15 new ground but wasn't intrinsic to the original use of LRIC+. Would that be a fair  
16 summary?

17 **MR PALMER:** So the original --

18 **PROFESSOR REID:** As you are not the regulator, it's not really your business to create  
19 incentives for --

20 **MR PALMER:** The original basis of the decision was Oftel's decision where they  
21 simply say, because of the similarity of this product with transit it should be assessed  
22 on the same basis and they applied an EPMU to do that. The level of analysis was  
23 not any greater than that. I can't say what they had in mind when they made that  
24 decision. What I do say is that when you depart from that decision under

1 ground 2A, you need to have identified a good reason to say that something more is  
2 required than was already satisfied, the letter of the condition and, b, when you then  
3 make that choice, and here we are in ground 3 territory, you then need to bear in mind  
4 that you are still departing from the possibility of reaching an ordinary commercial  
5 competitive market-based decision, you are still departing from the ordinary  
6 principle that a share of common costs ought to be recovered, spread across all  
7 services and you only do that if you have identified a specific incremental benefit  
8 which justifies that approach. What our ultimate criticism, whether one puts it  
9 under ground 2A or under ground 3, our ultimate criticism is at no point, however  
10 you characterise the framework which has set it out, at no point did Ofcom really  
11 engage with identifying the materiality of its concerns and considering whether those  
12 concerns amounted to sufficient reason to depart from that ordinary principle.

13 **PROFESSOR REID:** In a sense, you are providing a new body of analytical evidence  
14 which is filling what you perceive to be a gap within the Ofcom work.

15 **MR PALMER:** We say they are wrong to do that in the absence of anything sufficient  
16 being identified, LRIC+ is the default and it's clearly better for the reasons that  
17 Dr Maldoom identified. If we are going to depart from that position we need to see  
18 the analysis, the basis, the justification for that because, Ofcom accepts, it must take  
19 a proportionate decision. What that means is you don't take a more restrictive  
20 approach than is necessary. So if it's going to put this forward as being necessary,  
21 it's going to put this forward as being appropriate. It has to lead that evidence and it  
22 has not at any stage done so.

23 **PROFESSOR REID:** That's fine, thank you very much.

24 **MR PALMER:** Mr Godfrey accepts that it is a exceptional approach to take and does

1           require that justification.

2 **MR LANDERS:** You have spoken a lot about the change from LRIC to LRIC+.

3           I understand what you just said about needing the weight of evidence to move from  
4           LRIC+ to LRIC in terms of the appropriateness of LRIC+, but are you also saying  
5           the fact that it is a change is important, that Ofcom would require stronger reasons to  
6           effect a change from what they had done before, than they would require if this was  
7           completely new and there weren't any proceeding.

8 **MR PALMER:** They need reasons; not necessarily stronger reasons, beyond what

9           I have already said. It is, I accept, perfectly permissible for a regulator to  
10          re-examine its approach and change it. That as a generality is not the point. But  
11          the point is, in the specific context here, where it had previously accepted that this  
12          was analogous to transit services and that LRIC+ was appropriate and where they are  
13          now saying we are going to move to LRIC, there is an onus at least on them to  
14          explain why and those reasons must disclose the substantive incremental benefit to  
15          overall achievement of the effective competition efficiency and so forth, all the aims  
16          they have to keep in mind, why that justifies a departure from the former approach on  
17          an exceptional basis and that is what is lacking at the end of the day.

18          I must make progress. I am going to do this, Sir, with reference to the skeleton  
19          argument, I am not going to cover every point I make in the skeleton argument, there  
20          isn't time, but you have the points in the skeleton argument.

21          If I can turn to ground 1 in slightly more detail. That's dealt with from paragraph 13  
22          of the skeleton and I am going to skip straight to paragraph 23 and just deal with this  
23          point. Ofcom says, look at Article 30 of the USD, and it draws no distinction  
24          between contestable and non-contestable services. We say that misses the point



1 here. What it distinguishes between is services which are related to the provision of  
2 number portability and services which are not related to the provision of number  
3 portability and the task is to identify those services which are, rather than those  
4 which are not. And we say it's because there are genuine alternatives to inter-switch  
5 conveyance, because you don't need it, because it's totally an option, totally whatever  
6 happens to suit the commercial decisions of static approach of each CP on an  
7 individual basis which may differ widely, that this is not something which is in fact  
8 related to the provision of number portability. If I may just develop that last  
9 sentence, it's in brackets, but it's an important one. If you look at Ofcom's defence,  
10 in particular in paragraph 76(b), revealingly, Ofcom says this when dealing with the  
11 point about the potential for there to be third party transit:

12 "As far as Ofcom is aware, no CP other than BT currently offers transit  
13 for third party transit for ported calls in the UK".

14 Just pausing there, that recognises and make sense that BT does, where the DCP is  
15 someone other than BT, there is a transit service and BT provides it. We say others  
16 in similar ways could provide it in relation to cases where BT is the DCP. However,  
17 if a CP did provide such a service it would not itself be providing number portability  
18 and consequently its charge for transit would not be a charge related to the provision  
19 of number portability within Article 30 or GC18.5. We entirely agree, and that is  
20 the point.

21 From that point of connection you are, in effect, offering transit, conveyance  
22 between switches. It doesn't matter who provides it. Ofcom accepts that when BT  
23 offers that transit service from other DCPs it's not providing number portability.

24 But what it's doing there is providing inter-switch conveyance in precisely the way as

1 it provides it from its own switches after the ported call has crossed the switch, after  
2 there's been that initial switch conveyance, it's taking it on. We can do it, someone  
3 he will else could do it if they decided it was this their commercial interests to do so,  
4 we do do it for others. It's not part of the provision of number portability for  
5 precisely the reason that Ofcom gives there.

6 The rest of the skeleton argument on ground 1 is in writing. I dealt with Mobistar at  
7 length in opening. We say it doesn't provide any support for Ofcom's argument.

8 There's just one point to add, Ofcom argues that if we are right about this all hell will  
9 break loose because BT could decide not to offer inter-switch conveyance at all for  
10 ported numbers. We say that's wrong. It's wrong as matter of practice and as  
11 matter of law. You have, and I took you to in opening at the back of volume 1, BT  
12 volume 1, tab 10, condition GC20, which we say does oblige BT to provide that  
13 service to allow people to call a number successfully and connect. Mr Holmes  
14 suggested it can't possibly have that meaning, it doesn't have that meaning. We say  
15 on its face it does and we have all taken it to be so.

16 But, secondly, even if that were wrong, Mr Morden explained that BT couldn't and  
17 wouldn't refuse to supply ISC because the alternative would be that there would have  
18 to be considerable more investment in BT's network to provide the extra connections  
19 and BT has no incentive for that. Quite the opposite, it's the last thing it wants to do,  
20 spend its money on its ageing network, and that's precisely why you will recall BT  
21 has in the past shown willing to negotiate on the price of ISC as an alternative to all  
22 that extra interconnection being brought.

23 So if BT acted irrationally and refused to supply ISC, despite the fact it was making  
24 a return on that on a LRIC+ basis, on a commercial basis, in this hypothesis, and

1 remembering it can't charge more for that service but it can charge that, it doesn't  
2 mean that ported calls won't get through it would mean that CPs would interconnect  
3 at more exchanges to connect that ported traffic. That's no reason artificially to  
4 expand the scope of Article 30(2) and, in real life, in real practice, it doesn't present  
5 a problem.

6 That's all I want to say on ground 1 beyond what I have said in the skeleton  
7 argument.

8 On ground 2A I have already covered some of main points. I just want to add to  
9 ground 2A, if we go to paragraph 43 in the skeleton argument, that is summarising  
10 effectively what I was arguing a moment ago before the Tribunal. We take it in  
11 stages but then collectively.

12 We develop that, first of all, at a factual level from paragraph 44 about the link with  
13 prior practice, which we discussed a moment ago. And then from paragraph 49 on  
14 the requirement to identify a regulatory problem. That I derive from the judgment  
15 of Lord Sumption in the Supreme Court case, which again I covered in opening and  
16 I do not intend to revisit. I just recall at this point the emphasise on the scope -- the  
17 scheme of the directives being permissive, the fact that CPs are left to negotiate their  
18 own interconnection terms in good faith with a minimum of regulatory interference,  
19 that Ofcom can't do what it likes, it's bound to start from parties' contractual rights  
20 and may override them, only if that's required, is the word, by the Article 8  
21 objectives. We say the drafting of General Condition 18.5 reflects that by allowing  
22 for that primacy of --

23 **THE CHAIRMAN:** There is an issue about the 2008 case, as I understand it, is what  
24 difference, if any, it makes that in this case Ofcom has an obligation under article 30

1 USD.

2 **MR PALMER:** That's exactly right and, of course, we acknowledge that there is that  
3 obligation, that the EU legislature has seen fit to insert that obligation in order to  
4 promote consumer choice and effective competition. We know all of that.

5 **THE CHAIRMAN:** If I could just say, Mr Palmer, I think we have a very clear  
6 understanding of your and Mr Holmes' positions on that.

7 **MR PALMER:** I am very grateful. It resolves itself in the position that, even within the  
8 terms of that scope of regulation, there are choices to be made by Ofcom. It then  
9 doesn't just have a free choice, it must still bear in mind that overarching architecture  
10 of the whole system about being more restrictive where it is necessary to do so. I do  
11 not need to expand further and beyond that.

12 Then, ground 3, again the submissions are set out in quite some detail in the skeleton  
13 argument. May I just point out in light of the evidence some key points. First of  
14 all, we start from the fact that obviously LTC and ITC are otherwise unregulated and  
15 we can't charge a higher price. We have covered that and it's accepted by  
16 Mr Godfrey. So we are constrained by a competitive market.

17 Secondly, again I have covered, we have that agreed framework that it is exceptional  
18 to price at LRIC given that CPs must price to recover their fixed and common costs.

19 Thirdly, that it's a fundamental regulatory principle that CPs should have  
20 a reasonable opportunity to recover those fixed and common costs, Mr Godfrey  
21 agree that, and it's common ground that the imposition through regulation of a LRIC  
22 based cost standard requires justification by reference to the identification of a  
23 sufficient benefit. All of that is accepted and now common ground.

24 But yet we get to the outcome where Ofcom fully accepts that the merits of one

1 option didn't dramatically outweigh the merits of the other. But when you look at  
2 the determination and you look at the guidance which informs that determination,  
3 you have a position where, first of all, on cost causation you have effectively  
4 a tautologist's approach, leading only to a slight preference for LRIC, which in  
5 itself is premised only on the RCP pays principle, otherwise wouldn't exist at all.

6 You have cost minimisation being applied in circumstances where there's no  
7 evidence that incentives to minimise costs would be any stronger at all, bearing in  
8 mind these are competitive markets, there's already incentive to minimise costs. All  
9 you are doing, of course, is shifting the recovery of those same costs to other  
10 services, so where is the evidence or analysis to suggest that, when you have shifted  
11 the recovery of those common costs there will be greater incentives somehow to  
12 recover them, than if they are recovered under a porting charge. There's no  
13 evidence of that at all.

14 When you come to, which I think on any view Ofcom will accept is the key point,  
15 which was about effective competition. You have what we say is a central  
16 inconsistency in Ofcom's analysis between section 6 of the determination, with the  
17 position that it now seeks to advance, which is that there's a material impact on retail  
18 competition. Section 6 assumed LRIC pricing, which we know, and section 4  
19 effectively assumes RCP pays, insofar there's any discussion of effective  
20 competition.

21 In section 6, the materiality, even taking the highest figure for RCP at £1.71,  
22 averaged over all their customers, were thought not to be material. There's nothing  
23 under section 4 beyond the very broadly stated principles that it will cost RCPs less if  
24 you lower the charge, so therefore they have greater incentives to compete for more

1 customers. They would have fewer incentives to compete for ported customers or  
2 likely ported customers if you maintain the price at LRIC+, and there is a central  
3 point that new entrants will disproportionately be paying ported charges.

4 But in the absence of identification of materiality of those points, the extent of the  
5 effects of that competition, there's no basis to decide that that benefit is sufficiently  
6 material to overcome the presumption of LRIC+ pricing.

7 **THE CHAIRMAN:** So you would go so far as to say that there is a presumption that  
8 LRIC+ meets article 30 USD?

9 **MR PALMER:** I am not talking about a legal presumption when I say that, I am simply  
10 summarising. It's a useful label to put on an accepted principle. Mr Godfrey  
11 accepted that, given it's a departure from ordinary principles, you need to identify  
12 sufficient countervailing benefit before you adopt it. Whether one uses the  
13 language of presumption or not, that's the dynamic in play. The failure which we  
14 criticise is a failure to identify that benefit.

15 So it was incumbent on Ofcom to do that analysis. If it had done that analysis and it  
16 had decided that the effects on competition are material, it would of course then have  
17 to play that back into its earlier findings about RCP pays, because otherwise it's  
18 reaching an inconsistent decision on one stance as between the other.

19 Ofcom not only didn't do that but it didn't assess competition at the wholesale level,  
20 either. We had Dr Maldoom's evidence about that and, in particular, his concerns  
21 about arbitrage and incentives to use to keep traffic on BT's network rather than  
22 allow it to migrate whether to direct routing or NGN networks as they are developed.  
23 CPs had an incentive to keep that traffic on BT's network, even when they are taking  
24 non-ported traffic off. No analysis of that and crucially no analysis of incentives to

1 direct route on this question of LRIC versus LRIC+.

2 Now, just a moment ago in re-examination of Mr Godfrey, Mr Holmes went in that

3 context to footnote 148 on page 71 of the guidance. That simply records that BT

4 raises the argument; it doesn't answer it. He went in particular to paragraph 6.121

5 on page 74, which doesn't answer the point either. What that does, when the

6 Tribunal looks at it you will see, is encapsulates the very question Ofcom had to

7 consider. Essentially, what it reflects is that whether or not there are incentives to

8 move to direct routing, will turn on a cost-benefit analysis which, in turn, will

9 depend on the level of APCCs. So Mr Godfrey said that in view the pricing signals

10 faced by CPs, direct routing will be determined by choice of cost standard and who

11 pays. That reveals the clear lacuna in Ofcom's analysis, no assessment as to how the

12 level of APCCs would effect incentives to direct route, despite the fact that

13 Mr Godfrey accepts those incentives are relevant.

14 Standing back from it all, of course even if on consideration of these incentives and

15 consideration of the impact on retail competition, it doesn't of course follow that if

16 there was a material impact at retail level the answer would be to move LRIC + to

17 pure LRIC. You would have to consider the remedy for that, having identified that

18 material effect as a whole, including whether RCPs should continue to be expected

19 to pay and Dr Maldoom, of course, gave evidence as to various alternatives which

20 could be adopted.

21 The last point on this, of course, we also do draw attention to this distortive effect on

22 competition in wider markets that revealing LRIC pricing of inter-switch

23 conveyance would have. I refer you to Mr Farmer's glee. We say it's a really

24 serious point that wasn't considered at the time and, of course, it could be said that it

1 wasn't raised at the time, it's not the issue. It has become apparent on further  
2 thinking through the implications of Ofcom's decision on this that that would be the  
3 effect. Ofcom had provided no satisfactory answer to it. What was suggested in  
4 re-examination by Mr Holmes was that that information couldn't be derived at some  
5 higher level of abstraction. If you didn't provide the breakdown of the 10-call group  
6 model which is currently provided, that same information wouldn't be able to be  
7 extracted.

8 But CPs have insisted understandably on having that level of transparency because  
9 without it they can't meaningfully negotiate the level of APCC. They need that if  
10 you only give them the headline figure there's nothing -- there's no basis upon which  
11 they can negotiate or have that conversation at all or test BT's pricing at all. If you  
12 look, I will give you the reference it's paragraph 8.31 of the Ofcom guidance, Ofcom  
13 produced this guidance with specifically a view to allowing CPs to have the  
14 negotiation on APCCs. That's one of the reasons it gives for only producing  
15 guidance, rather than making a direction or a formal change of condition or setting  
16 prices itself or anything like that. It says: we want CPs to negotiate this. But in  
17 doing so you let the cat out of the bag on every other unregulated service as well.  
18 It's clear detriment that hasn't been considered and we say a clear disadvantage of  
19 having pure LRIC rather than any degree of LRIC+. When I say "any degree", of  
20 course the mere fact that you say LRIC+ doesn't give you the answer it depends on  
21 the share of common costs which are then allocated, so that depends on EPMU.

22 **THE CHAIRMAN:** Could I ask you to wind up in the next couple of minutes and if  
23 there are any other key points which you would have liked to have included in your  
24 closing submission, as opposed to the reply, could you just put them on a piece of



1 paper so we can be directed.

2 **MR PALMER:** I will do that. The main thing which remains for me to do is to Gamma  
3 point on limitation which I simply haven't had a chance to address yet. Entirely in  
4 your hands, sir, whether you prefer that to be on paper or whether you would allow  
5 me 10 minutes to develop that now.

6 **THE CHAIRMAN:** I think we would prefer it on paper. I think that would be helpful.  
7 We have read party's submissions on this and I have indicated to Ms Love that we do  
8 not want to hear from her orally again on this because she has produced a note. So  
9 I think, really, we have to wind you up now for this to become manageable and  
10 I think later we can perhaps discuss how many points that you would have liked to  
11 have covered should be covered in future.

12 **MR PALMER:** We are entirely content with that approach and very grateful to you.

13 **THE CHAIRMAN:** So Mr Holmes, the rough timetable that I think we have consensus  
14 on is that you will have 15 minutes from now until 1 o'clock. We will sit again at  
15 1.45 and you will speak until 3.30, which will give you a total of two hours.

16 **MR HOLMES:** Yes, sir, that's adequate.

17 **THE CHAIRMAN:** I think that means we are probably going to have to confine the  
18 interveners to 15 minutes each. So again if the interveners think there are points that  
19 they want to make but they can't cover in 15 minutes a written -- it only needs to be  
20 brief because we have all the material, we just need to be pointed in the right  
21 direction -- and then Mr Palmer would have a reply from 4 o'clock to 4.30.

22

23 **Closing submissions by MR HOLMES**

24 **MR HOLMES:** I am grateful sir.

1 I will begin, if I may, with some brief submissions on the task of the Tribunal in the  
2 appeal and on the role of Ofcom in these proceedings. The appeal is brought under  
3 section 192 subsection 2 of the Communications Act, section 195 subsection 2  
4 provides that the Tribunal shall decide such an appeal on the merits and by reference  
5 to the grounds of appeal set out in the notice of appeal.

6 So two points arise. First, the appeal is bounded by reference to the grounds and  
7 arguments comprising those grounds, which are contained in the notice of appeal,  
8 and I shall address those grounds in turn today as they have been set out in the notice  
9 of appeal.

10 Second, this is an appeal on the merits. The meaning of this has been elucidated in  
11 case law of the Tribunal and the Court of Appeal. We set out passages from two  
12 authorities at paragraphs 29 and 30 of our defence. If we could very briefly look at  
13 those. So this is in defence bundle 1, tab 1. The first case is a Competition Appeal  
14 Tribunal judgment under a different formation of this Tribunal in the British Sky  
15 Broadcasting case. That comprehensively but concisely summarises the relevant  
16 principles. At point A --

17 **THE CHAIRMAN:** If it would help, Mr Holmes, we have paid particular attention to  
18 these passages in your written argument.

19 **MR HOLMES:** I am grateful for that indication. If I might just highlight a couple of  
20 points by reference to the passages. Turning over the page to page 12, the Tribunal  
21 will note the need to attach due weight to the regulator's decision and to the reasons  
22 underlying it, following not least from the fact that this is an appeal from  
23 an administrative decision, not a de novo re-hearing and from the fact that  
24 Parliament has chosen to place responsibility for making the decision on Ofcom.

1 Also, reference is made at point D to the need to have regard to the investigation  
2 carried out by Ofcom, a specialist regulator, and, while the Tribunal isn't sure  
3 whether it's helpful to describe that in the European language of a margin of  
4 appreciation, the conclusion it reaches is the need it apply appropriate restraint. The  
5 Court of Appeal endorsed that approach in the passage which is quoted and you say  
6 see there, the conclusion that the Tribunal is not a second tier regulator, or shadow  
7 regulator.

8 This is an important framing point which I know the Tribunal will have well in mind  
9 for three reasons. First, this is a field of technical complexity, even by the standards  
10 of appeals before this Tribunal. Even those familiar with this sector may not have  
11 a fully informed perspective. We have seen various examples of this as the case has  
12 proceeded. We saw BT, which obviously knows the sector as well as any  
13 commercial party, confusing the local exchanges that were referred to in the LLU  
14 context. We saw the discussion about the scope for co-location of other parties'  
15 equipment at particular exchanges, and we saw Dr Maldoom's unawareness of the  
16 dynamics of unporting a number, which affected his expert opinion evidence on the  
17 evolution of porting traffic imbalance over time. That's point 1.

18 The second point is that Ofcom monitors carefully the industry and, therefore, has  
19 a particular perspective upon the economic and commercial dynamics of the  
20 industry. Its reasons in the statement in informed by its awareness of the market  
21 metrics which it constantly collects.

22 Mr Palmer appeared to query whether it was appropriate to have regard to  
23 Mr Godfrey's evidence in his witness statement. In our submission, this is exactly  
24 the kind of evidence that underlies Ofcom's reasoning. We stand by it and we rest

1 upon the reasons set out in the relevant decision documents: the guidance and the  
2 determination. But they were, of course, informed by that wider industry  
3 awareness.

4 The third point, and perhaps the most important, is that Mr Palmer rightly stressed  
5 yesterday that Ofcom has engaged in an industry-wide consultation on the matters  
6 that were for decision in the guidance. The issues were of general relevance to  
7 mobile porting as well as fixed porting and to non-geographic, as well as geographic,  
8 number porting. There were a number of moving parts, a number of decisions  
9 being made. The parties before the Tribunal today are a function of the specific  
10 matters which have been put in issue in BT's notice of appeal. If BT had challenged,  
11 for example, the OCP pays rule, we might well have had a different selection of  
12 industry parties, fixed and mobile, making submissions. That is why the grounds of  
13 appeal are key and why the other decisions, the other regulatory decisions must be  
14 taken as read for the purposes of the Tribunal's assessment.

15 In an adversarial appeal process they cannot realistically be looked behind. The  
16 tribunal would face an impossible task. The range and complexity of decisions at  
17 play in the guidance document also show the need for caution not to read the decision  
18 as though it were a statute, and you, sir, will be familiar with the public law  
19 authorities which emphasise that point.

20 The Tribunal should consider it, its substance -- the substance of the overall  
21 reasoning, and not seek to draw fine-grained distinctions based on where particular  
22 points are addressed in the document, as one might engage in the structural analysis  
23 of a piece of legislation.

24 With those points in mind -- and, in relation to the role of Ofcom in these

1 proceedings, the Tribunal may have noted that Ofcom is under no obligation to  
2 participate in appeal proceedings from a dispute determination such as that which is  
3 at issue in these proceedings. The Court of Appeal made clear in one of the appeals  
4 that arose out of the 08 proceedings that Ofcom should not feel obliged to participate.  
5 For your note the case is authorities bundle 1, tab 15, and the relevant passages at  
6 paragraph 87 of the judgment of Lord Justice Toulson with whom the other Lord  
7 Justices agreed.

8 Ofcom has taken part in these proceedings for two reasons. First, it considers that  
9 the legal arguments raised under grounds 1 and 2 give rise to broader issues of  
10 principle concerning the nature and scope of regulation applicable under the  
11 governing European Union law. Second, on the issue of substance, it considers that  
12 its approach to the resolution of the disputes was well founded, notwithstanding  
13 specific criticisms raised of the guidance under paragraph 3. With those comments  
14 in mind I will turn now to ground 1.

15 The issue, unless the --

16 **THE CHAIRMAN:** Perhaps we will rise five minutes early and sit at 1.40 again.

17 **MR HOLMES:** I am grateful, sir, of course.

18 **(12.55 pm)**

19 **(The luncheon adjournment)**

20 **(1.40 pm)**

21 **MR HOLMES:** Sir, the issue under ground 1 is whether BT's provision of inter-switch  
22 conveyance of ported traffic falls within the scope of Article 30(2) of the universal  
23 service directive and General Condition 18.5. The point is summarised for your  
24 note at paragraph 6(1) of BT's notice of appeal and then picked up at paragraphs 41

1 and subsequently. The key argument advanced by BT there is that the inter-switch  
2 conveyance is not necessary for the provision of number portability.

3 In our submission, the key provision for the purposes of this ground is Article 30(2).

4 This is because General Condition 18, as UK implementing law, must read  
5 consistently with it under the Marleasing principle of interpretation. Article 30(2)  
6 applies to pricing between operators "related to the provision of number portability".

7 So the relevant legal question is whether the charges made for porting conveyance  
8 including between switches are related to the provision of number portability.

9 It's common ground that interconnection related to the provision of number  
10 portability falls within the scope of Article 30(2). Recital 42 of the Universal  
11 Service Directive confirms that Article 30 applies to "interconnection related to the  
12 provision of number portability", and the Court of Justice held in Mobistar that this  
13 encompasses of traffic costs of numbers that have been ported. The reference for  
14 your note is authorities bundle 7, tab 7, at paragraph 30 of the judgment.

15 We are only concerned with whether BT is right to differentiate inter-switch from  
16 switch conveyance. That question must, in my submission, be assessed in the  
17 context of the UK system of number portability under which there is onward routing  
18 of ported calls and the RCP pays the associated conveyance charges, those features  
19 of the UK system not themselves being under appeal in these proceedings.

20 In Ofcom's submission, porting conveyance charges, both switch and inter-switch,  
21 clearly are related to the provision of number portability. This is so for two  
22 principal reasons. Those reasons are independent of one other and they are  
23 advanced further and in the alternative.

24 First, it is clear that the underlying services for which the charges are levied are

1 related to the provision of number portability. The evidence before the Tribunal  
2 shows that the route taken by a ported call, under the onward routing system will,  
3 typically, differ from that of a non-ported call. Typically, it will involve a detour by  
4 comparison with a non-ported call which will lead to the consumption of additional  
5 network resources, encompassing both switch and inter-switch elements by  
6 comparison to a non-ported call.

7 In consequence, it will incur supplemental conveyance charges that would not arise  
8 on an end-to-end basis if the call had not been ported. This should not be  
9 controversial; it is the basis for BT's contention that direct routing is more technically  
10 efficient than onward routing.

11 If I can show you quickly some passages from the notice of appeal and the witness  
12 evidence, I think that will make that good. Starting with the notice of appeal, tab 1,  
13 BT1, paragraph 28. You see there, BT sets out a helpful description of direction  
14 routing, under which the call does not need to be routed via the DCP's network at all,  
15 so there is no system of porting required. Instead, the call is routed directly to the  
16 called party who is identified by the OCP from the dialled digits without any need for  
17 lookup by the DCP.

18 Pausing there, the call is therefore identical to a non-ported call. The call could then  
19 avoid the DCP's network entirely, assuming interconnection between the OCP and  
20 the RCP. If they do not interconnect the OCP could continue to use BT's network  
21 for transit purposes if it so chooses. Indeed, the call would, in either event, be  
22 routed in precisely the same way and as efficiently as a non-ported call would be.

23 So there the contrast between a ported call and a non-ported call: greater efficiency  
24 and avoidance of the DCP's network. The evidence cited in support, Morden 1, to

1           which we will come in a moment.

2           Turning to paragraph 69 within the notice of appeal --

3   **THE CHAIRMAN:** Mr Holmes, is a key difference between Ofcom and BT this: that  
4           BT focuses on the route that the call could take, whereas Ofcom focuses on the route  
5           that the call actually does take, or is that too simplistic a contrast?

6   **MR HOLMES:** My understanding of BT's position is that they contend that, provided  
7           that there are choices to procure a service element from a provider other than the  
8           DCP, that means that the service is not related to the provision of portability. I will  
9           come to address that submission in a moment if I may.

10   **THE CHAIRMAN:** Yes.

11   **MR HOLMES:** We say that there are two reasons why it is reasonable to regard the  
12           charge as related to the provision of portability and the charge for porting  
13           conveyance, both switch and inter-switch. The first is the nature of the underlying  
14           service and we say that if one looks at the underlying service and one compares the  
15           route that a non-ported call would take between the same pair of  
16           ultimate -- ultimately, the original, the same point of origination and the same point  
17           of ultimate destination, one sees that a ported call, in most cases, will take a detour,  
18           will take a different route, and will consume additional conveyance including  
19           inter-switch conveyance. So that is my first point.

20           Turning to paragraph 76 in the notice of appeal. A further observation about direct  
21           routing by comparison with onward routing, direct routing here being a proxy for  
22           a non-ported call. The logical consequence of Ofcom's comparison of onward  
23           routing costs, with those of the direct routing of non-ported calls is that direct routing  
24           is taken to be more efficient than onward routing. That much is plainly correct.



1 Onward routing prevents overall optimisation of routes from the OCP to the RCP.

2 Since the call must always go through the DCP this acts as a constraint on the overall  
3 routing of call that would not arise under direct routing. Therefore, indirect routing  
4 is likely to increase the total cost of carrying calls.

5 Pausing there, the lack of efficiency, the failure to optimise and the increase in the  
6 total cost of carrying calls arises from the consumption of additional network  
7 elements in connection with a ported call by comparison with a non-ported call, and  
8 those elements are typically not confined to switch conveyance.

9 Two references to the evidence given in those paragraphs I have shown you: the first  
10 is to Morden 1, which is at tab 3. At paragraph 67, he shows the dog-leg in the  
11 diagram. At paragraph 69 he explains that there are a number of disadvantages of  
12 onward routing by comparison with direct routing. This is at page 24, tab 3. You  
13 see the first bullet, the call necessarily includes added call setup processing and at  
14 least an extra switch in the donor network compared to non-ported call. We say that  
15 has it right, it is at least. In our submission, there is more than just the switch. In  
16 the majority of cases, typically there will be conveyance of a call between switches.  
17 The evidence before the Tribunal shows that that's the case. It's true that  
18 a non-ported call or a direct routed ported call could take the same route as  
19 an onward routed ported call, that's not in dispute. Equally, we have no issue with  
20 the point that BT raised in relation to Ofcom's note, that for small providers, with  
21 limited interconnection, one might very well find that they will use a transit provider  
22 for a directly routed call and so therefore the call will contain a third party and could  
23 follow the same route, transit or porting conveyance provision.

24 **MR LANDERS:** So the reference Mr Palmer quoted in DF1, 76(b) referred to small

1 providers only, did it?

2 **MR HOLMES:** I will come, if I may, to 76(b). It's a slightly separate point. It could  
3 happen in some circumstances, but you will note how Mr Morden describes this in  
4 paragraph 72 of his statement -- at the end of paragraph 72 on page 26. So in some  
5 circumstances a ported call could be delivered by exactly the same route, regardless  
6 of whether direct or onward routing is employed. That is, as you will see, carefully  
7 and, we say, correctly qualified.

8 Just briefly to show you Dr Maldoom's evidence on this point, it's on two tabs at  
9 tab 5, paragraph 170. You see it's the same point made there, as in the defence:

10 It prevents overall optimisation of routes, the onward routing. The call  
11 must go through the DCP due to the nature of indirect routing and that's a  
12 constraint on the overall routing of the call likely to increase the total  
13 costs of carrying calls.

14 Turning then to the oral evidence which the Tribunal has heard. The reason why  
15 porting conveyance and onward routing will typically consume both switch and  
16 inter-switch conveyance, is as follows. In the majority of cases, the call will be  
17 delivered by the OCP to the DLE where it was originally hosted, under the far end  
18 handover approach.

19 The call will therefore take a trip to the final exchange on the DCP's network, where  
20 the number was originally hosted and will then need to be carried back to the tandem  
21 layer and on to the final exchange on the RCP's network. The ported call would  
22 never go to two final exchanges in this way. First the DCP's DLE and then back up  
23 and then to the RCP's final exchange; it has gone to the final destination point of two  
24 networks instead of just one.

1 **THE CHAIRMAN:** I think you said the ported call would never go.

2 **MR HOLMES:** I am so sorry, a non-ported call, I had meant to say, apologies.

3 For the Tribunal's note Mr Morden confirmed that this was the case in his oral  
4 evidence on Day 2 transcript at page 52, line 1, to page 53, line 3. So for the  
5 majority of ported calls, there is a detour which extends to the DCP's final exchange  
6 and then back up. We say, as a matter of ordinary language, the conveyance  
7 services used to carry a ported call back from the final switch to the RCP's network  
8 are all related to the provision of number portability. Those services switch and  
9 inter-switch are used because the call is ported call.

10 There's a further reason why ported calls will generally follow a different route and  
11 require additional conveyance elements. As Mr Rosbotham explained, the large  
12 operators who carry most of the traffic tend to be interconnected. The main traffic  
13 sources, as he put it, are connected together. By way of example, he noted that well  
14 in excess of 95 per cent of his outbound geographic traffic to carriers other than BT  
15 go on directly interconnected routes. The reference for your note is transcript  
16 Day 3, page 89, lines 4 to 13.

17 So when a large CP (a) sends a directed routed call to a large CP (b) it will do so  
18 directly. It will not route via CP (c), as is unavoidably required in the case of  
19 onward routing. Mr Palmer made the point this morning that small CPs will use  
20 more transits. True, but Ofcom's note concerns the generality of traffic. Generally,  
21 calls will follow a dog-leg. Again, as a matter of ordinary language, all of the  
22 conveyance required to carry the call back from the DCP's network is related to the  
23 provision of portability. It arises because the call has been ported. A non-ported  
24 call between CP (a) and CP (b) would not go on a detour via the DCP.

1 Sir, you put it to Mr Palmer that this argument may suggest a fine-grained analysis  
2 that would require distinctions to be drawn between categories of traffic. We agree  
3 that is a consequence of the argument taken on its own. The difficulty is avoided, in  
4 our submission, because of the second and independent reason which is, in many  
5 ways, more closely connected both with the language and purpose of Article 30(2).  
6 The second and independent reason why APCCs, both the switch and inter-switch  
7 conveyance, are related to the provision of number portability, concerns the charges  
8 themselves.

9 It's worth underlining that Article 30(2) doesn't refer, as Mr Palmer unwittingly  
10 suggested in his opening, to costs related to the provision of portability; it refers to  
11 prices relating to the provision of number portability.

12 Under the UK's system of number portability, the prices in question attach  
13 specifically to the CP that provides retail services to the ported customer. Look who  
14 pays these prices, these charges. As a commercial matter, it is the CP to which the  
15 customer has ported the number, the RCP, who must pay for the conveyance of the  
16 call back to its network. As the evidence confirms, the porting charges are  
17 a specific pence per minute cost which attaches exclusively to carrying traffic to  
18 ported customers.

19 In a departure from the normal approach in the UK, these charges are payable at the  
20 terminating end of the call and this departure occurs only in the case of ported  
21 customers. The APCCs are there are payable by the RCP because its customer has  
22 ported. Again, as matter of ordinary language, we say that those charges are  
23 therefore "related to the provision of number portability". I referred to these  
24 charges in my opening submissions to APCCs as a tax on porting, and this reference

1 has clearly caused some consternation and offence on the part of BT. By this  
2 I should be absolutely clear that I meant no criticism of BT for levying APCCs on the  
3 RCP. That is the regulatory system that we have in place. But under that system  
4 there is clearly a continuing financial disadvantage to serving a ported customer.  
5 Call it a tax, call it a toll: it is a cost on serving a ported customer that does not arise  
6 for a non-ported customer.

7 I also refer to the incentives that arise for an incumbent operator with a ported traffic  
8 imbalance. Those are part of the mix when assessing what actions may be needed to  
9 ensure effective competition. Again, this is not a criticism of BT. In terms of  
10 Dr Maldoom's evidence to the Tribunal, it is looking at the incentives. It is not  
11 an observation about BT's motives or even necessarily about its actual conduct to  
12 date. One of BT's argument insist this case is that both of these independent reasons  
13 why APCCs are related to the provision of number portability could be removed by  
14 changing other parts of the regulatory landscape, in the case of the detour by  
15 implementing direct routing and in the case of the channelling of the charges to the  
16 provider that serves the ported customer by moving on OCP pays. However,  
17 Ofcom had independent reasons to leave these features unchanged and neither of  
18 those choices is under challenge in these appeals.

19 BT does not contend that Ofcom should have mandated a move to direct routing. It  
20 has a point about direct routing but that concerns the impact of LRIC charges on  
21 incentives. As Mr Palmer accepted in his opening submissions and accepted again  
22 today, BT does not appeal against Ofcom's determination on the basis that it should  
23 have resolved the dispute by providing for OCP pays.

24 For the purposes of ground 1, the argument is in any event not relevant. The focus

1 of ground 1 is on the scope of Article 30(2) and that turns purely and simply on the  
2 construction of the words and, on a natural reading of the words "related to the  
3 provision of number portability", porting conveyance charges in their entirety are  
4 related to the provision of portability. They are incurred by RCPs only in respect of  
5 traffic of ported customers and the underlying services are generally required  
6 because the call is to a ported number. They would not be needed to carry  
7 a non-ported call between the called and the calling parties.

8 Mr Palmer observed in his closing submissions today that the distinction that it's not  
9 illuminating to whether charges should be assessed at LRIC+ or LRIC, but that's  
10 a ground 3 point and obviously it's not a point under ground 1.

11 We say that the textual interpretation accords with the purpose of Article 30(2) for  
12 the Universal Service Directive, recital 40 in the preamble enumerates the objectives  
13 of portability, namely to facility consumer choice and effective competition.

14 Charges which are specific to serving ported customers will make it less attractive to  
15 compete for those customers and will impose a particular burden on newer entrants.

16 It is within the intended purpose of recital 40 to regulate the level of such charges.

17 In the notice of appeal, BT contends that inter-switch conveyance of ported calls is  
18 not within the scope of Article 30(2) because the service is not necessary to the  
19 provision of number portability. What BT means by this, as Mr Palmer helpfully  
20 clarified this morning by reference to his skeleton argument, is at that the service  
21 would be provided by someone other than the DCP. Other operators could build out  
22 to every switch, it said, or they could buy transit services rather than buying  
23 inter-switch conveyance from BT, if any were on offer.

24 Paragraphs 45 and 46 of the notice of appeal, for your note, tend to suggest that the

1 mere physical possibility of alternative service provision is enough to mean that  
2 charges for conveying a ported call across a switch are not within the scope of  
3 Article 30(2). In its opening submissions, BT focused more upon the concept of  
4 contestability. It argued that BT's prices for inter-switch conveyance for ported  
5 traffic are competitively constrained by the possibility of entry and this is said to  
6 show that Article 30(2) was inapplicable.

7 Ofcom submits that this is not the correct analysis. First, there is no reference in  
8 Article 30(2) to whether a service is necessary to the provision of number portability.  
9 The language is much broader than this, it applies to charges that are related to the  
10 provision of number portability. Nor is there any reference to whether the charges  
11 for non-contestable services relate to the provision of number portability -- nor is  
12 there any reference as to whether the charges are for non-contestable services  
13 relating to the provision of number portability.

14 **THE CHAIRMAN:** Mr Holmes, I suppose that the legislature could have framed  
15 USD 30 to say something like "charges for ported calls". Is there any significance  
16 in the way in which charges related to portability is framed? It suggests an ability to  
17 do something rather than the fact of something being done.

18 **MR HOLMES:** My submission on that is that you will recall that in the original cast of  
19 the directive the reference was, I think, to interconnection, traffic costs. There was  
20 then the Mobistar case which asked whether set-up costs were also included, whether  
21 this was unduly narrow. The Court of Justice made clear that, despite the reference  
22 to interconnection, Article 30(2) should be read as encompassing a broader set of  
23 costs, both traffic costs and set-up costs.

24 That was the decision that the Court of Justice that it was both of those things.

1 Perhaps we should quickly look at that. If you take up authorities bundle 1 and turn  
2 within it to the second unnumbered tab in tab 7. Taking it in stages, the questions  
3 are set out at paragraph 19 of the judgment.

4 **THE CHAIRMAN:** The judgment, rather than the --

5 **MR HOLMES:** I think it's easier to take it from the judgment. It's quicker. You see

6 1(a):

7 "Does Article 30(2) of the Universal Service Directive, which provides  
8 that national regulatory authorities are to ensure that pricing  
9 interconnection related to the provision of number portability [that's the  
10 original wording] is cost orientated, refer only to costs related to traffic to  
11 the ported number, or does it also refer to tariffs of costs incurred by  
12 operators in executing requests for number porting?"

13 In other words, set-up costs. So, pausing there, it was common ground that traffic  
14 costs were covered by reason of that reference to interconnection which you will  
15 have seen from our defence is very broadly defined.

16 One turns forward then to paragraph 30 of the judgment, and the answer to that first  
17 part of the first question is given there, that pricing for interconnection related to the  
18 provision of number portability concerns the traffic costs of numbers ported and the  
19 set-up costs so it's giving a broad interpretation.

20 The recast of the Universal Service Directive following the Mobistar case was  
21 amended, we say, to broaden the ambit of the provision and to remove any risk of  
22 confusion in the light of this clarification provided by the Court of Justice in  
23 Mobistar. The intention was not to remove traffic costs from the scope of  
24 Article 30(2) and that much is common ground between myself and my learned



1 friend, Mr Palmer. One sees that there was no intention to narrow the scope from  
2 recital 42 of the Universal Service Directive, which retains the reference to  
3 interconnection following the amendment.

4 So we say that no omission of reference to traffic costs or to conveyance costs, no  
5 conclusion can be drawn to the effect that this is narrower than that. On the  
6 contrary, the history of the interpretation of the provision and its amendment shows  
7 that that's not a tenable interpretation.

8 **THE CHAIRMAN:** Thank you.

9 **MR HOLMES:** I had made the point that there's no reference to the charges being  
10 non-contestable services. My second point on this contestability argument is that  
11 a test based on contestability cannot be the right one given the context of  
12 Article 30(2) within the common regulatory framework and as a matter of law.  
13 Most of the factual evidence before the Tribunal, with the exception of some material  
14 on direct routing has been directed to the question of contestability. The Tribunal  
15 has been treated to an analysis of what competitive constraints apply to BT, that  
16 particular local exchanges from Lerwick to Bracknell. The evidence is of a kind  
17 that is very familiar to those working in the telecoms regulatory field. It is what  
18 Ofcom does all of the time as part of the rolling process of market reviews to  
19 determine whether BT or other CPs have significant market power.  
20 This evidence invites the Tribunal to carry out a kind of mini market review, based  
21 primarily on calculations provided by BT in its reply evidence and the responses  
22 given under cross-examination of their witnesses in the box. It's a very interesting  
23 and diverting exercise and it could keep us happy for much longer than a six-day  
24 trial. But, as a matter of law, it cannot be relevant to the scope of application of

1 Article 30(2). As I showed the Tribunal in my opening submissions, Article 30(2)  
2 does not require a significant market power assessment. It is not necessary for that  
3 provision to apply to determine whether any given market is effectively competitive  
4 or not. This was a deliberate regulatory choice. We saw that Article 30 falls under  
5 chapter 4 and not chapter 3 of the Universal Service Directive. The latter concerns  
6 regulation applicable only to undertakings with SMP where as the former does not.  
7 This design choice is then reflected in Article 8 of the Access Directive, which refers  
8 expressly to Article 30 of the Universal Service Directive and preserves the power  
9 under it to impose price regulation absent the SMP finding which would otherwise  
10 be required to take action under Article 13 of the access directive price control.  
11 The choice is carried through in the Authorisation Directive, which provides that  
12 Article 30(2) may be implemented by way of conditions attaching to the general  
13 authorisation applicable to all undertakings in a member state. The Tribunal saw  
14 the reference in annex C of the Authorisation Directive to number portability  
15 requirements in conformity with the Universal Service Directive. These are, if you  
16 recall, the category of obligations which apply to everyone to the universe of  
17 operators, as they are called in the CRF, or CPs as we have been calling them in this  
18 trial, and not to specific operators where there is a lack of effective competition.  
19 In view of this choice which runs like a scene through the whole of the common  
20 regulatory framework, it's unsurprising that in Mobistar the Advocate General  
21 confirmed that significant market power is not required for the application of  
22 Article 30(2). In our submission, contestability is all about determining what  
23 competitive constraints arise from potential entry. It's a species, a subset of market  
24 power assessment. Is there effective competition by reason of contestability or is

1           there market power?

2           You have my submission, Article 30(2), if it were read as being based on an implicit  
3           requirement to show the contestability of a service this would run counter to the  
4           scheme of the common regulatory framework, as the evidence in the case clearly  
5           shows. The effect would be to bring in an SMP assessment by the back door.

6           Contestability is also not aligned with the purpose of Article 30(2). There is  
7           a reason why the legislature did not require SMP. The aim of the provision, as  
8           shown by recital 40, is to protect the process of competition for switching customers,  
9           given the importance of this to market entry and consumer choice. Ported  
10          customers have to be won from existing operators. You have seen the traffic  
11          imbalance which is still very apparent today and endures despite the progress that has  
12          been made towards competition in a number of markets.

13          As Dr Maldoom accepted in his evidence yesterday, the charges for porting  
14          conveyance weaken the incentives to win ported customers by imposing higher costs  
15          on new entrants. In any event, in our submission, the evidence does not support  
16          BT's case that the market is contestable. It's important to see how BT puts this point  
17          and if I could ask you to pick up the transcript for Day 1 if you have that available to  
18          you -- do you have a transcript bundle?

19         **THE CHAIRMAN:** Yes.

20         **MR HOLMES:** The relevant reference is page 59 within that transcript. Do you see at  
21          the top of the page, there is the short adjournment and then Mr Palmer provided a run  
22          through of his grounds. You see that he starts with ground 1. He says at line 11:

23                     It is a normal commercial choice with whether to interconnect at any  
24                     given BT switch.

1 He clarifies at line 16 that his submission is not and never has been that it would be  
2 commercially viable for every CP to interconnect everywhere. Just pausing there,  
3 Mr Morden's evidence shows that there will be switches at which it is not viable for  
4 even the large CPs to connect. That's what the calculations show.

5 The fact that TalkTalk has done it to most switches doesn't necessarily show  
6 a competitive market outcome. One entrant is generally not regarded by Ofcom in  
7 its SMP assessment as a sufficient competitive constraint. So this would tend to  
8 suggest that some exchanges are contestable but others may not be. The ones that  
9 are not, that part of Mr Palmer's submissions would suggest that Article 30(2)  
10 applies. So you would end up with a mixed bag following a sort of quasi SMP  
11 assessment where an uncertain number of exchanges, something that the Tribunal  
12 really, in my submission, isn't in a great position to reach a view upon, would not be  
13 contestable.

14 So rather like your point in relation to my first argument, it would be a mixed picture  
15 with Article 30 applying in some cases but not others.

16 Mr Palmer's answer to this is at page 62, still within ground 1 of his submissions.

17 You see at lines 15 to 18, the point that he made again in opening today:

18 "There may be areas or exchanges where the CP commercially wouldn't  
19 choose anything other than to consume that product [that's the BT  
20 product]. But BT then doesn't put up a price in those cases just because  
21 they are there"

22 I think the transcript may have been a little garbled there: just because there they are  
23 constrained. There is a competitive constraint that applies nationally, a competitive  
24 constraint that applies nationally.

1 So that is his point. You have contestability at some exchanges and because BT  
2 prices nationally for APCCs at a price which reflects a competitive price, there is  
3 a single national market, despite the differing competitive conditions at each  
4 exchange and with a single price. The basis for this constraint was illuminated by  
5 Mr Palmer's cross-examination of Mr Godfrey yesterday and it is also set out in BT's  
6 closing submission of today at paragraph 2; do you have that to hand? I put it in my  
7 skeleton bundle but I am not sure where it is. You see in the final two sentences:

8 If BT increases its price for ISC, interconnection will become  
9 commercially viable at more sites and that provides a constraint on BT as  
10 Ofcom itself has previously recognised.

11 There is a reference to the cross-examination of Mr Godfrey and to paragraphs 8.88  
12 to 8.90 of the 2009 narrowband market review.

13 The constraint in question that was put to Mr Godfrey, and that appears in the  
14 narrowband market review, is none other than General Condition 18.5 and  
15 Article 30, paragraph 2. So that's how you avoid this problem of a hotchpotch that  
16 his case, even if it were accepted, would not get him home in all exchanges, in that  
17 some allowed for competitive entry and some didn't.

18 It's because the price fixed for APCCs on a national basis by reference to what is said  
19 to be a competitive price. That is because of General Condition 18.5. But, in our  
20 submission, this gives rise to circularity in the context of ground 1. It is circular to  
21 say that regulation of ISC conveyance, under General Condition 18.5 and  
22 Article 30(2) is not needed on the basis of contestability when the less contestable  
23 exchanges are said to be priced at the same level as other exchanges by reason of the  
24 regulation that is said to be unnecessary. Regulation under Article 30(2) is being

1           relied on here to show that no regulation was needed under Article 30(2).  
2           In the section of SMP regulation -- this argument has arisen again, it's a familiar  
3           argument in the SMP context -- the question there is, do you ignore constraints  
4           resulting from existing regulation when assessing for SMP? Again, there's the risk  
5           of circularity. If you say the market was effectively competitive because of the  
6           regulatory constraints which have been put in place pursuant to SMP, you would end  
7           up withdrawing in a subsequent market review the SMP regulation which had  
8           achieved an effective competitive outcome.

9           The conclusion that has been reached under what is known as the Greenfield  
10          principle or approach is that you ignore SMP regulation when assessing there is  
11          market power to avoid this circularity.

12          So we say that BT's case that these are contestable that all exchanges are contestable,  
13          is not successful. Again, we would pray in aid the evidence of Dr Maldoom that we  
14          are interested here in incentives and not actual conduct, which has been conditioned  
15          by regulation and perhaps more recently in relation to the price change in  
16          November 2015 by the fact of these proceedings. But I come back to my key point,  
17          we say at that the Tribunal need not concern itself with any of the labyrinthine  
18          elements about contestability because it is simply not a requirement for regulation  
19          under Article 30(2).

20          BT objects that if inter-switch conveyance or porting conveyance -- inter-switch  
21          charges for porting conveyance are within the scope of Article 30(2), then various  
22          other types of charge must also be in the scope of this provision. This was your  
23          question, sir, about the question about paragraph 76(b).

24          He says if a third party provided the conveyance needed to carry the ported call back

1 to the RCP, this would also be related to the provision of portability. On this we  
2 make two submissions. First, and as a practical matter, the issue in our view is  
3 entirely moot; there is no transit product. This is common ground at the local level  
4 in porting conveyance and, at the tandem level, although BT suggested that Gamma  
5 provides porting services, as we understood the evidence of Mr Farmer, Gamma  
6 purchases inter-switch conveyance from BT and sells it on to the CPs whose  
7 numbers it hosts. It is reselling BT's provision of inter-switch conveyance; it's not  
8 providing it itself.

9 The second point is that the issue does not arise on this appeal. In this case we are  
10 concerned with BT which is the DCP. We do not need to consider hypothetical  
11 transit services which are not in the market at present, in order to decide whether they  
12 would themselves be subject to price regulation. Perhaps the question might come  
13 up in some context at some stage, it hasn't arisen in this case. Mr Palmer also says  
14 that direct routing conveyance would be caught and would require to be cost  
15 orientated.

16 If there were any charges levied in addition to those for a non-ported call we agree  
17 that they would be caught, we accept that. But we say that there are no such  
18 charges, there is no transit. Direct routing removes the detour. It also removes  
19 RCP pays, so that neither of the two reasons why porting conveyance in our  
20 submission is caught by Article 30(2), in an onward routed RCP pays world, would  
21 apply. There was a small tangle in the evidence about whether direct routing of  
22 a ported call would involve the same conveyance as the routing of a non-ported call.  
23 We do not take issue with the evidence that Mr Morden gave on this. But what we  
24 do say is that it was based on the wrong comparison.

1 On inspection, Mr Morden was comparing the route between a given OCP and the  
2 DCP with the route between a given OCP and the RCP under a system of direct  
3 routing. The correct comparison is of the route for a ported call between the OCP  
4 and the RCP and the route for a non-ported call, between the OCP and the RCP. It's  
5 this which enables one to see what impact there is of serving a ported customer, and  
6 the evidence of BT on direct routing and the references in the notice of appeal are all  
7 based on that, and that is why they say that direct routing eliminates the inefficiency  
8 and the distortion from the indirect routing model.

9 Mr Palmer also say that Ofcom's approach is inconsistent with the one that it took in  
10 relation to mobile interconnection and transmission. My first point about that is that  
11 it is unclear where it takes him. If Ofcom had made some error in another decision,  
12 it cannot assist him if the present decision was correct as to the scope of  
13 Article 30(2). We are here addressing a question of law. Ofcom's duty of  
14 consistency cannot require it to take the wrong legal decision twice. But in any  
15 event, his point seems to turn on an infelicity in Ofcom's record of its reasons for  
16 excluding mobile transmission costs.

17 You remember the cross-examination of Mr Perry on this point. Mr Perry  
18 explained in his evidence that the costs were omitted on the basis that there were  
19 little or no such costs relating to portability, given the different configuration of  
20 mobile interconnection.

21 Finally, under ground 1 we do maintain our submission that if BT were right it would  
22 not be required to provide porting conveyance services between switches. You  
23 have my submission in opening why General Condition 20 cannot fill the gap.

24 Mr Palmer said that he disagreed but in his opening closing submissions he advanced



1 no reasons for disagreement. We will see if he says anything in his closing closing  
2 submissions.

3 Ofcom's focus, and equally to pray in aid Mr Morden's evidence about what BT  
4 actually does, is misdirected. Ofcom's focus is, again, on incentives and safeguards  
5 that this may require. It's not on whether BT would, as a matter of practice, cease to  
6 supply network conveyance elements.

7 So that concludes my submissions on ground 1, subject to there being any questions  
8 from the Tribunal I will turn to ground 2.

9 Based on BT's pleaded case in the notice of appeal, we understand that there are two  
10 issues. The first is the 08 issue. As we understand the, the question is whether  
11 Ofcom erred by failing to identify a reason for intervention by reference to its  
12 Article 8 duties, and the second is the agreement issue, had BT reached a commercial  
13 agreement within the scope that General Condition 18.5(a)(ii).

14 On the first issue, Ofcom submits that it had good reason to intervene and that its  
15 actions were in accordance with its statutory duties. You have my submission in  
16 opening that the 08 case is not authority for any special threshold in a case where  
17 an existing regulatory obligation applies. The Tribunal will recall the distinction  
18 between the type of dispute at issue in this case, where there is such an obligation,  
19 and the type of network access dispute where no obligation applies and Ofcom is  
20 doing the best justice it can, based on the parties dealings to date. There, whatever  
21 agreement is in place must obviously carry significant weight. In that respect,  
22 Lord Sumption's comments were a matter of common sense.

23 In his opening submissions today, I detected a certain softening in Mr Palmer's  
24 position under ground 2A. He now says simply that Ofcom must identify

1 a regulatory problem. On this, sir, we would respectfully submit that you hit the  
2 name on the head with your question to Mr Palmer. We accept that Ofcom needs  
3 a reason for action in this case to justify LRIC over LRIC+. All regulatory action  
4 under the Communications Act requires to be justified proportionate and Ofcom  
5 should only regulate where there's good reason to do so.

6 Dr Maldoom accepted that, in principle, retail competitive effects were capable of  
7 providing such a reason, and I will give you specific reference to his  
8 cross-examination when I come to ground 3.

9 Mr Palmer also raises the issue of proportionality. This was raised in the notice of  
10 appeal under ground 3 -- 2, as well, I stand corrected. It was apparently raised  
11 under ground 2 as well. But in our submission, at all events, ground 3 is the right  
12 place for it. Proportionality depends on Ofcom's specific assessment, the  
13 considerations that were in play. It's not something that can be conducted in  
14 abstracto without seeing the reasons for and the potential countervailing  
15 considerations so ground 2A collapses into ground 3.

16 On the second issue, we say at that there was no agreement on another basis of  
17 charges for the purposes of General Condition 18. The Tribunal has the point that  
18 there is no agreement that can be shown on any particular element LTC or ITC rate,  
19 there's no contract which sets that rate out in the written form. There's no agreement  
20 to substitute a basis of charges, other than long run incremental cost and that, we say,  
21 is the relevant question for General Condition 18.

22 The BT standard interconnect agreement is, as one would expect, expressly subject  
23 to BT's regulatory obligations under the general conditions including General  
24 Condition 18.5. The CPs cannot contract out of the obligations imposed upon them

1 pursuant to Article 30(2). You will recall I showed you in my opening, I think it  
2 was clauses 12.9 and 12.11 which make that explicitly clear.

3 That brings me to ground 3, unless there are any questions on ground 2.

4 The appropriate starting point is the guidance itself to see how matters were dealt  
5 with there. I would be grateful if you could turn that up. It's at tab 8 of the first  
6 (inaudible) bundle. If you could turn please to page 25 within that tab. You will  
7 see at page 24, paragraph 4.16, there are the six principles set out which Ofcom  
8 considered but, as you know, the three of relevance are: cost causation, cost  
9 minimisation and effective competition.

10 Cost causation is addressed from paragraph 4.32 and you heard Mr Godfrey  
11 yesterday explain why his principle was regarded as relevant. In essence, it takes  
12 you to the questions of static and allocative efficiency because it looks at what cost  
13 causes costs to arise. The reference to your note is page 115 of the transcript from  
14 Day 5, lines 4 to 6. It's common ground that the cost causation principle favours  
15 LRIC although Ofcom has fairly recognised that this consideration played  
16 a relatively small role in its decision.

17 Cost minimisation is then dealt with from 4.49. This also played a relatively small  
18 part in Ofcom's decision but in Ofcom's assessment it also favoured LRIC.

19 Mr Godfrey explained that, where common costs are recovered in competitive  
20 markets, the pressures of competition are likely to lead to cost minimisation in any  
21 event. However, given that LTC and ITC share infrastructure with other services  
22 which are not necessarily used in competitive markets, there is still some scope for  
23 a LRIC standard to strengthen cost minimisation incentives. That was Ofcom's  
24 view and the reference for your note is pages 121 to 123.

1 Turning then to effective competition, Ofcom attached importance to this issue for  
2 two reasons. If I could take you to 4.27 just to pick up the reference on this. You  
3 see there's a reference to the recitals of the USD. There's a typo that should be  
4 recital 42. It makes it clear that number portability is intended to facilitate  
5 competition through switching and that, amongst other things, charges should not  
6 hinder consumers from changing providers.

7 Then there's also a reference to Ofcom's principle duty to further the interests of  
8 consumers where appropriate by promoting competition under section 3 of the  
9 Communications Act. The discussion of effective competition then begins in  
10 earnest at 4.58. It goes on over a few pages, we can pick up at 4.67.

11 You will recall that Ofcom split the issue two three themes: incentives to compete,  
12 recovery of common costs and costs excluded under GC18, they are the one set out at  
13 4.67. On the first issue, incentives to compete, the point made at 4.68 is that the  
14 higher the porting charge the RCP has to pay the fewer incentives it would have to  
15 compete intensively to gain customers that are likely to port their number. You see  
16 that in the penultimate sentence.

17 Now, pausing there: this, as is apparent from yesterday's oral evidence of  
18 Dr Maldoom, is common ground between the experts. Dr Maldoom explained in  
19 the evidence that he agrees with this as a matter of principle where he takes issue  
20 with the magnitude of the incentive effect. By way of example, there is a reference  
21 for Day 5 page 21, lines 21 to 24 of the transcript. A large part of Dr Maldoom's  
22 reason for disagreeing on the magnitude of the effect was his view that a CP could  
23 not discriminate between ported and non-ported customers. But he accepted, when  
24 pressed, that there are a number of ways available for discriminating between ported

1 and non-ported customers: bill boards targeting BT's customers, targeted rates,  
2 mailings, and so on.

3 At paragraph 4.69, Ofcom made the point that another disadvantage would arise in  
4 consequence of the imbalance in the number of ported customers, each CP has.

5 That imbalance, it is said there, is likely again in the penultimate sentence to  
6 disadvantage later entrants since they will have to pay porting charges for a greater  
7 proportion of their customer base.

8 The Tribunal will recall that Dr Maldoom was particularly concerned with the  
9 potential effects of the imbalance in ported traffic. He said the imbalance indicates  
10 the type of customer which each CP might acquire, which can then be expected to  
11 shape the CP's incentives to acquire ported customers. That was his evidence on  
12 Day 5, page 30, lines 10 to 23.

13 On this point, Dr Maldoom's written evidence was that he would expect any traffic  
14 imbalance to iron itself out over time. This was because he thought consumers  
15 would move back and forward between providers, so that eventually all CPs would  
16 have a balanced spread of new and ported customers. The reference for your note is  
17 his second report at paragraph 96. But in oral evidence, Dr Maldoom accepted  
18 quite properly that, when he wrote that passage in his second report, he had not  
19 appreciated that consumers who port away from BT and then move back become  
20 unported but that ex-BT customers moving between other CPs would always remain  
21 ported. This substantially undermines any tendency for the imbalances to equalise  
22 over time. The transcript reference, Day 5, page 43, lines 4 to 9.

23 When we looked at the data on traffic imbalances, Dr Maldoom accepted that it  
24 shows there to be a substantial imbalance between CPs, exactly as you would expect

1 given BT's historic position. For your note, the relevant figures are at DF1, tab 4,  
2 page 53, figures 7 and 8 and Dr Maldoom's comment upon it is at transcript Day 5,  
3 32, lines 1 to 3.

4 On retail competitive effects, in our submission, there is a high degree of common  
5 ground, at least at the level of experts, as regards the starting point of Ofcom's  
6 analysis in paragraphs 4.68 and 4.69 of the guidance.

7 Higher porting --

8 **THE CHAIRMAN:** I was just wondering if this would be a convenient moment to have  
9 a short break. Just whenever suits you.

10 **MR HOLMES:** I have two further points on this and then perhaps, if that would be  
11 convenient.

12 **THE CHAIRMAN:** Yes.

13 **MR HOLMES:** So what the evidence shows, in our submission, following testing and  
14 cross-examination is that higher porting charges do create fewer incentives to  
15 compete intensively for customers who are likely to port their family. The  
16 substantial traffic imbalance between CPs poses another problem which would not,  
17 in fact, be expected to disappear over time. It's a problem that one sees, in fact, in  
18 the world as it is in the United Kingdom.

19 The main additional point relied on by Dr Maldoom for saying the retail competition  
20 incentives are of limited practical significance was the diminishing importance of  
21 voice services, especially in the context of a retail market which has agreed to be  
22 competitive.

23 That is a point that will take a little time to develop, so if now were a convenient  
24 moment I will come to that after the break.

1 (2.53 pm)

2 (A short break)

3 (3.05 pm)

4 **THE CHAIRMAN:** Mr Holmes, if you could aim to wind up by 3.30.

5 **MR HOLMES:** Yes, I will do my very best. We were coming to Dr Maldoom's point  
6 about the diminishing importance of voice services and it's important, in this regard,  
7 to keep in mind that, although the retail voice market may be diminishing in its  
8 proportional importance, it is still is a very important market, accounting in 2014 for  
9 27 per cent of the household telecoms spend, line plus calls, and the reference for  
10 that is Mr Godfrey's statement at paragraph 155. Moreover, within that market,  
11 30 per cent of households, nearly a third, still purchase landlines on an unbundled  
12 basis. Godfrey, paragraph 154.

13 When one looks at the competitive conditions in that unbundled segment, as  
14 Dr Maldoom himself highlights, it is a segment in which competition is relatively  
15 weak. The reference for your note is Day 5 of the transcript, page 36, line 21. We  
16 say it would not be right to approach this from the point of view that voice is a small  
17 and highly competitive market. Voice only is still a very significant segment and  
18 one with particular competition concerns. That is the appropriate context in which  
19 to assess the incentive effects of APCCs at LRIC as against LRIC+.

20 It is also right to note that, in respect of the other 70 per cent of the market in which  
21 retail competition may be working more effectively, Dr Maldoom also accepted that  
22 the tendency of APCCs, the direction of their incentive effect, would be the same,  
23 albeit that he thought that the effect would be very small, Day 5, page 38, lines 8 to  
24 16.

1 In this regard, it's worth emphasising that of course, not all consumers purchase top  
2 end triple per play bundles. There are dual play bundles as well, to whom voice  
3 makes up a more significant component of the bundle.

4 On the size of the incentive effect, you will recall that Mr Godfrey was cross  
5 examined at some length on what Ofcom said in section 6 of the guidance, as regards  
6 the choice between RCP pays and OCP pays, and it was put to him that Ofcom had  
7 said in that connection that an annual bill increase of around 1.59 per customer was  
8 unlikely to deter a customer from switching and that the same logic would apply to  
9 the incentive effect under consideration in this appeal. But as Mr Godfrey  
10 explained, this is comparing apples and pears. Ofcom has said repeatedly that  
11 setting APCCs at LRIC is likely to have only a small impact on consumer prices.  
12 It's decision rested on an different consideration, namely the competitive intensity  
13 between CPs to acquire porting customers. The impact of APCCs, higher costs that  
14 are specific to ported customers, can only be to weaken RCPs' ability to compete.  
15 The extent of the impact will depend not on APCCs as a proportion of consumer  
16 prices but on a comparison with RCPs' profit margins. So standing back, we say at  
17 that Ofcom was right to determine that effective competition at the retail level  
18 pointed unambiguously toward the LRIC standard.

19 The question there is what weight needs to be given to the countervailing  
20 considerations in favour of LRIC+. In this regard, Dr Maldoom was right to  
21 emphasise that a balance must be struck. He said, if I could quote from the  
22 transcript from Day 5 on page 53:

23 "it is a balance. I think that is my ultimate conclusion. You have these  
24 retail effects on one hand, and you have got various wholesale effects, of



1                   which there's a large rag bag of them, and we in some sense try to  
2                   balance that."

3                   That was the exercise Ofcom was engaged in, a regulatory balancing exercise. He  
4                   went on to point out that, if it were not necessary to strike a balance, the criterion of  
5                   effective competition would have supported an even lower cost, standard of short run  
6                   marginal costs, even a 0 price, in order to remove the specific cost penalty attaching  
7                   to customer switching in this market by reason of the APCCs. He explained  
8                   correctly that the reason Ofcom had not adopted such an approach was because it had  
9                   struck a balance, and you see that at paragraph 4.71 of the guidance which is worth  
10                  just briefly turning back to. That's at tab 8 of appeal bundle 1.

11                 You will see there that Ofcom rejected TalkTalk's suggestion of short run marginal  
12                 costs because it would adversely affect incentives to invest in the provision of  
13                 porting services in the long run in the penultimate sentence. So there was there  
14                 a consideration of further dynamic issues which Ofcom relied on for not going lower  
15                 than LRIC.

16                 Turning over the page, one sees that in striking the balance where it did on the  
17                 question of effective competition Ofcom had particular regard to the fact that setting  
18                 APCCs at LRIC would mean at that BT would have to recover more common costs  
19                 from other sources. This is the dead-weight loss point that Dr Maldoom makes.

20                 The point was raised before Ofcom, Ofcom considered it and Ofcom reached a view.  
21                 Its view was that, assuming that the common costs were instead recovered from BT's  
22                 retail customers, the increase in charges, you see the confidential figure for the  
23                 entirety of the APCCs, would be small relative to BT's annual rental and  
24                 Dr Maldoom agreed with that characterisation at Day 5, page 54, line 17.

1 It's also worth remembering that BT's preferred solution of direct routing would itself  
2 involve this same effect. In direct routing there would be no APCCs so common  
3 costs would need to be recovered from elsewhere. It's fair to say, as Dr Maldoom  
4 pointed out, that there would still be some transit of ported traffic across BT's  
5 network but, as I explained in relation to ground 1, the general picture is that one  
6 would expect to see more direct routing and no more dog legs down to and back up  
7 from the wrong final exchange. Therefore, the common costs would be recovered  
8 from elsewhere.

9 At the appeal stage, BT has raised two other countervailing considerations to be  
10 placed in the balance. The first is the alleged distortions in wholesale markets, and  
11 the second is the incentives for moving to direct routing.

12 In addressing these issues, Dr Maldoom's evidence took a slightly different  
13 direction. You will recall, in relation to the question of retail competition benefits,  
14 Dr Maldoom accepted that Ofcom had correctly identified the relevant incentives but  
15 argued that in the real world those incentives were unlikely to have much impact. In  
16 contrast, when it came to these other countervailing considerations which  
17 Dr Maldoom placed emphasis on, he said on several occasions that he was simply  
18 identifying the incentives, sometimes even in a theoretical or hypothetical way,  
19 rather than looking at behaviour.

20 In our submission, it's always appropriate for the economic analysis to be situated in  
21 the real world. On the issue of retail competition, we say that Dr Maldoom down  
22 plays the real world significance of the incentives and on the issue of distortions and  
23 direct routing we say that the real world evidence shows Dr Maldoom's concerns to  
24 be misplaced.

1 The main alleged distortion was said to be the possibility of CPs pushing traffic onto  
2 BT's network, instead of carrying it on their own network. Here, the evidence is  
3 clear, that at the prices prior to the determination, no one, save for TalkTalk, was  
4 picking up at the DLEs. As to the tandem layer, Mr Rosbotham explained with  
5 reference to Vodafone that where a CP is already interconnected at the tandem, it  
6 would much prefer to collect the traffic there rather than leave it on BT's network.  
7 A CP in that position faces a choice between the incremental cost of routing the call  
8 on its own network, as against the LRIC of taking it on BT's. It would plainly prefer  
9 to receipt the call on its own network as the incremental cost would be very low  
10 where there is spare capacity. So for these reasons Ofcom does not consider the  
11 concern about pushing traffic onto BT's network to be realistic.

12 The second alleged distortion was said to be that splitting ported traffic would erode  
13 commission of scale in the call networks by fragmenting traffic over different routes.  
14 We must admit we found this a somewhat difficult point to understand. If, for some  
15 reason, a CP were to send traffic on BT's network rather than its own, the traffic  
16 would be aggregated with other traffic to BT's network and would therefore benefit  
17 from any economies of scale.

18 When asked about this, Dr Maldoom suggested there would be no such aggregation  
19 if the only traffic using BT's network was the ported traffic. That's the page 63,  
20 line 24. So this point seems to be a point about the transition from TDM to NGN  
21 networks, which I will come to in a moment.

22 The third alleged distortion is said to be that CPs might have an incentive to port  
23 numbers from BT rather than issuing new numbers. In our submission, this is  
24 a very telling point. Where as Dr Maldoom characterises this as a distortion on the

1 negative side of the equation, Ofcom's position is that this is a key reason why LRIC  
2 is appropriate. It promotes the benefits associated with porting.

3 The fourth alleged distortion is said to be the pricing at LRIC will reduce incentives  
4 for CPs to interconnect deeper into BT's network. What the financial evidence  
5 shows, as we briefly discussed already, is that there is currently extensive  
6 interconnection at the tandem layer. At the DLE layer there is extensive  
7 interconnection for other kinds of traffic but BT requires a segregated link for ported  
8 traffic and imposes other contractual limitations that competitors have said in their  
9 evidence they find inconvenient.

10 BT contends that the traffic segregation is because it owns the traffic and relies on  
11 an external facing document recording a negotiated position which was put to  
12 another CP. This was put in cross-examination to witness only after she has  
13 confirmed that she had no knowledge of the relevant negotiations and no other  
14 disclosure has been given.

15 BT does you not require the same segregation of the ported traffic which it owns and  
16 delivers at the tandem layer. The effect of the segregation is to increase the costs of  
17 collecting ported traffic instead of using inter-switch conveyance. Mr Morden's  
18 evidence to the Tribunal was that BT does not want extensive additional  
19 interconnection by CPs at its local exchanges, given its plans to close them as part of  
20 its move to NGN. For that the reference is Day 2, 35, line 21, to page 36, line 2.

21 The available evidence of actual behaviour in the market confirms that further DLE  
22 entry is unlikely. The DLE handover product has been available since 2010 and for  
23 five years prices have been at LRIC+. TalkTalk is the only CP to have used the  
24 products; BT was mandated to supply the product to it and the two documents

1 disclosed by BT show that TalkTalk negotiated the dispensation from one of the  
2 strictures which appears on the face of the standard interconnect agreement in  
3 relation to overflow.

4 During the five years of APCCs above LRIC, no one else has used the products.

5 The precise balance of reasons may differ from CP to CP and there are clearly some  
6 considerations specific to particular CPs as the evidence shows but whatever shows  
7 particular reasons may be, it's clear that more extensive -- intensive use of the DLE  
8 handover product sees an unlikely prospect based on APCCs priced above LRIC.

9 Moreover, the incentive turns on a regulatory assumption namely that DLE handover  
10 links are not themselves subject to the cost orientation obligation under General  
11 Condition 18.5. Arguably however, this may be a false assumption. The links are  
12 required by BT to be segregated and therefore only carry ported traffic. On that  
13 basis, it could be said, without prejudging the point, that they are themselves related  
14 to the provision of number portability. If they too require to be priced at LRIC, the  
15 alleged distortion would not arise. The conveyance cost and the interconnection  
16 cost would be the same.

17 Just briefly to show you, BT 3, 35, the Opal dispute, there was a paragraph which  
18 touches on this point, 5.124. So you see Ofcom's agreement there with the point  
19 raised by BT that onward routing costs include all the costs incurred by BT --

20 **MR LANDERS:** What was the paragraph number?

21 **MR HOLMES:** 5.124 on page 87 -- 5.123 is the paragraph. You see this was a point  
22 that was considered briefly by Ofcom:

23 "In the case of interconnection link costs up to the [point of handover],

24 we believe that these constitute porting conveyance costs that BT is

1                   entitled to charge the recipient provider for on a cost orientated and  
2                   reasonable basis in line with the GC 18."  
3                   So on that basis, the segregated routes, the elements required for interconnection for  
4                   DLE handover are themselves subject to General Condition 18, and the alleged  
5                   inefficiency resulting from LRIC+ price for interconnection by comparison with  
6                   a LRIC price for conveyance simply wouldn't arise. But I put the point no stronger  
7                   than that, it's not a point that Ofcom -- it may be one at that Ofcom needs to consider  
8                   but it is not one that it has yet reached a decision on at issue in these proceedings.  
9                   The final point relied on by Dr Maldoom was incentives for direct routing. This is  
10                  a point which was actually raised during the consultation process unlike the  
11                  wholesale distortions, but it may help to look back at how this was dealt with in the  
12                  guidance. Ofcom's discussion on the incentives to move to direct routing is  
13                  discussed in the context of section 6, the who pays section, because it was in this  
14                  context that BT raised it during the consultation. The relevant discussion begins in  
15                  this paragraph 6.95, this is at BT1, tab 8. The reference is 6.95 on page 70.  
16                  You see at 6.95 the consultation had not proposed mandating proposed direct  
17                  routing. This was because the cost-benefit analysis in 2010 had been significantly  
18                  negative and, at footnote 147, reasons to think that the CBA remained valid.  
19                  Although the costs might have fallen, the benefits would also have gone down with  
20                  declining traffic volumes.  
21                  As an aside, the quantified assessment that Ofcom did in that context is readily  
22                  understandable given the very significant industry costs involved in a general move  
23                  to direct routing, and the finally balanced nature of the assessment. So there are  
24                  circumstances, obviously, which quantify and a cost-benefit analysis will be

1 appropriate. It's not in every case.

2 At 6.103 to 6.104 you see BT's argument. BT recognised that direct routing could  
3 happen under the current charging arrangements but it considered it will not readily  
4 happen based on the available evidence for the following reasons. OCPs have no  
5 direct incentive to directly route.

6 Then Ofcom's analysis picking up at 6.118, the argument from CPs is set out there  
7 about the need for OCP pays to incentivise direct routing. At 6.120 there is  
8 a discussion about the costs of direct routing. Then 6.121, we say, shows the link  
9 between this discussion and efficient charges for portability, for porting conveyance:

10 "Direct routing between two CPs would only be efficient where the costs  
11 identified in the previous paragraph were lower than the benefits of  
12 avoiding onward routing and, hence, cost based porting charges."

13 We know that cost based porting charges, Ofcom has already concluded, are efficient  
14 when they set at LRIC. That's the first best, or closest approximation to first best in  
15 the regulatory context. This is precisely the argument that Mr Godfrey makes in  
16 these proceedings in his report: there is no lacuna in relation to incentives to direct  
17 route.

18 The evidence of the CPs in these proceedings is that they have strong incentives to  
19 move to direct routing, which are independent of the pricing of APCCs.

20 Specifically, there may be cost savings from reducing the need for interworking and  
21 there are quality of service improvements, which are sufficiently commercially  
22 important in their business judgment to merit the effort. Their customers pay  
23 enough heed to quality of service improvements to make it worth the candle.

24 In sections 4 and 5 of the guidance, Ofcom also considered wider issues of dynamic

1 efficiency relating to the transition from TDM to NGN. At page 38, turning back to  
2 the now familiar terrain of the costs standard chapter. It's worth picking up first  
3 paragraph 4.89 where, you will see that BT raised the point about dynamic efficiency  
4 I draw that to your attention in passing as it may be of interest.

5 Then at 4.91 you will see that BT felt that LRIC+ was the most appropriate cost  
6 standard to reflect the opportunity cost and it said it would have to maintain  
7 an onward routing capability for over 8 million numbers. This is the bit of their  
8 consultation which has been carried forward on the appeal. It thought this could be  
9 a barrier on reducing the size of its TDM network.

10 I should draw your attention next to 4.93 where the dynamic efficiency points were  
11 addressed. Again, this is really just for your note, since these points have not  
12 formed parts of the grounds of appeal on dynamic efficiency. Then at 4.96 you see  
13 the response to the question of the opportunity cost of onward routing. The first  
14 point, which Ofcom makes at the top of page 40, is that BT plans to continue with  
15 TDM voice for some time. Then you see in the footnote maintain it beyond 2020.  
16 So it doesn't appear likely that ported traffic is going to be the cause of its TDM  
17 network's survival at any point in the near future.

18 Ofcom then goes on to make point that in any event BT could provide onward  
19 routing in an NGN. This is really where BT's argument, in our submission, falls  
20 down. It's impossible to understand in what way, even theoretically, LRIC pricing  
21 is going to cause it to keep its TDM network going. It can do what it wants in terms  
22 of the switch between networks. It can move all traffic to the NGN network and  
23 charge at the LRIC of the NGN network for so long as NGN and TDM were judged  
24 to be equally efficient or as both valid efficient choices.



1 If for some reason, which we find hard to fathom, BT did have to keep ported traffic  
2 on the TDM, network it could of course charge at LRIC for that. As Mr Godfrey  
3 explained, as the other services drop of the TDM network the LRIC would increase.  
4 The reference is Day 5, page 149, lines 2 to 10.

5 So for all those reasons, we do not accept that the various incentives which  
6 Dr Maldoom is concerned about will arise in any meaningful way in the real world  
7 but more than that, we say that all of this overlooks the Ofcom is not here trying to rig  
8 the incentives for direct routing in order to bring about a particular market outcome.  
9 What it wants to ensure is that market participants face the right incentives to make  
10 efficient choices and, as explained at 6.121, efficient choices will be determined by  
11 pricing at the LRIC level.

12 Lastly, if I could have three minutes, sir -- may I have three minutes?

13 **THE CHAIRMAN:** I suppose so.

14 **MR HOLMES:** There are a few miscellaneous points that have been raised, which  
15 I need to knock on the head very briefly. The first is dynamic efficiency. I have  
16 shown you in the guidance dynamic efficiency was in fact considered as part of the  
17 guidance. Dr Maldoom was interested in the point when it was raised with him and  
18 he suggested that the reason more has not been made of the point is that it doesn't  
19 come into what he calls the regulatory dogma in telecommunications.  
20 But the point was considered by Ofcom a the real reason it does not form part of this  
21 appeal before you is that neither you nor Dr Maldoom has raised it. It has nothing to  
22 do with any dogma.

23 Section 6 of the guidance there's a suggested disconnect in relation to the reasoning  
24 on effective competition. This was not a point that was raised in the notice of

1 appeal and is not, in our submission, within the grounds of appeal. There is  
2 an allegation of inconsistency under ground 3 of the notice of appeal but it relates to  
3 an alleged inconsistency between mobile interconnection and APCCs. I have  
4 already touched on this point but I apprehend that Mr Palmer was seeking to make  
5 a wider point in his cross-examination of Mr Godfrey to the effect that if retail  
6 effects were so important they would have featured more strongly in section 6.  
7 The simple answer to that point is that Ofcom had particular practical reasons why  
8 the RCP pays model was adopted, and you can see that in paragraph 6.70 to 6.78 of  
9 the guidance, for your note. Fortunately, furthermore, no one has appealed the  
10 decision to adopt an RCP pays model, so it's difficult to see how any alleged error in  
11 the reasoning in that section of the guidance could effect this appeal.

12 Quantitative analysis. It was suggested on an couple of occasions that Ofcom  
13 should have done more detailed analysis at various points, including possibly  
14 an analysis of different customers or detailed model of economic welfare. The first  
15 point to note is that BT has not itself done the analysis which it now says Ofcom  
16 should have done. Ordinarily in an appeal on the merits the appellant would  
17 provide the information, which they say was missing at first instance. Given that  
18 the information was not before you, it must follow that if you were to decide that  
19 Ofcom was in error in not undertaking sufficient analysis, the appropriate course  
20 would be to remit the matter to Ofcom for further consideration.

21 However, this brings me to what is, in a sense, a more fundamental objection to this  
22 line of the argument which is that it is not one of BT's grounds for appeal; BT could  
23 have challenged it but it didn't.

24 CBA was specifically raised in ground 3 at paragraphs 79 of the notice of appeal but

1 only in the context of direct routing. The suggestion was to update the quantitative  
2 CBA done for the much more significant question of mandating direct routing. If  
3 BT had been criticising Ofcom for not engaging in some wider quantitative analysis,  
4 BT would have certainly raised it in the same way as was done in paragraph 79.  
5 Had they done so, Ofcom would have defended such an appeal on the basis that it  
6 reached a lawful regulatory judgment about the appropriate analysis.

7 Mr Godfrey explained in his oral evidence yesterday the reasons for not doing  
8 a more sophisticated analysis. In short, such an analysis does not necessarily  
9 deliver the results you might wish for, given in particular the various assumptions  
10 and trade offs it would require. That was at pages 138 to 139 of the transcript.

11 A similar point was actually made in the guidance itself, paragraph 6.47 just for you  
12 note.

13 **THE CHAIRMAN:** Mr Holmes, I think if I'm going to be fair to the interveners --

14 **MR HOLMES:** I shall stop. My only remaining point is we have obviously seen BT's  
15 closing submissions today for the first time. It has not been possible to respond to  
16 those on the hoof and if there are particular points we will request liberty to put in  
17 short responsive submissions.

18 **THE CHAIRMAN:** The Tribunal is minded to allow any party who wishes to do so to  
19 present in writing any submissions that time has prevented it from making it today by  
20 5.00 pm on Friday.

21 **MR HOLMES:** I am grateful, sir.

22 **THE CHAIRMAN:** Mr Bates?

23

24

**Closing submissions by MR BATES**

1 **MR BATES:** Some years ago, I was in a case about avian flu, in which the Parrot  
2 Society intervened to repeat the points that one of the other parties had already made.  
3 I will try not to fall into that trap today.

4 The group CPs intervened in these proceedings because we were particularly well  
5 placed to answer BT's evidence on two issues: first of all, contestability; and,  
6 secondly, incentives for direct routing. So we therefore find ourselves in the  
7 position of having to intervene on issues that are, we say, completely irrelevant to  
8 whether Ofcom's decision was correct and we adopt Mr Holmes' submissions on the  
9 interpretation of Article 30(2).

10 The two issues on which I want to make submissions in closing very briefly are, first  
11 of all, LRIC versus LRIC+, and, secondly, contestability. It's on LRIC versus  
12 LRIC+ that we differ very slightly from Ofcom in relation to its reasoning, in that  
13 Ofcom presented its decision to require LRIC as being a finely balanced one,  
14 whereas we say that the case in favour of LRIC was strong. BT says that, in order to  
15 decide in favour of LRIC, Ofcom had to identify some specific exceptional reason  
16 why LRIC, rather than LRIC+, should be specified and we disagree. There's no  
17 judicial authority or legislation or even basis in economic literature that has been  
18 identified that shows that there's any such rule. The correct approach, we say, is  
19 simply to ask which is the most appropriate, having regard to the underlying  
20 purposes of Article 30(2).

21 But even if an exceptional reason were required, we say that that exceptional reason  
22 is anyway provided by the specific context, namely that of number porting. We are  
23 not dealing here with an ordinary price regulated service provided by a CP with  
24 SMP. For such services, one can immediately see why it might be appropriate to

1 regard the default position as being that all services contribute to the common costs.  
2 But porting is different from other services. As Mr Godfrey accepted, it's  
3 exceptional that a business that loses a customer can continue to earn ongoing  
4 revenues by virtue of how long it had previously been that customer's supplier, and  
5 also, as Mr Palmer put to Mr Godfrey, it's also unusual that a losing provider would  
6 be required to continue carrying out tasks in relation to the lost customer. So, for  
7 those reasons, the porting situation is exceptional.

8 We say that the competition considerations point very strongly towards LRIC, the  
9 obvious benefits for promoting competition and the obvious disadvantage of the  
10 losing provider receiving an effective ongoing subsidy towards its ongoing costs.

11 Dr Maldoom has accepted, however grudgingly, at paragraph 149 of his report, that  
12 the level of porting charges may have an effect on competition. But he says that not  
13 enough analysis was done of the cost of a LRIC approach. He has identified a lot of  
14 additional analysis that could be done but doesn't explain why it would be  
15 proportionate to carry it out.

16 We say that the fact that the importance of APCC rates between LRIC or LRIC+  
17 might be expected to have a relatively small effect on retail competition doesn't  
18 mean that such effects cannot provide a rational basis for Ofcom to come down in  
19 favour of LRIC, and that the reasons given by Dr Maldoom to justify down playing  
20 those effects do not withstand scrutiny.

21 On behalf of Vodafone, a specific point that I identified to Dr Maldoom is that of  
22 business customers. They are not buying these multiproduct bundles with Sky  
23 Sports, et cetera. You have Mr Rosbotham's evidence about Vodafone's  
24 participation being particularly in relation to fixed line business customers; clearly

1 business customers will, as Dr Maldoom accepted, tend to be the higher value  
2 customers. Voice calls remain very important for business customers, even if they  
3 become less important for residential customers and, obviously, business customers  
4 receiving lots of calls will, if they are ported calls, generate substantial porting  
5 conveyance costs.

6 In answer to the question I put to Dr Maldoom about the importance to business  
7 customers, particularly of being able to port their number, his response to that was  
8 that business customers can use non-geographic numbers. I suggest the Tribunal  
9 can consider for itself whether that's a persuasive answer based on its own  
10 experience of the extent to which businesses use geographic numbers.

11 We say that his criticisms of supposed limitations of Ofcom's analysis of the  
12 competitive effects of choosing LRIC rather than LRIC+ are somewhat rich in light  
13 of the limitations of his own analysis.

14 The second issue I wanted to address was that of contestability. BT says it's  
15 commercially rational for larger CPs to connect at many DLEs for business ported  
16 traffic. The first point to be made in response to that is the one that Mr Holmes has  
17 already made: it's contrary to the observable evidence of what has actually happened  
18 in the market. Secondly, there's the real world fact of the move from TDM to NGN  
19 networks. One can see at that Vodafone is largely a TDM network, it has done  
20 some connecting at the DLE layer, although you heard Mr Rosbotham's evidence  
21 that, in fact, a lot of the connection at the DLE layer is with VICs. So it's virtual,  
22 they are not actually physically connected with many of these DLEs.

23 Sky is an NGN. Given the development of technology, it's not surprising, we  
24 suggest, that it has not connected at the DLE layer and this is something that flows

1 from real world technical features of the market.

2 We also note that the whole system of DLE, switch conveyance and tandems, that's  
3 all a product of BT's own choices for its network infrastructure. In relation to the  
4 history of BT not provisionally having wanted to provide DLE handover at all, we  
5 make a rhetorical question: how can the scope of application of GC18.5 be governed  
6 by BT's own choices about where its wishes to leave ported calls for CPs collect  
7 them?

8 The third point is with regard to the information gap in being able to identify the  
9 DLEs and tandems where traffic is handed over. We know that a call to a particular  
10 DLE linked ported number may be delivered to the DLE or any one of the up to  
11 seven parent tandems. The split between DLEs and tandems on a national basis  
12 that's relied on by Mr Morden in his second statement at paragraph 20 clearly doesn't  
13 help, as he accepted, in identifying which tandem the call's going to be dropped off  
14 at.

15 Ms Kennedy, for TalkTalk, supplied some data, which we have accepted is in  
16 relation to tandems rather than to DLEs. But the point we make with reference to  
17 that is the same, that if one looks at the percentage of the traffic that's ported traffic,  
18 there's a very wide variation between different tandems. One cause of that may be  
19 that more of the calls are being delivered at the DLE, in relation to those areas of the  
20 country.

21 Mr Palmer's quite right that the statistics given by Ms Kennedy include a lot of other  
22 calls mixed in, a lot of other TalkTalk traffic mixed into them, but that's really just  
23 making our point for us, because what that shows is that there are clearly lots of local  
24 variations between different areas about the profiles of different networks in those

1 areas and how many customers they have, et cetera, and that is all going to feed in to  
2 where calls are dropped off.

3 There's a lot of local call traffic within individual localities and it's entirely a matter  
4 for the OCP how it routes the call to particular tandems and, indeed, at different  
5 times of the day. You will have noted from the chart Ms Kennedy provided that it's  
6 divided into daytime, evening and weekend, because there are different prices for the  
7 BT products at different times of the day and that, again, is something that a CP is  
8 going to need to know in order to work out the efficiency of connecting at the DLE  
9 layer.

10 In relation to Mr Morden's calculations of the DLE handover, the Tribunal's heard  
11 Mr Rosbotham's evidence about the fact that Vodafone would actually need to  
12 employ additional staff in order to move towards doing DLE, use of DLE handover,  
13 and the reference for that is Day 3, page 74. In any event, if there's a reallocation of  
14 CP circuit capacity at the DLEs, which the CPs invested in, so as to be able to  
15 terminate traffic to BT more efficiently, then there's clearly going to be a cost  
16 disadvantage to them if, instead of benefiting in that way, they have to reallocate that  
17 capacity towards dealing with ported traffic.

18 Further, Mr Morden has ignored the move to direct routing, which is already well  
19 underway as the Tribunal has heard, and the impact that that would have on the  
20 economics of connecting to DLEs. He has also ignored the closure of the DLEs  
21 which is already underway.

22 The answer that was provided about compensation. You have heard  
23 Mr Rosbotham's evidence Day 3, pages 75 to 77, where he explains that the  
24 compensation is provided in relation to the costs of moving physical assets. It's not



1 compensation for the loss of the benefits that Mr Morden says a CP could obtain by  
2 investing in connecting at the DLE layer. So a CP is in a position of having to make  
3 those sorts of investments not knowing precisely when, between now and 2025, that  
4 DLE is going to close.

5 Given that the compensation arrangements were Mr Morden's only justification for  
6 his 10-year amortisation period we say that period is also clearly unsustainable.

7 Those are my submissions.

8 **THE CHAIRMAN:** Mr Bates, you have done something nobody else has done, which is  
9 to finish within your allocated time span, so thank you very much.

10 Ms Love?

11  
12 **Closing submissions by MS LOVE**

13 **MS LOVE:** I shall endeavour to follow and avoid the parrot example.

14 In relation to out of time, I do not intend to repeat anything that is in either of my  
15 submissions.

16 Just to round off with the one thing from this morning. Sir, you threw out, as it  
17 were, the life raft, whether this could be positioned as a scope dispute, BT accepted  
18 the principle but the only question was ISCs and switch conveyance. I gave my  
19 initial example to that, which is that that is not how the ground was put. It was  
20 an alternative to ground 1 and ground 2. It was a LRIC+ against LRIC blanket  
21 debate.

22 The second thing that has, in particular, emerged from my examination of  
23 Mr Godfrey this morning, is that it doesn't really fly on the facts either. This scope  
24 issue is not the one that was before Ofcom at the time and if you look -- I will just

1 give you the reference, I don't invite you to turn it up to -- to paragraph 4.97 of the  
2 guidance, BT1, tab 8 page 40, it's clear that all porting charges, conveyance and  
3 non-conveyance, were thought to be in scope.

4 Ground 2, I do not know if I need to trouble you with. We were not of the view we  
5 had entered into any implied agreement. Mr Palmer said to Mr Godfrey that if you  
6 don't agree you take it to dispute. Well, quite, here we are.

7 On ground 1, we echo Mr Bates in adopting all of Mr Holmes' submissions. We say  
8 that he is right in construction, the debates to which you have been treated, for  
9 a given value of "treat", to the workings of the system is an irrelevant one but,  
10 nevertheless, I want to put some of the points that are made in the factual note by BT  
11 into context. As we understood BT's argument originally on contestability, it was  
12 that inter-switch conveyance was outside the scope of GC18.5 because it was not  
13 necessary to purchase it at all. So we said, in effect, in our statement of intervention  
14 and evidence: well, let's explore that, do we have a choice about whether to consume  
15 any ISCs?

16 Just to be absolutely clear, in saying that, we were not agreeing that what drives  
17 Gamma's decisions is just cost-benefit analysis, so I have a slight question mark to  
18 put next to paragraph 2 in Mr Palmer's note. Mr Farmer made it quite clear in  
19 page 90 of the Day 4 transcript that there is more than pounds, shillings and pence at  
20 stake. In particular, he mentioned page 89 the salience of call quality to the  
21 business market voice telephony and call quality, which Mr Bates has just covered.  
22 But, in any event, we did the calculation, Mr Palmer says in paragraph 12 of his note,  
23 well, it was just averages: quite. It was a broadbrush calculation, we have never  
24 said anything else, and it didn't add up for us.

1 Now, BT's response is to say, well, it doesn't have to work for all of them, back into  
2 the realms of contestability, you can pick some. We agree, we could have probably  
3 cherry-picked the odd DLE. That was made plain in Mr Palmer's witness statement.  
4 But we then, with respect, have spent a lot of evidence down a sort of rabbit hole  
5 about the parameters of that. So we have heard about the drawbacks of the DLE  
6 product and even Mr Morden, accepting Day 2, page 74 of the transcript that would  
7 be preferable not to have to split out traffic, reference to not disagreeing with  
8 Mr Erlang, the question of segregation, and whether it was necessary, whose  
9 instigation it was raised. We do say it's unclear to us why, if that is such a concern,  
10 there's no segregation at the tandem layer, which is a point from Day 3, Mr Perry,  
11 page 62, line 24. There's a question about what information you need. Mr Bates'  
12 clients have addressed that.

13 On the exact numbers, well, you have got Mr Farmer's criticisms, Day 4, pages 84 to  
14 85. You've got Mr Morden's tables, we say they are equally broadbrush in one way  
15 or another. But there are two certainly odd surreal features of this. The first which  
16 Mr Bates and Mr Holmes have both said is that this is not what people if the industry  
17 are actually saying or doing. As Mr Farmer said, Day 4, page 89, line 2, he would  
18 like to think he runs a rational business.

19 The second one, again, is that it misses the point that there has to be some purchase of  
20 inter-switch conveyance. In fact, you can test the whole thing by saying if that all  
21 that you need is a bit of contestability for there to be a nationwide competitive  
22 constraint, we do not need to see table 7 at all. The point applies just as much if  
23 break even at 5 per cent as at 95 per cent.

24 Another aspect that I should pick up here is third party transit. I think that was

1 possibly soft-pedalled slightly by Mr Palmer in his closing submissions and, rightly  
2 so, we say, because it is, with respect, a very bad point. Mr Farmer has said, quite  
3 clearly, transcript for Day 4, page 83, lines 15 to 16, page 114, line 19, that  
4 ultimately somebody is still buying at least some inter-switch conveyance from BT.  
5 Gamma is buying for its customs. So if I am in the happy position of eating out at  
6 my local restaurant every night I may be able to buy less washing up liquid but that's  
7 not because it's not being bought on my behalf at the restaurants and by the bundle of  
8 services. They are not throwing away the cutlery and crockery every night. It  
9 takes him absolutely nowhere.

10 The question really is what genuine options there for a CP. I suppose one genuine  
11 option might be just not to take in customers who are porting from BT.

12 Dr Maldoom accepted that one could differentiate. He expressed some scepticism,  
13 that's Day 5, page 22, and we say it's possible but not an attractive strategy,  
14 particularly not for a new entrant to effectively rule out from their potential customer  
15 base. Another possibility is the DLE handover, but that's incomplete solution,  
16 nobody has come saying you can make it work at every single DLE, and that leaves  
17 you with inter-switch conveyance.

18 Obviously, there is an extent of trade off and that it all depends on the price.

19 Mr Morden, I think, said that if BT increased its prices for inter-switch,  
20 interconnection becomes more commercially attractive and that's in paragraph 2 of  
21 Mr Palmer's note. Insofar as if the frying pan gets hot enough you start to look  
22 again at the fire, that may be say so. We still say that is that is not a meaningful or  
23 helpful way in which to think of CPs having a commercial choice here. These are  
24 ultimately all different ways to end up paying money to British Telecom.

1 We accept that there are extra costs that come with a ported call. We have never  
2 taken issue with the principle that we should pay a donor call communications  
3 provider the costs associated sending that call onto us, but this is about going beyond  
4 that. It's about paying a share of BT's common costs. Here, we end up towards  
5 ground 3 and the context. The context is that we are down to LRIC from mobile  
6 termination, we are down to LRIC for fixed termination. I think as Mr Godfrey  
7 poetically put it this morning, the tide has gone out on those and the rocky foreshore  
8 of APCCs was exposed.

9 Mr Morden accepted that those elements only really cancelled out if you have  
10 a balance of traffic, if you are neutral between incoming and outgoing. That was  
11 Day 2, page 121, line 12 through to page 122, line 3, but that that doesn't apply  
12 across the board. In particular, there's no reason to think it applies to smaller  
13 operators.

14 BT seems to be saying that this doesn't really matter for smaller operators from their  
15 perspective because they are already reliant on transit services anyway and this is  
16 going to be just an element of package. Mr Perry made it quite clear in his  
17 evidence, Day 3, page 60, lines 23 to 24, it is an element, but he is not saying  
18 anything about the size of the element or about whether it's important. We do say  
19 that this does reflect a somewhat airy view that BT take of the materiality of this.

20 I think Dr Maldoom said that these are very small numbers in telecoms terms or very  
21 small numbers in the telecoms world. That is around Day 5, page 29.

22 We have said what the numbers represent to us. I will you the references:

23 Mr Farmer's witness statement, paragraphs 26 to 27, give the pounds, shillings and  
24 pence for Gamma of what this dispute means, what is at stake for us, to put at that

1 into context. Mr Farmer's exhibit, page 6 of the first exhibit, one has Gamma's AIM  
2 listing and you can see our profit after tax and how we are (inaudible) and we are by  
3 no means the smallest here.

4 Briefly on the summit uplands of direct routing, we can only echo Mr Holmes saying  
5 we have to look at the real world here. Mr Farmer has given a very detailed  
6 description of his evidence-in-chief of what is happening in the real world. I do not  
7 believe that was challenged. We do particularly urge the Tribunal look at pages 86  
8 to 88 of the Day 4 transcript. It is happening, it's well beyond the negotiation stage  
9 and it's happening as fast as we can prudently and expeditiously make it happen. It  
10 was happening in LRIC plus and it still is happening at LRIC.

11 Unless I can be of further assistance.

12 **THE CHAIRMAN:** Thank you very much, Ms Love. Also finished within your  
13 timing.

14 Mr Palmer?

15  
16 **Reply submissions by MR PALMER**

17 **MR PALMER:** Mr Holmes began with some general points of by way of introduction.

18 I just want to focus on two of those in particular, first of all. First of all, he started  
19 by saying that Ofcom monitors carefully the industry and is informed of the metrics  
20 and the evidence which has given, particularly by Mr Godfrey, underlies Ofcom's  
21 reasoning and we will call that evidence.

22 But Mr Godfrey confirmed that his assessment and evidence on retail competition  
23 impact in this case was not reasoning which he looked into at the time. The  
24 publication of reasons in a consultation document is the principle basis upon which

1 Ofcom's decision has to be set out and in order for consultation to be meaningful.  
2 That was not done at the time and it was not because, as Mr Holmes sought to imply,  
3 there was high level summary with the workings and the mechanics underneath.  
4 Second point of introductory nature, is that Mr Holmes emphasised throughout his  
5 submissions that BT had not challenged the RCP pays principle in this appeal and we  
6 might have had different interveners, and so forth, if that was an issue. As I have  
7 been at pains to point out, Mr Holmes is right that BT does not challenge the RCP  
8 pays principle. It's not challenged because we agreed, when Ofcom found, in the  
9 context of its analysis of that question, that making a RCP pays rule would have no  
10 material effect on retail competition or otherwise give rise to a distortion of  
11 competition.  
12 But Ofcom's reasoning must be consistent. If, in defence of this appeal, it  
13 emphasises a response to the issue of whether a LRIC or LRIC+ cost recovery  
14 principle should be applied, the effects on retail competition that making the RCP  
15 pay at LRIC+ rather than LRIC, we're entitled to look at those reasons and to point  
16 out not that the reasons were wrong in chapter 6, but simply that the conclusions  
17 reached in chapter 6, section 6 of the guidance, apply equally with force in the  
18 context of section 4 on the issue which is before you, and that if Ofcom thought there  
19 was a relevant point of difference between the effects of competition in that regard, it  
20 had to identify what that point was.  
21 That is what it has failed to do. I will come back to ground 3 in a moment, but just  
22 on ground 1, some very, very brief points by way of response on that.  
23 The key point to understand is that you were right in the question that you raised, that  
24 the wording of the directive is directed towards the provision of number portability

1 and not the making of ported calls. That is true in the old wording of the directive as  
2 well. When you look back at the old wording, which appears in Mobistar judgment,  
3 yes it uses the word "interconnection" but interconnection related to the provision of  
4 number portability. So Mr Holmes' answer to that point doesn't take him any  
5 further.

6 We accept that there is such a thing as interconnection related to the provision  
7 number portability, we have called it switch conveyance. The point is we argue that  
8 inter-switch conveyance doesn't amount to the provision of number portability.

9 Next point, the key point to understand is that the use which some CPs make of  
10 inter-switch conveyance, and only some, from the DLE to the tandem is still  
11 a choice. The charges levied on that choice when it is made are no different in  
12 principle. An RCP can choose to pay for inter-switch conveyance or can choose to  
13 invest in the alternatives. Mobistar is not authority as he sought persuade you, for  
14 the principle that traffic costs, in broadest sense, are included within the definition of  
15 what is related to the provision of number portability. Yes, some traffic costs are  
16 accepted switch conveyance, but you will recall I took you in opening to Mobistar  
17 judgment, and it's paragraph 11 of the judgment, where the term "traffic costs" is  
18 defined for purposes of that judgment, which was additional traffic costs not incurred  
19 in relation to non-ported calls.

20 If you look back at that judgment and that definition that clearly puts that ultimate  
21 conclusion in focus and it's not authority for the broad principle which Mr Holmes  
22 presented to you.

23 Lastly on ground 1, I emphasise that a large part of Mr Holmes' submissions on this  
24 point were completely misdirected. It is not our case, as I made clear in opening,



1 that Article 30 of the USD is limited in scope of application to operators with SMP.  
2 The point is a simple matter of fact. Ported calls may, as a matter of fact, travel  
3 along inter-switch conveyance provided by the DCP or they may not. They can be  
4 carried by the RCP without any inter-switch conveyance, or by transit operator so  
5 ISC is not required to provide portability. Only the DCP can provide switch  
6 conveyance, but that's not true of ISC.

7 That submission has nothing to do with any SMP assessment. It's therefore  
8 irrelevant that some exchanges are contestable and some are not, and you might end  
9 up with a mixed bag if you looked into the matter on a DLE-by-DLE basis as to  
10 which ones there were multiple interconnection and which ones there were not,  
11 where it was viable, where it was not.

12 The purpose of that evidence is not, as Mr Holmes suggested, to invite the Tribunal  
13 to substitute itself for Ofcom and conduct mini market review, and have great fun for  
14 many more days than in the six days that we have had as Mr Holmes suggested.  
15 That's not the purpose. We are not inviting you to do that, nobody's inviting to do  
16 that. What we are inviting you to note is that CPs have a genuine choice, whenever  
17 it suits them, for whatever commercial reasons, on the basis the way they have  
18 configured their network for all purposes, not just ported traffic, for non-porting  
19 traffic as well, they can choose the precise extent to which they wish to consume  
20 BT's inter-switch conveyance.

21 What that demonstrates is that the consumption of inter-switch conveyance or not is  
22 not a necessary part of the provision of portability and is not, to use the language of  
23 the directive, related to the provision of number portability. It is related to the facts  
24 of the structuring of the CP's network and its commercial choices within that context.

1 That's ground 1.

2 Ground 2A and 3, I am going to take together, because Mr Holmes says that one  
3 collapses into the other. To a certain extent, he is right, to a certain extent because  
4 what they share is a common complaint that what Ofcom has not done is identified  
5 the real problem, in other words identified the basic reason why it has to intervene at  
6 all with this type of control and, in particular, whether one casts it under ground 2 or  
7 3 hasn't identified the materiality of the concerns which it has expressed with relation  
8 to effects to retail competition, and thus cannot discharge the burden of showing  
9 a substantive benefit, which is capable of justifying the move to LRIC.

10 Let me take that all at once. The key point that Mr Holmes focused on was in  
11 relation to paragraph 4.68 of the guidance, I'm just going to turn that up. The  
12 sentence within it:

13 "The higher the porting charges the RCP has to pay the fewer incentives  
14 it would have to compete intensively to gain customers that are likely to  
15 port their number".

16 We had a lot of submissions based on that which essentially amounted to  
17 Mr Holmes' submission that Ofcom would be entitled to take that view.

18 **THE CHAIRMAN:** That seemed to be a noncontroversial proposition in the evidence.

19 **MR PALMER:** Sir, I'm just coming to that because Mr Holmes developed that by  
20 saying that Dr Maldoom agreed that proposition as a matter of principle. Where he  
21 disagreed of course was a question of materiality, and that is the elephant in the  
22 room. That is the point which as I will show you Mr Holmes sought entirely to  
23 sweep under the carpet as he went through, when you were waiting for the punchline,  
24 waiting for the magician to pull the rabbit out of the hat, and you suddenly found the

1 hat was empty, there was no rabbit.

2 Let me show you. The key basic point is, if consumer choice and market entry is so  
3 affected by porting charges it would have been open to Ofcom to demonstrate a large  
4 retail benefit, or a significant retail benefit, for LRIC versus LRIC+. The key  
5 question was, does this principle at 4.68 actually play out, as Mr Holmes put it, in the  
6 real world? That depends on the ability of CPs in fact to discriminate between  
7 customers they are targeting. There is no evidence that CPs are so doing. There is  
8 no discussion in the guidance that there was such separate competition. There has  
9 been no investigation or analysis to understand or establish that an important mode  
10 of competition is competition for ported customers specifically rather than customers  
11 in general. Nothing.

12 So does this potential problem actually present competitive asymmetry in the  
13 marketplace in practice? If that was correct, you would expect Ofcom to investigate  
14 it in the narrowband market review, but there was nothing. We would look at the  
15 analysis of competition in voice specifically as opposed to bundles, remember the  
16 distinction and the importance that Mr Holmes put on the voice only market. We  
17 would look at the market from this new perspective identified by Ofcom and on how  
18 competitors in competition operate and to take up the point Mr Bates made, we  
19 would look at the business sector perhaps and how the voice market operates in the  
20 business sector in particular which he says is important for Vodafone. We would  
21 look at the extent that businesses used or didn't use non-geographic numbers.

22 Mr Bates said the Tribunal can do that itself, it can use its own experience as to  
23 whether businesses use non-geographic numbers and referred to Dr Maldoom's  
24 evidence. What Dr Maldoom said on that point is, it would need to be assessed.

1           There has been no analysis of any of this retail competitive impact on APCCs at  
2           LRIC+ for business customers or any other segment of the market. In fact the  
3           example that Mr Bates gives there is the perfect example of why further analysis is  
4           needed.

5           **THE CHAIRMAN:** Could I just ask you this, Mr Palmer. I think the way Mr Holmes  
6           approached it in his cross-examination of Dr Maldoom was to say something along  
7           these lines, all other things being equal, you would expect increase of APCCs to  
8           disincentivise CPs from competing for ported customers; is that correct?

9           **MR PALMER:** Yes, I believe so, if you put it that way.

10          **THE CHAIRMAN:** Once he has established that, and has sought to address in evidence  
11          to support his proposition that, all other things being equal, in practical terms does  
12          the onus not then pass to you to show that this general principle accepted by  
13          Dr Maldoom does not apply in this particular case? I am asking that not because  
14          I consider that to be the position, I just wanted your view on it.

15          **MR PALMER:** The answer is, no, it doesn't. If a single CP, whether it's BT or anybody  
16          else, were in a position to conduct a market-wide analysis to show the effects on  
17          different CPs of this pricing charging policy that Ofcom has adopted, it may be  
18          a different matter. But in reality only Ofcom is in a position to undertake that sort of  
19          analysis which it ought to have taken in this case but hasn't. All that BT can do in  
20          practice is look at the analysis and say, there is a missing link in your reasoning.  
21          You've identified a principle but you haven't shown how that principle cashes out in  
22          the real world and so you haven't shown that you have from a perspective of  
23          proportionality, from a perspective of necessity or from a perspective of economic  
24          principle, that you have to identify the substantive benefit to justify the move to pure

1 LRIC; you haven't done that.

2 It's not incumbent on BT to substitute itself for Ofcom and somehow do a  
3 market-wide survey on the effect on other CPs and say, if you had done that, it would  
4 show the precise opposite. It may be that the ultimate consequence of my argument  
5 is, as Mr Holmes says, that the matter has to be remitted to Ofcom so that it does do  
6 the work and does fill in the missing links of its own reasoning and it may, in so  
7 doing, find the exact opposite of what it's expecting to find.

8 But what it hasn't done is complete that process that it has and the burden is on  
9 Ofcom to do so because the burden's on Ofcom to demonstrate that its own  
10 conditions and its own application of those conditions its own determination of the  
11 dispute is proportionate, is compliant with the Article 8 framework directive and so  
12 forth. That burden rests solely with Ofcom and it hasn't discharged it. We are  
13 entitled to point that out.

14 **THE CHAIRMAN:** So that raises questions as to, first of all whether as you say it was  
15 necessary for Ofcom to do that withstanding the agreement on the matter of  
16 principle. Secondly, whether it was proportionate for Ofcom to do that and, thirdly,  
17 in light of the discussion between Professor Reid and Dr Maldoom, whether you  
18 would be any the wiser if did that. All these questions arise, is that right?

19 **MR PALMER:** We obviously don't know what the outcome of the work would be if  
20 Ofcom did do it. What we can say, and we have said is, prima facie, it looks like  
21 there would be no impact at all. Because when you look at the numbers, we won't  
22 go through all those numbers again, but when you look at the sizes involved, the  
23 amount of the charge, the amount to which it affects consumer's bills, Ofcom accepts  
24 all that is immaterial. So if it is going to say, nonetheless, despite all that context

1 there is a material effect on CP's ability to compete arising from the plus element, not  
2 arising from the fact they have to pay APCCs at all because according to them that's  
3 fine, but the loading on of any contribution towards common costs, if that is what  
4 they are saying tips the balance and has a material effect on competition, they have  
5 got to establish that and it's not enough for them to wave their arms as matter of  
6 principle and say this could do, it could do. There's a materiality point to overcome  
7 before it can reverse that ordinary principle that LRIC+ has adopted to share  
8 common costs for all the allocative efficiency reasons that may entail, rather than  
9 forcing the price of other services.

10 So on traffic volumes, for example, if you take Mr Godfrey's evidence and just turn  
11 that up, at Mr Holmes' pointed specifically to this, it's in DF1, tab 4. It's the now  
12 familiar page 53 with figure 7 and 8. If we look at the bottom of figure 8, the net  
13 value, this is confidential along the bottom row, we can pass over the BT figure,  
14 looking at the other figures, i.e. the effect on the other CPs which are there identified.  
15 These are all very low numbers, prima facie, in the context of telecoms. That may  
16 not be decisive of the matter but that's a starting point, prima facie. There's no  
17 analysis there. What does this represent? What's the margin impact on customer  
18 acquisition of those numbers? That, according to Ofcom, is the key point. So  
19 where is it? What do we do with this? There is a burden on Ofcom that's going to  
20 assert a competitive imbalance to demonstrate it, to a material degree at least, and to  
21 show that there could be -- this is the key phrase -- a change in the intensity of  
22 competition. That's what it says it's concerned about. There can't be a change in  
23 the intensity of the competition in relation to an immaterial.

24 **THE CHAIRMAN:** I think we understand where you are both positioned on that.

1 **MR PALMER:** So that's the point, it's genuine question of materiality. So it's the trade  
2 off against the wholesale effects which needs assessment of the magnitude of retail  
3 competition impact. Mr Holmes talked about striking a balance but on one side of  
4 the balance, the work hasn't been done.

5 Mr Holmes referred to the bundling and voice competition again in that context.  
6 Again, what is the extent of competition for voice? To what extent is competition  
7 targeted, fighting between voice only customers, or are they being fought over by  
8 seeking to attract them to upgrade to bundles? We don't know, we've no idea about  
9 that. As this material demonstrated, to put Mr Holmes' words, he said the extent of  
10 the impact requires comparison with RCP's profit margins. That's where the drum  
11 is rolled and we are waiting for the rabbit to come out of the hat, Mr Holmes moved  
12 on.

13 **THE CHAIRMAN:** I think we have your point.

14 **MR PALMER:** That's the point where we are all took a gasp of breath and we waited.  
15 So a balance with what? Then we've got to the wholesale effects. Again, the  
16 contrast in Ofcom's approach here with this, the approach to the retail, was  
17 absolutely notable. At this point Mr Holmes leapt into the air on his trampoline and  
18 turned a complete somersault, it was breathtaking because it was a complete  
19 reversal --

20 **THE CHAIRMAN:** I must have missed that.

21 **MR PALMER:** Let me recapture the moment for you in all its glory because having  
22 talked on the retail level about how it could all be done as a matter of principle, we  
23 were then treated to an exposition at the wholesale level about how Ofcom has to  
24 take decisions in the real world. Of course it didn't analyse the real world wholesale

1 incentives at all. Just as it didn't at the retail level. But his criticism of  
2 Dr Maldoom's point was based on assertions that in the real world none of this would  
3 play out, it wouldn't be material. And the essential basis for that, in particular on the  
4 critical point of Dr Maldoom's points about arbitrage and about disincentives to  
5 move to direct routing and NGNs, was just to assert that it couldn't possibly arise  
6 because there would be spare capacity on the RCP's own network so they wouldn't  
7 need to split out traffic and ported traffic could pass that onto BT to gain the  
8 advantage of the LRIC pricing. That's just asserted. It's just assumed that there  
9 would be spare capacity. What spare capacity? What CP simply runs bags of  
10 spare capacity for the sake of it? Yes, voice may be shrinking, but of course ported  
11 traffic is rising. In the context of changeover of networks, as TDM networks have  
12 shrunk, who is to say that suddenly there are still bags of spare capacity. The point  
13 again is it has never been assessed by Ofcom.

14 Then direct routing, another point, which has never been assessed by Ofcom. Here  
15 Mr Holmes sought to explain it all away by saying with reference to paragraph 6.121  
16 of the guidance that there, there was an explicit link with the level of efficient  
17 charges for portability. But all of this is simply question begging as to what the  
18 efficient charge for portability is. It's all based on the assumption that LRIC is the  
19 most efficient but that that in turn simply begs the question, the very issue of which  
20 Ofcom is meant to be deciding.

21 It's the associated cost of carrying ported traffic without recovering costs which  
22 means BT wants to move on. All witnesses accepted, that -- and Ofcom  
23 agreed -- that there is at very least a commercial benefit of direct routing in the form  
24 of reduced APCCs for CPs. Mr Rosbotham of course accepted, in determining



1 whether to direct route, an RCP would have to take account of the cost of  
2 implementing direct routing as compared with savings from reduced APCCs and that  
3 business case had to be assessed in the light of existing technology and so the lower  
4 the APCC charge the reduced commercial benefit of direct routing. We say it must  
5 follow from that, that lower APCC charges dampen incentives to direct route, as  
6 Mr Rosbotham accepted, as Mr Moore accepted, and it's that impact on those  
7 incentives at the wholesale level that Ofcom has failed take account of in its decision  
8 to price APCCs at LRIC.

9 Direct routing of course may also facilitate closure of a TDM network and so reduce  
10 common costs due to the unusual legacy network at situation.

11 But, once again, returning to that point of principle at 4.68 of the guidance, the higher  
12 porting charges the RCP pays the fewer incentives it has to compete. Ditto at the  
13 wholesale level, ditto in connection with direct routing, that the more an RCP has to  
14 pay for APCCs, the greater its incentives to direct route, and the converse. And if  
15 that qualitative level of analysis in the context of retail competition was sufficient for  
16 Ofcom purposes, and equally BT is entitled to point out about the qualitative level,  
17 the fact that that simply hasn't been taken into account, hasn't been factored in, in any  
18 meaningful way. We say the qualitative points are not enough for Ofcom to rely  
19 upon. What it has got to do is do the work and analyse the point.

20 Last set of points, I think I might even finish within my allotted 30 minutes in  
21 making it. At the very close of his submissions Mr Holmes returned to section 6 of  
22 Ofcom's guidance and he said, look, nobody's alleged an error here, quite right. But  
23 then he said Ofcom had practical reasons nonetheless for picking RCP pays rule.

24 And he pointed to paragraph 6.70 to 6.78 and I can't let that go without challenge.

1 At 6.78 what Ofcom concluded is that the OCP paid option was likely to involve  
2 practical difficulties if it were to implemented satisfactorily, but it wasn't possible to  
3 do so or to overcome those practical difficulties. The relevance of this point for  
4 you, given we are not challenging that conclusion here, is that Mr Holmes appeared  
5 to be saying that that was the reason why they didn't have to go any further into the  
6 competition analysis. That is a complete disconnect on the basis of the reasoning,  
7 so we are basically saying it didn't matter whatever the competition effects were of  
8 RCP pays because there were practical reasons why OCP pays wouldn't work  
9 anyway. But if you read the determination as a whole, that's simply not the thrust of  
10 Ofcom's reasoning, it took the competition on its own merits and we say that's the  
11 starting point for looking at the question, given the conclusion there was not  
12 material, that must be the starting point for looking at the materiality of the  
13 competition points in relation to the question which we are concerned with.  
14 Finally, at the death, the last refuge available to Mr Holmes was to take a pleading  
15 point and to say that these points about the absence of the assessment of the retail  
16 competition weren't made in the notice of appeal. That's just wrong as a matter of  
17 fact. If you turn in the notice of appeal to paragraphs 59 and 62(2) and find they are  
18 squarely raised. 59, by way of introduction, "Ofcom has not shown that  
19 nonintervention with competitive market prices would undermine regulatory  
20 objectives". Then at 62(2) specifically, "Ofcom has not discharged its burden", and  
21 (2) "it has failed to demonstrate that LRIC+ rates are inconsistent with end-to-end  
22 connectivity or that they conflict with Article 8 objectives nor could Ofcom do so in  
23 circumstances where there's effective and sustainable competition in all relevant  
24 markets. No retail markets are regulated at all and the LTC and ITC ...(Reading to

1 the words)... Ofcom does not find that effective competition at the retail level will be  
2 enhanced by the use of LRIC to any material degree in any event".

3 **THE CHAIRMAN:** I suppose Mr Holmes' point is that you don't there suggest there was  
4 an issue about materiality or providing quantitative rather than qualitative  
5 judgments.

6 **MR PALMER:** I just read it out:

7 "Does not find that effective competition at the retail level will be  
8 enhanced by the use of LRIC to any material degree in any event."

9 For the purposes of note of appeal that's more than enough to put it in issue and we  
10 say, although it has not been shown to be material, and we hear Ofcom argue as to  
11 why they say it can be material, but that's a matter of evidence for you to resolve.  
12 As a pleading point, it takes Mr Holmes no further at all. That is raised in the  
13 context of ground 2A, which is where it overlaps with ground 3 and in the ground 3  
14 there's the further points on effects on retail competition at paragraphs 83, 84, which  
15 have to read in that overall context. So it's there, they have pleaded to it, they have  
16 responded to it in evidence, you have heard our evidence, it's a point before you to  
17 determine, we say you can. So I am very grateful.

18 **THE CHAIRMAN:** Thank you very much, Mr Palmer.

19 I have already said that the Tribunal is prepared to entertain written submissions in  
20 respect of any matter that any party feels it was deprived of the opportunity of  
21 dealing with because of the tightness of the timetable today. As far as the transcript  
22 is concerned, we would be very grateful if parties could agree any corrections to the  
23 transcript by 5.00 pm on the Friday if that's practicable.

24 Finally, the Tribunal would just like to thank everybody involved for each party,

1 counsel, solicitors, witnesses and parties themselves, in presenting issues that  
2 initially to us seemed very daunting so clearly, so thank you for that. We will  
3 reserve our judgment.

4 **(4.30 pm)**

5 **(The hearing concluded)**  
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