IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1180/3/3/11
1181/3/3/11
1182/3/3/11
1183/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

5th April 2012

Before:

MARCUS SMITH QC
BRIAN LANDERS
PROFESSOR COLIN MAYER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED
HUTCHISON 3G (UK) LIMITED
VODAFONE LIMITED — Appellants

- and -

COMPETITION COMMISSION — Respondent

- and -

OFFICE OF COMMUNICATIONS — Interested Party

- and -

TELEFÓNICA UK LIMITED — Intervener

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HEARING – DAY 3

APPEARANCES

MR. ROBERT PALMER (instructed by the Legal Department) appeared on behalf of British Telecommunications Plc.

MR. JON TURNER QC and MR. JULIAN GREGORY (instructed by the Regulatory Department) appeared on behalf of the Everything Everywhere Limited.

MR. BRIAN KENNELLY (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G (UK) Limited.

MRS. ELIZABETH McKNIGHT and MR. ANDREW NORTH (Solicitors, Herbert Smith) appeared on behalf of Vodafone Limited.

MR. JOSH HOLMES and MR. MARK VINALL appeared on behalf of the Office of Communications.

MR. MICHAEL BOWSHER QC and MR. NICHOLAS GIBSON appeared on behalf of the Competition Commission.

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THE CHAIRMAN: Yes, Mr. Palmer?

MR. PALMER: (No microphone) Sir, I am grateful. I said yesterday that there were at least two points of factual premise on Everywhere's submissions to deal with on Ground 1. I turn this morning to the second of those, and that is the point stressed by Mr. Turner in his submissions that he could not commission surveys based on unknown findings of the CC and so the evidence could not reasonably have been adduced earlier. Mr. Kennelly dealt briefly with that in his opening submissions and I add this: it is quite possible to conduct a survey on a range of possible pricing effects. EE's own survey – I shall not say more about it, it is a confidential document, I understand it is to be handed up in reply – you will see it investigated a range of alternatives.

In terms of uses, price changes in particular for pre-pay it was, of course, both EE and Vodafone case that that was the most likely change. In answer to Mr. Landers' question of yesterday, can I just direct the Tribunal to the relevant paragraphs of the Determination on that point. There is para. 2.609, bundle A1, tab 2. This is the start of the section dealing with the arguments of the appellants about likely impact on usage and subscription charges. These arguments are summarised in bullet point form. Can I direct the Tribunal's attention to the third, fourth and sixth bullet points, I will not take time over them now, but even scanning them will give the Tribunal a sense of their gist. In the final bullet point, second sentence:

> "In other words, we understand EE to argue that usage charges will have to increase for pre-pay customers."

Vodafone's argument is set out at 2.610, again I invite the Tribunal's attention to that paragraph and, in particular, six lines down, the third sentence:

> "Vodafone submitted that the profit impact could be estimated in a straightforward way because a reduction in revenues from incoming calls for a customer segment was equivalent to an increase in the marginal cost of serving that segment."

That was an answer to Ofcom's point, and the mechanism of the waterbed effect. In 2.612 Vodafone also clarified in the hearing that:

> "… the net effect was that customers with net incoming calls would tend to see price rises whereas customers with net outgoing calls would tend to see price reductions."

Over the page at 2.613 importantly:

> "Vodafone also addressed the question of the size of price increases. Ofcom argued that it was wrong to assume that the CLV of each customer segment would

> be preserved at today's levels. Vodafone disagreed, arguing that since competition between MCPs was strong for both pre-pay and post-pay customers, MCPs would change their prices for each customer segment, on average, in line with the change in CLV caused by a reduction in MTRs."

So that was their positive case, but the likely usage charges could be calculated. Their survey reflected that approach. The problem with it was it just went from current levels down to pure LRIC rather than from what would be LRIC+ levels to pure LRIC. There was no real difficulty with estimating the extent or nature of those price changes, so it is puzzling to hear that this is not evidence which could have been adduced. The real problem was that Vodafone put in a survey which was methodologically flawed, the flaw was point out but they did not do anything to repair the hole in their case.

The next point to deal with is just a matter of perspective as to the nature of the evidence, which Mr. Turner argues is missing and the absence of which generates an obligation for remittal for it to be sought and obtained by Ofcom.

We bear in mind, as I went to yesterday, that the CC considered that survey evidence could be of value and we bear in mind also that they said it would have to be treated with care, and that would be so particularly in the case of a survey conducted on what the CC found would be the right basis, which would be perforce to ask respondents to the survey, first, whether they would cease using a mobile phone or a mobile subscription on reduction to true LRIC+ levels, exclude all those who answer "yes" to that question, and then ask the remaining people what about the extra £4 a year or £6.40 a year, is that going to make all the difference? That is the nature of the survey question which needs to be asked. You may find interpreting that you have to bear in mind it is quite an artificial exercise for respondents to be put through, but it could be done. It could have some value but it would certainly be open to interpretation if I put it that way and those results would only be realistically assessed against the background of highly developed optimised packages which their refusals would be on. We would have to bear in mind that that ignores the other benefits to fixed users – they may also be fixed users – the fact that they have been making cheaper calls to mobiles and, indeed, they may even have added value in receiving more calls on their mobile. All that would have to be borne in mind and interpreted, and the results would have to be considered against the further background of the Commission's considerable doubts that the loss of subscribers can simply be translated into a loss of allocative efficiency.

The short point is that on no possible basis could this missing evidence be said to amount to established fact, or non-contentious evidence, or even objectively verifiable evidence, and it cannot be said that the absence of it led to a mistake on the part of the CC in its reasoning. In fact, even on the applicants' own case we do not know what the surveys would show. They propose this cumbersome mechanism by which the appeal would be remitted, not to the CC but Ofcom, who would carry out these inquiries, produce the evidence, no doubt consult upon it spending more time, but we still do not know if the actual product of that survey would actually materially advance the debate on the role of allocative efficiency. Even now, although they could have done, the appellants have failed to gather the evidence to demonstrate that it would have a material effect on the CC's reasoning or change its conclusions in any way.

Just to round off, in terms of putting all the submissions I have made into a legal matrix and trying to identify a possible ground for judicial review, I have identified up to seven, which have been floated at various times, either written or orally. I will try and deal with them all in very summary form. The first is on the basis of *E v. SSHD*, the mistake as to fact. None of the four criteria are fulfilled in this case, and I need not say any more about that.

Second,, we have had little mention of the duty of the CC to put itself in a position to determine the question before it. Again, we say the case law on that relates to bodies with an investigative not an appellant function. You have heard about that (see, please, also BT's submissions to you at para.6).

Third, we have a new analysis from Mr. Turner and his oral submissions replacing his previous analysis which based on the Framework Directive an obligation that the CC must get it right. As Mr. Bowsher explains, it was impossible to derive that obligation from Article 4, or any duty on the appeal body to ensure that users derive maximum benefit independently of the evidence and grounds put before them, and certainly *Mobistar*is not authority to the contrary.

Fourth, we have the *Talk Talk* point, if I can put it that way. I will not spend time over that. Mr. Bowsher dealt with it. Can I also direct the Tribunal's attention to para.12 of BT's submissions on that point.

Fifth, Mr. Turner clarified yesterday in a short intervention that he said there had been a confusion between error and remedy. We say that is misdirected too. No error is established giving rise to a potential remedy until it is established that there is a material error. The onus on appellants is not simply to point to errors but establish their materiality, and that is the hurdle which the appellants failed to get over.

Sixth, there is the procedural unfairness point. I have dealt with that along the way. This is not a case of an unexpected outcome, this was a simply a case of a hole in the appellants' evidence which they failed to plug.

The seventh and final point is a point as to proportionality. Again, we say that does not advance the point further either in substance or on the double proportionality point. This was a point which the appellants had to adduce evidence on, and the CC's own obligations were to respond to that, and their conclusions to be assessed effectively against the standard of rationality for the reasons that Mr. Bowsher covered.

Sir, those are all my submissions on ground 1. Ground 4 I do not propose to deal with in any detail. I have dealt with it in writing. The way Mr. Turner put it in his oral submissions was effectively that it was not argued independently of ground 1. He said that if ground 1 succeeds then ground 4 follows. It may well be that in the absence of any flaw on ground 1, we say there is nothing on ground 4.

We have set out in our written submissions the fact that there was no actual evidence put forward beyond mere assertion, of a very general high level kind, that the highest speed of change would lead to greater significance of damage. The CC dealt with that perfectly adequately by referring back to its conclusions under Reference Question 1 and the benefits which would accompany any detriments, and that being a safe way for it to proceed.

Unless I can help the Tribunal further, those are my submissions.

THE CHAIRMAN: Thank you very much, that was very helpful. Mr. Holmes?

MR. HOLMES: Sir, I spent yesterday mournfully shredding my submissions as I listened to those of my learned friends for and in support of the CC. If you will indulge me, I propose to limit my submissions to three matters which are of particular importance to my client, Ofcom. First, I would like to make some short points about the context of the appeal. Second, I will briefly address the question of the applicable standards of appeal and review. Thirdly, I will say a word about relief in response to the Tribunal's question in its letter of last week.

Beginning with the context, we say that the various issues which are now before the Tribunal need to be considered with a careful eye to the workability of the statutory scheme governing price controls, which has a number of distinctive features. The first is that price controls cannot be avoided or delayed, and they must be repeated on a regular cycle. There are certain communications markets that are stubbornly immune to competition, of which mobile call termination is one. The Common Regulatory Framework now requires the price controls to be revised every three years, absent exceptional circumstances. Within that

three year cycle it is necessary to fit the consultation process leading up a price control and the appeal procedure which follows it. Price controls are therefore rather like painting the Forth Bridge. Ofcom must begin again almost as soon as it has finished.

The second point is that subsequent appeals are not the exception, they are the rule. Six of the last seven price controls have been appealed. This is not surprising. Price controls apply to inputs on wholesale markets with buyers and sellers, both large and sophisticated undertakings, substantial sums are at stake and there is every incentive to continue the regulatory conversation before the CC and the Tribunal.

Thirdly, the appeal process is procedurally complex – I do not need to labour the point, we have this elaborate waltz which we are all familiar with now where matters are passed back and forward. There are hosts of lawyers, economists, modellers, engineers, and case management is challenging, with much risk of slippage and delay.

Fourthly, the matters arising on price control appeals frequently do not admit of right or wrong answers. That is true at the higher level of design where you have to balance policy points in choosing, for example, the appropriate cost standard, and those policy points are difficult to measure. They may also be incommensurable. How do you balance allocative efficiency against the concern about vulnerable consumers? These are matters inherently of judgment.

As regards the detail, there is also complex modelling work to be undertaken. The model embraces the whole industry, and it must seek to capture a complex array of costs that are involved. Costs and demand are forecast into the future with all the uncertainty this entails. Moreover, the modelling seeks to establish what costs would be incurred in a future period, not by real life operators but by hypothetical efficient operators, and on the LRIC measure the modelling is not even of a full functioning network such as one would find in the real world, but rather of a network which no one in the real world has ever had cause to build – that is an ex-MCT network. So when the Tribunal Chairman described it as an approximation of reality, that is correct, but even this description needs to be qualified, because what is being modelled is, itself, an abstraction from reality. Needless to say, there are many variables, significant uncertainty and Ofcom and the CC must do the best they can. In many cases, it will be meaningless to ask whether the model is accurate or correct. It is incumbent upon the critic of the model to show how it could be better.

The fifth and final point is that there is no means of compensating consumers or parties who pay too much or too little if the price control is at the wrong level. So things need to be dealt with swiftly.

Pulling the strands together, we say that it is vital that the appeal procedure is kept within manageable bounds so that it reaches a fair result promptly and with the highest level of finality.

Sir, we have listened to the submissions that have been made about standards of appeal and review, and also about relief. We view them with some concern in view of the specific features of price control appeals. As I hope to show more specifically when I turn to the detail, we see in them a risk that the already cumbersome process of price control appeals will be rendered more difficult and there is a risk that the whole process will be brought into disrepute.

Against that background, let me turn to the standard of scrutiny to be applied. Two bodies are involved, the Competition Commission and the Tribunal. Mr. Turner says that the task is to ensure that the right result is achieved. That may be true, subject to the confines of the appeal process, but the roles of the CC and the Tribunal in that task are very distinct, and for price control matters the appellate role under Article 4.1 of the Framework Directive is clearly assigned to the CC. The Tribunal's task is not to check that the CC arrived at the right result, but instead to conduct a failsafe judicial review at the end of the process.

So what standard should the CC be applying? It must determine the price control maters on the merits. It is not confined to examining the process or reasons. That is common ground. They can look at whether there is something wrong in the underlying conclusions arrived at. Ms. McKnight submitted to you that the CC is required to substitute its judgment on all points, and she suggested that it should not confine itself to verifying whether Ofcom went beyond the bounds of what was permitted and that it should not defer to Ofcom's regulatory judgment. In our submission that is incorrect. The Tribunal and the CC have both consistently recognised that Ofcom should be accorded a margin of discretion and that its judgments as a specialist regulator should not be lightly dismissed. This is in line with the general approach taken by appellate jurisdictions. We refer you to paras.28 subparagraphs 5 to 7 of the CC's skeleton argument, and also to the *Cable and Wireless* price control Determination at tab 57 of authorities bundle 3 at para.1.33. Given the complexity of price control appeals and the tight timescales within which they must be resolved, an approach which did not accord Ofcom some margin of discretion we say would be simply unworkable.

There is a general consensus here today that, on a merits appeal, an error must be shown to be material in the sense that it infects the substance of Ofcom's decision. But there is an issue about what exactly an appellant is required to do in order to show that an error is

material. Mr. Turner for Everything Everywhere suggests that where the appeal body finds that there has been an error that could affect the soundness of Ofcom's decision but that the evidence is lacking as to whether it does or does not affect the soundness of Ofcom's decision, the appellant has done enough and the appeal must be allowed. The question of how the evidence is to be obtained is then a matter for remedy, and the answer is said to be on the face of the statute in the procedure for remittal to Ofcom for further investigation pursuant to s.195.

As to this, to begin with we agree with and gratefully adopt Mr. Palmer's submission that the CC did not in fact find that it lacked sufficient evidence to determine whether Ofcom's error of analysis affected the soundness of Ofcom's decision. In fact, the CC was able to uphold Ofcom's decision on the basis of the evidence before it. But in any event, we say that Everything Everywhere is wrong as to the underlying principle. In the context of an adversarial appeal on the merits it is for the appellant to supply the chain of evidence or reasoning needed to show whether or not an error of reasoning on Ofcom's part affects the soundness of Ofcom's decision. It was therefore not enough for Everything Everywhere to show that Ofcom made mistakes in its assessment of the impact of lower termination rates on retail prices without offering any evidence as to the likely consequences of the impact for allocative efficiency or numbers of vulnerable subscribers. We say that it is not the CC but Everything Everywhere which has confused the issue of substance with the issue of remedy. The CC rightly required Everything Everywhere to make good its case, but Everything Everywhere seeks to bypass the need for it to show a material error and to jump straight to the question of remedy.

Again, the broader context must be kept in mind. Mr. Turner candidly admitted that there might be numerous cases where an error was shown that the evidence was lacking to conclude whether or not it was material to the decision. We say that frequent remittals would render an already cumbersome appeal process unworkable. I will come back to this when I turn to remedy.

Two reasons have been offered why the appellants should not be required to bring forward evidence in the circumstances of this case. First, it is suggested in the written submissions that the CC should undertake the necessary enquiries itself. We say that this is wrong. The CC is an appellate body and it is for those appearing before it to provide the evidence needed in this context, where no information gathering powers are available under the statute. The appellants rely on the quotation from the Court of Justice's judgment in

Mobistar, but this is taken out of context, and I refer you to paras.18 to 21 of our skeleton argument for today.

Secondly, it is suggested that the appellants were unable to bring forth the necessary evidence to make good their case on the merits by the strict timetables of the appeal process and the CC's injunction against further evidence. In this respect, the appellants' case, as Mr. Palmer observed, appears to amount to an allegation of procedural unfairness, although it has never been put in that way. In our submission, it is unsustainable on the facts. The appellants should always have been aware that the nature and level of retail price increases resulting from lower termination rates was only one link in the chain of argument and that to make good their case they needed to show that the increase would significantly affect numbers of subscribers and mobile phone usage so as to have a potential impact on allocative efficiency and/or on vulnerable customers.

Mr. Turner objects they could not have been expected to anticipate the CC's findings as to the nature, form and targets of retail price changes. We say that is a red herring. The appellants were not required, in their Notices of Appeal, to anticipate what the CC would find, but they should at least have reasoned through the consequences of what they themselves said would happen to retail prices and how that would affect usage. They should, in other words, have had the courage of their own convictions, and carried through their arguments with appropriate evidence to show the consequences of Ofcom's conclusions.

As matters turned out, had they done so they would have been able to come up with evidence that was in fact well tailored to the CC's findings. This is because the CC upheld the appellants' case as to the form and targets of retail price increases. Mr. Turner himself emphasised the extent to which the appellants' case on this aspect had been upheld and Ofcom had been reversed. He took you to a table at para.8 of Everything Everywhere's response to the Provisional Determination which showed the respects in which the appellants' arguments had been carried through into the Provisional Determination.

We have slightly updated that table, sir. I have only five more minutes.

THE CHAIRMAN: That is fine, Mr. Holmes.

MR. HOLMES: This table has been updated only to show the relevant paragraphs from the appellants' Notices of Appeal and their evidence which went to show the points that were subsequently upheld by the CC about the form and targets, as Mr. Turner put it, of the price increases.

That, of course, leaves the level of the price increases. We say that here too Everything Everywhere could and should have arrived at a range of increases not dissimilar to the £5 to £8 range arrived at by the CC. Everything Everywhere and the CC agreed as to the form and targets of the price increases and the level was then simply a matter of back of the envelope calculations dividing the number of affected mobile subscriptions by the net revenue loss to the mobile operators. This was how Ofcom got the £2.50 figure which the Tribunal has seen. They divided £200 million by 80.3 million total mobile connections. Similarly, as we understand it, the CC did exactly the same thing to arrive at its £5 to £8 figures. So the £5 figure divided the £200 million by the number of pre-pay mobile subscriptions, using publicly available data about the percentage of such subscriptions from the Consumer Experience Report which is a publicly available document exhibited to Everything Everywhere's own witness evidence. The reference is exhibit MW 36 to Walker 1. Similarly, the £8 figure performed the same calculation, but subtracting the number of barely active or inactive subscribers as given in the MCT Statement.

None of this is rocket science for Everything Everywhere and Vodafone given the teams of people who have been poring over the various documents, are well immersed in them and understood the crucial need to arrive at a link between the price increases that were being alleged, the form and targets of the price increases being alleged, and the impact on allocative efficiency and vulnerable consumers. So not unexpected; not unduly difficult. But even if it were too much to expect them to have put in that reasoning and supported their own case from the outset, they could have applied to put it in once the Provisional Determination was published. Vodafone successfully applied to put in fresh survey evidence during the CC's proceedings. Everything Everywhere preferred to wait. In our submission, this is not the right approach to take, given the wider context of these appeal proceedings, and there is no unfairness to the CC's conclusion that Everything Everywhere has not made out its case.

Sir, you have my point in relation to Vodafone's case on modelling. As we understand it, Ms. McKnight was saying that the CC was wrong to require Vodafone to bring forward a clearly preferable alternative, and that the CC should instead have asked whether Vodafone had done enough to undermine confidence that the model predicts a robust number. I hope I have not done any violence to her submission, but that was my understanding of it.

If that is the position, we disagree with it. The CC rightly held the model is the theoretical exercise to establish a reasonable basis for identifying avoidable costs. Ofcom and the CC must do the best they can, but it is both an approximation of and an abstraction from reality,

and in every price control the CC has therefore proceeded on the basis that it is not enough to bring forward a laundry list of criticisms. You have to go the further step and to make some practical suggestions as to how the model can be improved. That is what the CC should have done.

As regards the Tribunal, I can be very brief. We say that the Tribunal had it right in the last round of MCT when it held in para. 21 of its final Judgment ([2009] CAT 11), the judicial review principles to be applied under s.193(7) are exactly the same as those applied by an ordinary court. That leaves open the question of whether you should adopt the approach an ordinary court would adopt taking account of the European context, or whether you should just apply common law judicial review – if one can call it that. On that we would endorse the submissions of Mr. Bowsher.

The standard of review to be applied by the Tribunal needs to be assessed in the context of the merits appeal which has already been provided by the Competition Commission, the appeal body for the purposes of Article 4(1). By the time the Tribunal comes to consider judicial review challenges, the Competition Commission should already have provided at least the level of scrutiny that EU law requires to be applied to decisions taken pursuant to EU law obligations, and so the second stage judicial review was a matter purely for national law and therefore the statements of the Court of Appeal in the context of the Enterprise Act apply equally in this context. There is no reason to vary ordinary judicial review principles.

The purpose of Article 4(2) of the Framework Directive, as the Competition Commission submitted, is to provide a conduit for references to be made pursuant to what was Article 234, now Article 267, hence the specific reference to Article 267, which one sees in Article 4(2) of the Framework Directive. It would be very odd in our submission if, having required intensive scrutiny at the appeal stage, EU law required it all over again at the subsequent judicial review stage. So the *Mabanaft* case law simply is not applicable, and that conclusion, we say, is reinforced by the relevant recital of the Framework Directive in Recital 12 – I will not take you there – just to note that recital states that the:

> "… appeal procedure is without prejudice to the division of competencies within national judicial systems."

It seems to us that that provides further support for the proposition that once the appropriate appeal standard on the merits has been applied the rest is a matter for national courts subject only to allowing points of law to be ventilated before the Court of Justice in necessary cases which, of course, ordinary judicial review is quite adequate to achieve.

Just briefly on the *E* case. We say first that neither Everything Everywhere nor Vodafone appears to us to be alleging an error of fact on Ofcom's part. They rely on legal errors, failures to take account of relevant consideration, an absence of evidence, which we say is another and a separate matter. They do not allege any mistake as to existing fact. What the Court of Appeal had in mind in *E* was non-contentious and objectively verifiable facts, and that is simply not where we are in this case.

Finally, very briefly, a couple of points on remedy. If the judicial review challenges were to succeed, we say that remittal to Ofcom under s.195 is not the Tribunal's only option. Depending on the nature of the error found by the Tribunal it may be equally or more appropriate to refer any price control matters back to the CC which have not yet satisfactorily been determined so that the flaws identified can be addressed on a further reference. So, for example, if evidence is lacking the appeal proceedings could resume, the parties could bring forward evidence to make good their case as to the existence of a material error, and the CC can then decide the point.

Mr. Turner suggests that this would not be appropriate because of the CC's lack of information gathering powers. In our submission that is not correct, it is in the parties' interests and it is the role of the appellants to bring forward the evidence needed to prove their case. This is not a case where the CC needs to pull the information out as a body investigating a merger or an infringement of the competition rules would. This is a case where the appellants have every interest to prove their case, and if there is an element of evidence that is required to make good their case, and to show a link between an error which has been identified, and the conclusions Ofcom has arrived at, then they can be expected to do that before the CC.

Similarly, if the CC's reasoning were found to be insufficient, or unsatisfactory, contradictory in any respect, which we understood to be the main focus of Vodafone's submissions yesterday, the CC could further consider the point and then supplement or amend its reasoning requesting further submissions or evidence in order to do so if it needed to. In each case we say this is the most obvious outcome for the appeal proceeding; the most obvious outcome is for the appeal proceedings to resume. The statutory framework leaves this option open. Section 193(7) does not specify the remedial consequences of a successful review, it is notably silent on that, and so there is therefore a choice between a s.195 route, or a further Reference of price control matters. In this regard, we note that the rules governing price control References do not preclude price control matters from being

referred at any stage of the proceedings, and I will not take you there, but for your note the reference is authorities' bundle 1, tab 4, Rule 3(5).

Considering the broader context of the appeal process, we say that the interests of expedition and finality are much better served by allowing the appeal proceedings to reach their final outcome with any errors corrected. As we see it, remittal to Ofcom would have a number of disadvantages. Ofcom would then have to take a new decision in relation to the existing price control. This would trigger Ofcom's obligations to consult domestically and with the European Commission with attendant delay. There is the question whether Ofcom would be required to reconsider the price control generally, the appeal would have concluded, the Tribunal would be *functus*. It is at least arguable that the s.88(1) duties would have to be met across the piece, and that might require substantial further investigations.

There would be difficult questions about what level of mobile call termination charges should prevail pending the outcome of Ofcom's further inquiries, a point which Mr. Turner, I think – unless I missed it – did not address in the statement of his position on remedy.

There would also be the risk of yet a further appeal at the conclusion of Ofcom's further inquiry of its fresh decision, and if it went on long enough this "endless iteration", as Mr. Bowsher put it, this ongoing wrangling would risk an overlap of the existing price control appeal process with Ofcom's work on the next round of the MCT price controls.

In short, in the circumstances of this case, the interests of expedition and finality would be much better served by a Reference back to the CC than by remittal to Ofcom if the Tribunal were to find any error in the CC's determination.

Finally, we just note for the record, whether or not the appeals succeed no party has made any submissions to the Tribunal in relation to Ofcom's methods of implementing the remedy as set out in our letter of 2nd March, and our proposal is therefore to adopt those methods to the extent that they remain relevant following the judicial review.

Sir, unless I can be of any further assistance, those are my submissions.

THE CHAIRMAN: Thank you very much, Mr. Holmes. Mr. Turner, before you rise let us just check if Mr. Bowsher has completed all his homework or has anything more to say.

MR. BOWSHER: Thank you, sir, there were a couple of questions outstanding, although I think they have probably been covered but I should, as a matter of courtesy, I think pick them up. There is one point Mr. Holmes has just raised which I wanted to pick up in one minute, and one observation I want to make about one claim, and I can deal with it fairly quickly, if I may.

The first, in no particular order, Mr. Landers asked us a question, it is in the yesterday's transcript, p.63, line 8:

> "Did the Competition Commission then accept the pattern of price changes that had been put forward by the appellants from which one could argue that the appellants should have been able to work out what would happen as a consequence or did they put forward something quite different that the appellants could not have predicted?"

I think you probably had a fair bit of chapter and verse on that from other people, but it was directed to me so I should at least make sure that you have had the answer from me as well. The short answer, as you will gather, is "yes" to the first part of the question, we did accept those price changes and there was nothing unexpected. The answer is set out in our written submissions in para.123(3)(b) where we say: EE seeks to portray the expectation that EE and Vodafone could and should have done so as unreasonable, i.e. put forward more submissions, but this rings hollow for the following reasons: it is not only obvious that the appellants are generally obliged to prove the decision appealed was wrong, it was also readily possible to anticipate from the appellants' own arguments that the evidence described in the preceding paragraph was likely to be required in the present case. The Commission's finding was broadly consistent with the line taken in the appeals of EE and Vodafone, and then we give further references to the final determination. I invite you to look at those because those were the fine detail which I wanted to make sure that I had before answering is in those references. There was therefore nothing surprising about the direction of the Commission's thinking in this regard.

I wanted to follow up the logical follow-on for the second part of the question which is: what did we do instead? We did not leave them high and dry, we sought to do the best we could with the material that we had, and again you have seen those paragraphs in the final Determination – perhaps not all in order, but you can follow through, there is a logical sequence if you follow through in s.2 where this particular analytical strand, as it were, joins the stream towards the final answer of our Q1. If I call out the numbers you can follow it through. The whole section starts at para.2.582. We pick up this head at 2.663, just after the review of evidence which has just been referred to at 2.657. We assess the survey evidence at 2.690. There is a sub-conclusion at 2.700, which you have seen. That then joins a further set of conclusions at 2.742, 2.818, 2.823 you have seen, 2.929, 2.931 and then 2.938 is, in fact, the answer to our Q1. So at each stage that is how the best answer that could be given

joins the stream that leads into the final answer. It is not a case that they were left with what we were doing is something they could never have anticipated.

A question was put to Mr. Kennelly about time shift and parameters, and I just want to make clear where we have our answers to those points. Mr. Kennelly has already dealt with those points but just for your note we also have that in our written submissions. The premise for that, of course, starts with the premise in the final determination that the approach to modelling must be that the costs have to be attributable to MCT traffic, and that is in 3.11 of the final Determination, and that is what we are seeking to identify. On each of the three elements, cell radii, micro and pico cells, and cell breathing, we deal with the proposition or the evidence which was being put forward to suggest our analysis was wrong, that is in para.200 of our written submissions, and the conclusions we reached are cell radii are coverage related or at least it has not been proved that they are traffic related, likewise with micro and pico cells not enough evidence to show that they were solely MCT traffic related, and with cell breathing, we looked at this and decided we agree it is disproportionate to model cell breathing. So they all fall out because there is just not sufficient evidence that those were MCT traffic related, and that was the way we dealt with it.

Picking up Mr. Holmes' submissions which really covered the territory that I did not get time to go into, but he has made the points that I would have made and I just wanted to add this further point that it is clear from Article 4 of the Framework Directive, that the EU contemplated that review would be carried out by non-judicial bodies, that is explicit in the Article. It would be strange, if EU law had any doubt about the ability of a non-judicial body to conduct that review it would be strange not to have made some specification in that regard. Clearly that was regarded as an acceptable route, and what is provided for is only this preliminary reference route. In our submission that makes it clear beyond any question that a full implementation of Article 4 having been carried out that is a sufficient and complete response.

The last point was simply under head C, and this is not to make any substantive observations but simply to emphasise that this is the H3G pleading point which all the parties have dealt with in writing. I just wanted to emphasise that while the Commission has made a determination which deals with the matter on the premise that the unpleaded arguments are not open to challenges, we do urge the Tribunal to determine, as a matter of principle, whether it is open to challenges to allow their cases to depart from their pleadings in the way that is contemplated by the Vodafone claim.

We reiterate all that has been said in the Final Determination about pleadings, the proposition in *H3G v Ofcom* [2008] CAT 10, para.86, which we have referred to, but it is important for future cases, we say, that there be a determination as to how these matters should be dealt with. As you will know, in a practical sense there is a measure of indifference on our part because we have, in fact, made a determination on the basis that the claim is amended, in any event. In practical terms it does not go anywhere, but just because it goes nowhere it does not mean, in our submission, that the Tribunal should not decide the matter for the future, as it were.

Sir, that means on the application to amend we take effectively a neutral position, because it is not really practical for us to object to it, given the fact that we have, as it were, anticipatorily dealt with it.

I hope that is clear.

THE CHAIRMAN: That is clear, I understand.

MR. BOWSHER: That was all I wanted to say.

THE CHAIRMAN: Thank you very much, Mr. Bowsher. I think we are on to replies then.

Mr. Turner first?

MR. TURNER: Sir, if it pleases the Tribunal, I am going to respond to the answers given by the opposing parties by reference to themes in a more or less logical order rather than by individual. I will start with the legal framework that was addressed yesterday by Mr. Bowsher and today by Mr. Holmes. There are two roles: what is the role of the Competition Commission in this process and what is the role of the Tribunal? If the Tribunal would take out again the Act in the first authorities bundle. Page 250 has the beginning of the appeal provisions, s.192. In the submissions you have just heard, it has been referred to as the Competition Commission as essentially the appeal body given the task of deciding this part of the appeal. In fact, as one sees from s.192(2), clearly, the appeal is to you, the Tribunal.

What is the role of the Competition Commission? It is not the appeal body. You see from s.193(1) to (3) that its role is a subordinate one to you, a sort of executive agency. Its task is look into, and I have used the word “investigate”, the price control points in the grounds of appeal to see whether Ofcom got matters wrong in the respect alleged. It then reports back to you, the Tribunal, as one sees from s193(4). So you are the appeal body.

A second point, the Competition Commission, it is common ground, does not have any information gathering powers. Both sides agree on this and it is relevant to the issues before the Tribunal today. If the Commission finds that the appellant had demonstrated that

Ofcom's methodology was, to quote its own para.2.59, "so unsound as to create a real risk that the decision was wrong", it is not well placed to go and get further market evidence, should that be needed, to assure itself what the right answer should be.

I would invite the Tribunal at this point again to look at the way in which Ofcom's methodology was dismantled. If you would pick up bundle A1 and turn back to the Final Determination, I will just remind you of the central paragraphs because they are also relevant to the argument on what the appellant should then have done. One starts at 2.624, p.110. There is the statement of Ofcom's position. You saw what they thought would be the outcome in terms of the targets of price rises, the statement of broadly what the appellants' position was.

Dropping down to 2.627, the expectations of the Commission. Note the intermediate expectation there:

> "… we would expect the overall effect to be higher prices for pre-pay users, especially low-usage pre-pay customers …"

Subsequently that particular point is not found to be correct. They do not find that there would be an especially heavy impact on the low usage pre-pay customers.

Over the page at 2.632, there is the rejection of the claim that companies will increase prices for the high end post-pay users.

Over the page again at 2.634, there is the paragraph saying that they find force in our arguments that the reasoning on the retail price changes is not sufficient to support the conclusions. They agree with our arguments that prices will rise for the pre-pay customers as a whole. Here again, they are saying at this stage, especially low usage customers, and for low usage post-pay customers while prices for high usage post-pay customers will tend to fall.

Finally, 2.657, "Overral assessment on effects on retail prices". There is the paragraph where they accept our depiction of the effects of the termination rate changes on the marginal cost revenues and thus customer lifetime values, well aligned with economic principles in the evidence. They say that they agree that Ofcom has misunderstood the mechanism by which the waterbed effect operates and the likely effects on prices. So there is a finding that their methodology was flawed, no appropriate methodology.

You can put that away for the moment, but I hope you still have the statute open. We, the appellants, carried the burden of demonstrating that there was an error in Ofcom's basic approach on a key issue in the determination, and we did that. If the reasoning supporting the conclusion is removed – it is like the legs of a statute being chopped away – the rest of it

falls. The conclusion is wedded to the reasoning on which it rests, and the conclusion is therefore in that sense no longer safe. If it still to be upheld something else needs to be put in its place.

If one returns to the statute, s.195(4), decision of the Tribunal, you, according to sub-section (2) must:

> "… must decide the appeal on the merits and by reference to the grounds of appeal …"

At sub-section (4) you remit the decision under appeal to Ofcom with such directions as you consider appropriate. There is no requirement for the Competition Commission in anything in the statute to come up with substitute numbers in every case where it finds that Ofcom did get matters seriously wrong in the respects alleged. We accept it is naturally desirable that the Competition Commission should do so where it has all the necessary information that a regulator addressing the problem would want. That is what the Tribunal's ruling in 2008, which Mr. Bowsher showed you yesterday, said. It put it at the level of desirability, and we endorse that.

The error is to elevate that into a rule which the Commission then follows in a procrustean fashion. The Competition Commission's guidance itself recognises what should be a clear difference between finding that Ofcom erred and then working out what the right answer should be, which moves towards the issue of remedy. That is para.3.27 in their guidance. On that latter question the Commission should not tackle the question by asking itself simply whether the appellants' existing evidence, such as it is, is, itself, sufficient to dislodge Ofcom's now shaken conclusion.

The legislative scheme requires at this stage, if you get there, that the ground of appeal which has been successfully raised should lead to a remedy in the line with the s.88 objectives. The Regulator should take into account all appropriate evidence based on the Commission's conclusions to ensure that the solution adopted confers the greatest possible benefit on end-users.

The Commission has suggested that it viewed its task like that of what it said was any appellate court, but an appellate court will generally remit to the decision maker where it does not have all the tools it needs to reach a decision in line with the legislation. In fact, it emerged from Mr. Bowsher's speech yesterday, in argument with the Bench, that the Commission really viewed its task as being akin to that of a trial court in private litigation between a claimant and a defendant which takes its final decision based on the available evidence the parties place before it.

Even in relation to a trial court that argument does not work. There are many cases, sir, as you will know, where, for example, the court will order a split trial between liability and damages issues. If it would assist, I can provide examples, but I apprehend it will not be necessary.

THE CHAIRMAN: That will not be necessary.

MR. TURNER: For example, a court might decide that there are different permutations which its future findings on liability might take. Those cannot be foreseen in advance, and in such a case you have a split trial because you await the findings on liability before putting together, or asking the party to put together, the case on damages which happens in a subsequent trial. There are numerous examples of that.

Sir, to summarise, in this case the Competition Commission should not say , "We find against the appellants because although they have shown that Ofcom's methodology was so unsound as to create a real risk that the decision was wrong, to shake the conclusions, we are required to do the best we can with the current evidence because the imperative is to reach a final answer. The current evidence does not demonstrate to us that another solution is better. We do the best we can with it. We recognise that further relevant and normally important evidence can be gathered by the Regulator and that that might perhaps be done relatively quickly, but it is too late for that". If that is the thought process it is a misunderstanding by the Commission of the way that the appeal system under this legislation is meant to work, and it is a misunderstanding of its own role in the system as has been teased out by the written submissions and the oral submissions you heard yesterday.

So much for the Commission. What is the supervisory role of the Tribunal? This is not a tertiary appeal at all. It is the first occasion when you, as a judicial body, can review the way in which the Commission has exercised its powers and conducted its decision making process, because you are the guardians of that. If you find that their process has been unfair to the appellant in some way, if you find that they have misunderstood their role in some way or if they have omitted consideration of some relevant material, or, Vodafone's areas, they have committed some evident logical fallacies or something of that kind, that is the territory of the present hearing.

Any error of law is a reviewable matter and is for you. So far as what that label "error of law" covers, may I direct you briefly to the short summary that was in our core submissions in bundle B3 tab 27 p.24. I am not going to expatiate on this in any detail. There is a heading "What are errors of law" as opposed to errors of fact" and at para.77 we pointed

out that the courts say it amounts to an error of law, which would be a matter for you to review, where Ofcom has found facts in a Determination, although there was not sufficient supporting evidence, where the reasoning was self-contradictory or based on an evident logical fallacy, or where Ofcom has committed any of the full range of errors which can be attacked on judicial review and so on. There is a reference to the *Unichem* case which I referred you to yesterday and we quote that.

So much for your role. What about the standard? Is there a heightened European standard that you should apply above the points that I have just shown you in this document? We are certainly in the territory of European review. Sir, you remarked on that yesterday. We are in an area which comes directly out of what is said in Article 4 of the Framework Directive as a review. But the English courts, in a judicial review context, recognise that in this sort of case they do apply European law principles, and that in general those can be stricter. However, does it make a difference in this case? In my submission (and I believe Mrs. McKnight also) no. In this case no-one is asking you to disagree with an expert judgment made by the Commission and to descend into the nitty gritty of the merits of the arguments. That is not the way that either of us put the case.

Our main point is that the Commission made errors in its approach. There is, though, a short answer which I must give to all of the cases on proportionality cited against us by the opposing parties. Every single one of them involved a decision maker who was making broad policy or political judgments. That is different from the present statutory context where a regulator is instructed to reach a precise, best decision by reference to a stated set of considerations. You do not find that in any of those cases.

Let us just take a few. *Fedesa* was a public safety issue about animal hormones being banned for livestock farming; *Mabanaft* was about a requirement for emergency stocks of oil, and the only requirement there under the law was that the decision maker had to be fair and non-discriminatory; *BT*, the case that Mr. Kennelly showed you yesterday, was about the Digital Economy Act, was described by the judge in para.211 as a "major problem of social and economic policy where important and conflicting interests are at play".

In our case, if the Competition Commission or the regulator after a remittal is going to correct the errors uncovered in the appeal, they should do so taking account of what the Competition Commission has referred to as "the important evidence which a regulator should normally rely on". We do place weight on the need to get the right answer consistently with the orderly conduct of the appeal process on which you have heard submissions, in particular today from Mr. Holmes on the Competition Commission properly

directing itself as to its job and on considerations of fairness about how its process ran from the point of view of the parties.

Before I turn back to the facts to see what Mr. Palmer and Mr. Bowsher said about those, may I ask you to look at the case which the Tribunal drew to our attention at the end of the first day: *E v. The Home Office* which you should now have in the authorities bundle at tab 74. I was intrigued to hear that there was a departure between the opposing parties in relation to the relevance of this case. Mr. Palmer seized on it and sought to apply it; Mr. Holmes said that it was not relevant to these proceedings. Mr. Holmes is right; Mr. Palmer is wrong. This relates to a different sort of problem from the one that we now face. It is about a situation where the decision maker has reached a decision about the right question on the right basis, but has done so in ignorance of some established relevant fact.

If you turn in it to para.58 where there is a list of examples, you see the sorts of thing that the court has in mind. I will take the first of those: an inspector's mistaken understanding that land had never been part of the green belt. At para.66 the court states the four main requirements of this doctrine of mistake of fact, which can be a ground for a judicial review. The first is that there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. That is why, in one of the cases that is discussed in this authority at para.45, a Criminal Injuries Compensation Board case, one sees the problem. The Board there made a decision in ignorance that there was a medical report which bore out the claimant's story that she had been sexually assaulted.

In our case there is no mistake by the Competition Commission about the ready availability of any evidence on a particular matter. Quite to the contrary. Para.2.700 (which is probably now etched upon your minds - at least until this afternoon) shows that they did appreciate that there was some important evidence. It was not overlooked; they consciously referred to it. They recognised that a robust survey on consumer responses is important evidence that a regulator would seek to rely on to decide a key issue in a determination.

But the problem that we face is that the Commission then proceeds to make a decision on the cost standard without taking into account the evidence which it has just recognised is potentially important. You can express that as a failure to take a relevant consideration into account, to use one judicial review label. But the nub of the problem from our point of view is not that. The problem is that the Competition Commission has misdirected itself as to its job. They did not see their principal task as being to give profound and rigorous scrutiny to the question whether Ofcom had erred in adopting pure LRIC for the reasons expressed in our Notices of Appeal. Instead, they saw their real task as needing to reach a final result on

the cost standard, even if it meant sacrificing some potentially important evidence which one would normally expect to see on this sort of issue. With that I turn now to the facts.

THE CHAIRMAN: Mr. Turner, just two points. First, *E*. It may be much more a point for Mrs. McKnight than for you. What triggered my raising this case, for good or bad, was the submissions that Mrs. McKnight was making on the deficiencies in the model. It occurred to me that clearly there is difference between the sort of factual question that is being discussed here in *E*, and the modelling defects that Mrs. McKnight was very helpfully explaining to us. But in a sense the difference is one that the modelling defects are much less factual; they are an attempt to generate assumptions or approximations that the model can properly reflect the circumstances that might occur in the real world, given the exercise that has been undertaken by Ofcom and the CC. It seemed to me that the fact that the ability to review grounds and mistake of fact being so widely drawn in para.63 ought to have some resonance when one is seeking to challenge a deficiency in a model. That is why I raised the fact that in para.63 (ii) the point is made by the Court of Appeal that a fact is only established if attention has been drawn to the point and the correct position could be shown by objective and uncontentious evidence. It is the "uncontentious" which struck me as quite interesting in these circumstances. But I do accept it is much more a point that arises out of what Mrs. McKnight was submitting than what you are submitting.

MR. TURNER: I understand that.

MRS. McKNIGHT: I will address it in due course.

MR. TURNER: I will not anticipate what Mrs. McKnight will say about it.

THE CHAIRMAN: If you have anything to say about it then do. I just thought I would make it clear where I was coming in raising it.

MRS. McKNIGHT: I will address it in my submissions. I am thankful for the advance notice that that is a particular point you have in mind, sir. Thank you.

MR. TURNER: In that case I will leave that well alone.

THE CHAIRMAN: I did wonder if you had anything to say about Mr. Holmes' point in terms of there being multiple reactions on the part of the Tribunal if a problem with the CC's decision was found. In other words, as I understood Mr. Holmes' point he was not shrinking from the fact that there could be a remission back to Ofcom, but he identified various consequences of that. He was suggesting that an alternative was that the Tribunal could formulate a fresh question, even at a very late in the process, for the CC to address, and deal with the point that way. He was not being prescriptive, as I understood his submissions, about these alternatives; he was saying it might depend on all the

circumstances. Do you say that a further reference question to the CC at a late stage, say now, would be an impermissible course, or merely a course that might, in some cases, be desirable and might, in other cases, be undesirable?

MR. TURNER: The latter. We do not say that you have no power to do that at all. I will make submissions in a moment about the appropriateness of what you should do because what Mr. Holmes was saying was essentially a plea: do not send this back to us; send it to them! You heard the mirror image of that from Mr. Bowsher! The words "hot potato" come to mind!

THE CHAIRMAN: It rather seems like a game of Pass the Parcel!

MR. TURNER: What it comes down to then, should you reach that point, is a question of which is the most appropriate. What I would say, very briefly, is that the alarms that Mr. Holmes referred to were exaggerated. He raised a number of spectres in the language of *Talk Talk*, known unknowns if you like, but this is an ordinary case where the regulator is well placed to conduct any further enquiries and to take that decision.

THE CHAIRMAN: I can see that, but he was right in saying that we would be *functus* and the process would effectively start again. It seemed to me there was some force in that point.

MR. TURNER: That the appeal would have been decided by sending it back to them. That is true, as in every case where an appeal is resolved in favour of an appellant and the remittal to carry out further work is required.

THE CHAIRMAN: So inevitably we are talking about an extra two months, no matter what.

MR. TURNER: We are talking about that. He raises some considerations which, in principle, the Tribunal may wish to bear in mind should you reach that point. But in terms of the weight to give to them we say they were exaggerated.

I turn then to the facts and I must begin by tuning our violins on this issue. A legal question has arisen, it was raised as a threshold point by Professor Mayer for me on day one, which is: what is material? Or, to put it another way, what is unsafe? What exactly are we tilting at here? We say that the issue that we are now complaining about was material, by which I mean it is something which could have affected the outcome, and it is not for anybody in this room to anticipate that outcome.

The opposing parties have each set the bar very precisely in the wrong place. Mr. Bowsher yesterday (p.65 of the transcript): "It is really necessary for the challengers to show that without this …" I will not do the arm gestures, "… the decision falls away altogether". Mr. Palmer yesterday (p.83):

> "On Mr. Turner's account the absence of fully reliable survey evidence was critical to the Commission's conclusion that allocative efficiency grounds do not provide a clear answer to reference question 1."

Then a few lines later:

> "Mr. Turner's case is that part of the ultimate conclusion was fundamentally affected by the absence of fully reliable survey evidence."

That is not how we have ever put our case and, more particularly, it is absolutely not the law. Something that was missed out in this case on our account was material if it could have affected the outcome. One of the authorities in the bundle, which was referred to in Vodafone's grounds at para.90 on this basic point. It is *Simplex* in authorities' bundle 1. This is a Court of Appeal case – a planning case. The appellants had an application for their planning permission refused by the local authority, and the Secretary of State then declined to call it in. His decision, relied among other things on the fact that a planning study had concluded that the land should be kept in the green belt, and in fact there had not been any such study. There was a flaw.

The issue arose, given all the other reasons relied on in the report – an extensive report – by the Secretary of State, was this error material to the outcome. What does the judicial review court do about it? If you turn to p.15 of the Westlaw transcript, at the very bottom there is a paragraph setting out counsel's submission there:

> "Referring to the extract of the Judgment just cited, Mr. Barnes submitted that the judge had set the test correctly, namely was there any ground for concluding that the decision of the Secretary of State <u>might</u> have been different if the mistake had not been made; but he submitted that in coming to the conclusion which he reached the judge was plainly wrong. Mr. Barnes relied upon the judgment of the court delivered by Lord Justice Ackner (as he then was) in *ex parte Brent*."

Then, over the page:

> "… 'it would of course be unrealistic not to accept that it is certainly probable that if the representations had been listened to by the Secretary of State, he would nevertheless have adhered to his policy. However we are not satisfied that such a result must have inevitably have followed … It would in our view be wrong for this court to speculate as to how the Secretary of State would have exercised his discretion if he had heard the representations'."

Then there is a reference to a well known quotation from Mr. Justice Megarry. If you then go to Lord Justice Purchas' conclusions, which are on p.18, you will see in the middle paragraph:

> "Notwithstanding the submissions persuasively made by Mr. Pannick, I am unable to accept them. The [Decision] letter, as Mr. Barnes rightly pointed out, is an admirably succinct document and skilfully and carefully drafted. I find it impossible to consider that the Minister referred to matters which he considered were irrelevant to the decision-making process."

Pausing there, what has happened in our final Determination is that the Commission has referred to the missing evidence in its determination, and it has not only done that, it expressly found that it is important evidence that one would normally have expected the Regulator to rely on. In its absence there is no evidence that allows the Commission to make a reliable assessment of the scale, the magnitude of customer reactions to price increases which the Commission expected. In those circumstances you cannot assume that the missing evidence could not have made a difference to the outcome.

Then if you continue and read from the last paragraph:

> "The error, in my judgment, is undeniably a significant factor in the decision-making process carried out by the Minister. Accordingly, even if it is not a dominant reason for the decision, it cannot be excluded as 'insubstantial' or 'insignificant'. I now turn to the test suggested by Lord Justice May, namely would the Minister have come to the same conclusion if the erroneous reason had been excluded altogether. If not, then on the approach adopted by Lord Justice May the decision should be quashed. Bearing in mind the judgment of Lord Justice Ackner in the Brent case incorporating, as it did, the words of Mr. Justice Megarry, I find it impossible to say that the learned judge was entitled to come to the conclusion that the Minister would necessarily have reached the same conclusion if he had not acted on the erroneous factor."

Then at the very bottom of the page, to pick up on something that has been said against us: Mr. Barnes there represents the equivalent of the appellants in our case:

> "it is not necessary for Mr. Barnes to show that the Minister would, or even probably would, have come to a different conclusion. He has to exclude only the contrary contention, namely that the Minister necessarily would still have made the same decision."

On p.20, for completeness, Lord Justice Staughton makes the same point:

> "I cannot be satisfied that this decision might not have been different. I say only that it might have been – no more than that. In that respect only I differ from Mr. Justice Otton."

Mr. Justice Otton was not one of the Court of Appeal judges, he was the judge below. So that frames the question correctly in law. The right question is whether the empirical evidence referred to by the Commission could have affected the outcome.

Now, if you turn to the Commission's final Determination again, we can look at it. We begin on p.129, with para. 2.700. I am obviously not going to repeat all of the paragraphs which I have gone through, but only respond as shortly as possible to Mr. Palmer. 2-700, the second sentence:

> "Since the question of consumer responses to price increases is a key issue in this determination, we would normally expect a robust survey to be important evidence that a regulator would seek to rely on."

Stop there. Now, the CC say in terms in that sentence that this is important evidence that a regulator, looking into the very question they are faced with would normally seek to rely on. That is enough. That evidence is missing.

Mr. Palmer says that when you read the next sentence the word "directly" is the key to the whole thing. In this case there does not appear to be any reliable survey evidence that directly addresses the magnitude of customer loss that would flow from the type of price changes we expect to observe. This is a novel argument which the author of the document, the Commission has not advanced, either in writing or in oral submissions because it is not right; it is not the right way to read this sentence. It is an attempt by an intervener, skilfully, to gloss the report in the way that the author has not done. It is also clearly wrong, both in terms of this paragraph by itself, although one must not read it as a Statute, and when one looks at it in context. The CC says there is no reliable survey evidence that directly addresses the magnitude of customer loss that would flow from the type of price changes we expect to observe. "Directly" means it is on point given our findings on target, scale and form of price increase, and that is all that it means.

The Commission does not go on anywhere in this document to say that there is, nonetheless, reliable survey evidence that indirectly addresses the magnitude of customer loss. Mr. Palmer then sought to stitch a case together that one could assemble it.

If one turns forward to the conclusion at para. 2.819 on p.158. This is a paragraph in the section, as you will see, if you go back two pages (156) "Overall assessment on allocative efficiency". What the Commission says here is:

"We have also considered evidence on the responsiveness of consumers to price increases. We would normally expect this question to be addressed using empirical evidence."

Again, that is the point.

"… but Ofcom relied on little relevant evidence in its decision and we found that the evidence of the appellants did not allow us to make a reliable assessment on the scale of reactions to price increases."

It is as clear as it can be. At para.2.820, to which Mr. Palmer took you, the CC refers to the expectation that without there being the empirical evidence which it said it would normally expect to see to address the question, that they expect an increase in call prices to have a relatively small effect on subscriber numbers. That does not mean that they have reached a fully informed or satisfactory decision without it in their own estimation.

If one now goes forward to para. 2.918 we move into the territory of the vulnerable customers, and this is the conclusion on vulnerable customers.

"We have considered effects on subscriptions, usage and income. We agree with Ofcom that its highest priority should be the effect on mobile-only subscribers giving up their only means of access to telecommunications services."

The way that it is put in the penultimate sentence:

"We find that some vulnerable customers are likely to be made worse off, but the appellants have not demonstrated that this would lead to a significant reduction in subscriptions or usage among this group."

To frame that conclusion and to show that what they are saying is, "You have not demonstrated it given the available evidence", rather than, "We find that there is no such effect", one can go back to para.2.914 on the previous page. This is merely to give you a flavour that there was a quantitative issue to be looked into:

"We expect the net effect on vulnerable customers to be negative, for two reasons. First, there are around twice as many mobile-only vulnerable customers as fixed-only. Secondly, the gain to fixed-line operators (which may be passed on to customers) from lower MTRs is lower than the loss to mobile operators …"

and so on.

The first point is that there are around twice as many mobile only vulnerable customers as fixed. The footnote takes you to para.2.886, which is the last paragraph I ask you to look at in the reasoning. That is on p.170:

"Ofcom found that more vulnerable customers were mobile-only than fixed-only; it reported that 24 per cent of DE adults lived in mobile-only homes …"

which is actually interesting to me –

"… and 28 per cent of adults with an income of less than £11,5000 lived in mobile-only homes and 13 per cent in fixed-only."

I draw that to your attention to show that there is a serious issue to be looked into about the impact on this particular group of a change which would mean that prices are raised, in that that they may realistically have given up their mobile phones, but that this issue has not been assessed by the reliable evidence to which the Commission referred.

One turns, finally, to the weighing exercise at the end, 2.929, the overall assessment of Reference Question 1(i), and what they do is to set out in paras.(a) to (d) how they have reflected on the criteria which Ofcom adopted and which they use. (a) refers to the competition assessment, and you will see two-thirds of the way through that it is in favour of LRIC, but the scale of effect may not be large.

Then (b) is allocative efficiency, no clear answer, and that is the point which we are exercised about because they have not got the evidence which could tip the balance in a finely balanced case.

Then (c) is the vulnerable consumers point. They agree with Ofcom that the highest priority should be the effect on the mobile only subscribers giving up their only means of access. The way that they put it is:

"Though we find that some vulnerable customers are likely to be made worse off, we do not believe it has been demonstrated that the net effect across all vulnerable customers, taking into account both winners and losers, would be significant."

The point is that they have addressed things and asked themselves a question in that fashion. There is, therefore, a missing element which has not been taken into account.

Standing back then, it is BT and not the Commission who says that that Commission reached the clear findings showing it was satisfied on the ultimate issue. I emphasise that because you have seen it is not the way that the Commission expressed its findings in the Final Determination, and particularly you have also seen in their skeleton – I took you to one paragraph yesterday – it is not the way that they say they made their decision there either. If I may, I will show you one more reference in their skeleton, if you have it to hand, because it is a repeated theme. I may have shown you para.124 already, and if so I will show you that again. The second sentence:

"… the Commission made a positive finding on the evidence before it …"

it is the way that they express what they did –

"… a positive finding on the evidence before it that neither Vodafone nor EE had persuaded the Commission that Ofcom had erred in relation to the matters alleged as errors in their appeals."

That same formulation you find in various places – for example, at para.74 – in the same terms. That is what we say is the error.

The final reference is para.2.731 on p.138. This is the heading, "Overall assessment on effects on mobile ownership and subscriptions". They point out there that they found force in our view:

"However, that also means that some of the arguments made start from Ofcom's conclusions on price changes rather than the position we have taken."

They then say in the last sentence:

"Therefore we apply the parties' logic and evidence as best we can."

That reference to "as best we can" is a clear indication that that is exactly what they were doing. They were not saying it was fully and properly informed by all the evidence that they would want, but that they took their task to be, "We now decide the case based on what there is".

That takes me to this question – we have looked at what materiality means, covered the question of materiality itself – based on the submissions of the opposing parties: if it was material, should we have provided the necessary survey evidence as part of our appeal? You heard something about that today from two of the opposing parties.

THE CHAIRMAN: Or to be clear, make an application later on.

MR. TURNER: I will come to that. I am trying to deal with it in stages. The first thing that they say is, "It should have been in your appeal, it is consistent with what you were arguing, so why was the evidence not there?" To use Mr. Bowsher's expression yesterday, "You are the authors of your own misfortune". Really what one is saying is, could we have, should we have, predicted the particular conclusions of the Commission in the Provisional Determination? Mr. Landers asked yesterday whether the conclusions were on all fours with our case on appeal. You have had heard an enthusiastic "Yes", perhaps unsurprisingly, from the other side of the room. No, they were not. It is necessary to consider the location, size and form of the price increases to customers.

I probably ought to show you this. If you have our notice of appeal, B2, tab 6. We put it in the notice of appeal. Just to tell you what there was, the notice of appeal has evidence

which is attached to it, and that was the evidence of a witness from EE, Miss Pippa Dunn, and attached to her evidence we have the survey that you have now seen referred to in the Final Determination. On p.20, if one takes the notice of appeal - what I want to do is briefly show you where we were on these three issues, the location or targets of price increases, the scale of them and the form they might take – on the location or targets, p.20, paras.64.3 and 64.4, you will see what we said, the last sentence, we made the case that the main category of people who were going to be affected was the low value pre-pay customers.

You know that the Competition Commission accepted our point about pre-pay as opposed to the high value contract post-pay customers. They did not accept the point about the targeting on low value pre-pay customers. They did not accept that the burden would primarily fall on their shoulders. That was the reference you probably know, it is 2.742. That is the location.

What about the scale of the prince increases? At para.68, where we talk about size of likely price increases, we essentially made the point that this was in part dependent on the difference between LRIC and LRIC+ which was, itself, an uncertain issue in these appeals. On that issue, as you know, the Commission mainly upheld Ofcom and did not accept our points.

What about the form, the form which price increases might take, would it be through reduced handset subsidies, increases in fixed monthly charges, call charge increases out of bundles, how would that work? We considered that there would be more than one way in which the companies would seek to recoup the lost revenue through the waterbed effect. If you go to the confidential part of this document, 64,9, last sentence, the yellow highlighting indicates confidentiality, we referred there to two ways in which we thought the effect would occur. Our survey, about which you have heard quite a lot now, was carried out on that basis. It was suggested that we could have surveyed and should have surveyed to cover a range of permutations. That is exactly what we did.

Before we go there, in relation to the Competition Commission's findings on the form of changes, the reference is para.2.747 in the Final Determination, p.142. They found that there was, in fact, limited scope for reducing handset subsidies, the first sentence.

At 2.750 on the same page, in relation to whether there would be fixed or *quasi* fixed charges, no evidence that was a likely response by the MCPs. They said that it would be likely to happen through the call charges.

We commissioned this survey in relation to the consultation, as you know, and we relied on it in the appeal, and it was considered by the Commission. If was GFK's survey, and it is

referred to in the Final Determination at 2.683 and following on p.126.. I should say we have just noticed a typo in the Commission's Final Determination. 2.683 shows what the survey covered. It is confidential, and therefore marked as such, but you will see three bullet points down 2.683, the figure should be 3 not 5. That was just an error which we have seen by comparing that to the survey itself.

So those were the assumptions. The survey was commissioned in part by EE's internal teams who were considering themselves how best to respond to the anticipated cuts in termination rates, and that was all explained in the witness statement of Miss Dunn. Could you take up bundle B2, tab 7. A lot of the information in this is confidential, so I am just going to ask you to note the paragraphs and then you will read it for yourselves. On p.16, from para.57 onwards, what she does is set out a chronological summary of our internal decision making about how we should respond to these cuts, what prices we should increase as the company. If you look over the page, para.65, she explains how we decided to go about things, which led to the survey. The survey was exhibit 13 to her statement. Does the Tribunal have copies of it? We have handed them to the parties. There should be colour copies of it. I am not going to go through this in nauseating detail, but to meet the point taken against me, you will see that this was a fully responsible survey in which we did the best we could on the information available to try to work out what the effects would be. At p.10 you will see that we asked about the handset surcharge issue, which we thought was going to be an issue and which the Commission disagreed with us about. A few pages on – I think it is unnumbered, but it should be p.13 – we consider and we asked about the introduction of a fixed minimum daily charge. The 16th page, unfortunately also unnumbered, we looked at extra call charges and there you have the 3 figure which was the mistake in the Commission's Determination.

MR. BOWSHER: It is the second time that Mr. Turner has said that. It is not actually a correct statement if you look at the page that he was just looking at. There is actually a note about that at the bottom, footnote 584. It is in the second bullet at 2.684 and the number that my learned friend is referring to, and you will see that there is actually a footnote about that in the Determination; it is not an error in the Determination.

MR. TURNER: All right. I am grateful for that. We say that the smaller number is the right one when you read the source document. The point is that these questions were all included in the survey because they were the sorts of price increase which the company was considering itself introducing in response to the cuts. It was designed to be used for our own decision making. It is difficult to argue that the survey results were obviously inappropriate.

Mr. Palmer said this morning that he had some suggestions as to how the expert survey should be carried out. I listened with some wry amusement because, as far as I know, even Mr. Palmer would not suggest that he is an expert in survey design. He says even now we have not got a survey, even as we sit here today. I am not quite sure whether it was expected that in the period between provisional Determination or Final Determination and this hearing we should have commissioned a survey, but we say that is not something that we ought to have done, and that we cannot be criticised for having failed in material respects to anticipate the finely grained conclusions of the Commission in the provisional Determination which do provide the basis for a tailored survey, almost regardless of whether that is the case or not. Once the Commission's conclusions have been arrived at one should move forward from that point. That is the question of "are we the authors of our misfortune because we should have foreseen all of this at the time of our appeal?"

The next stage, regardless of that, the provisional Determination arrives with us on 21st December, just before Christmas. What should we then have done? Despite the Commission's unambiguous guidance, despite its letter telling us there was categorically no scope to file new evidence, what is now said is we should have applied to it for permission at that stage to commission a new survey before the appeal process ran its course, and to ask the Commission to ask you for an extension in its timetable.

With respect, we say no, that is not realistic. We did everything that should have been done. You have seen our response to the provisional Determination (I will not ask you to turn that up again). We told the Commission precisely what the problem was and that they should not uphold pure LRIC on the basis of what they themselves apprehended was sub-optimal available evidence. It would not have been right for the company to apply for permission to put in new evidence. First, Mr. Bowsher said yesterday at one stage almost "our door is always open". He relied on an early case in which his predecessor had said that the Commission would consider admitting new evidence if appropriate. That related to a situation in the early foothills of the first appeals, not the provisional Determination stage at all. When questioned, he fairly accepted that that was the position pre-guidance which then came in.

Second point: I do say that the Commission was not the appropriate body to do the survey work, and it would not have been efficient to extend the appeal timetable. I will at least put this point to the Tribunal. Had we applied to commission our own survey now, then what would have occurred? We put in a survey, the other parties put in competing surveys, Ofcom puts in a survey, so there is a battle of the surveys. In a case which may be

exceptional (and in this respect I must clarify what I said in opening - and the way that things have happened here it is perhaps exceptional because the landscape has been changed by the Commission's intermediate findings) where the Commission recognises that further survey work is potentially relevant and important, there should be a remittal for the industry regulator to do it. One job. The industry regulator carries out the survey.

So for all those reasons we say that the answers given by the opposing parties to our submissions on Ground One must fail.

THE CHAIRMAN: Mr. Turner, help me on this. You began your submissions by making clear that, contrary to Mr. Bowsher's submissions, it was not a three-layered cake; it was a nested process whereby in effect one has a decision of Ofcom which is appealed to the Tribunal and the Tribunal then parcels out certain defined questions (price control matters) to the CC but maintains an overall control of the process, so it is actually a nested process where you have got two stages, with the second stage a slightly elaborate dance between two institutions - the CAT and the CC. It is very clear from the decision of the Court of Appeal in the *Ofcom v. BT PPC* case that the appeal to the CAT is unusual, evidentially speaking, in that although the CAT is an appellate body, it is not confined by *Ladd v. Marshall* rules in respect of the admission of new evidence. So, although normally, according to rule 8 of the Tribunal rules, so far as practical all evidence should accompany the Notice of Appeal there is a rule 22 discretion to admit further evidence and that discretion is a broad one. Given that the process is driven by a Notice of Appeal coming from the parties which is supported by evidence, including witness statements and expert reports if the parties are so advised to put it in, it does seem that whatever the CC's rules say, the parties did have an option to put in, or seek to put in, additional evidence by way of an application to the Tribunal. Obviously, facts which inform a discretion vary, but let us take your case that it was impossible to foresee the need for this evidence at the outset, and the CC's provisional Determination took you completely by surprise. Just hypothesise that and take it as read. Let us also take it as read that the approach of the CC (which was unexpected) revealed the need for new evidence which was, in your terms, material. In other words, it really had to be before the CC in order for the CC to reach a decision. Why on earth not apply to the Tribunal to put in more evidence?

MR. TURNER: May I start with one preliminary observation. I do not accept that the only circumstance in which we are in this situation at all is if we are taken completely by surprise. I think that must state it far too high. There may be a situation where in a much simpler case one can be expected to put in evidence on the point in question. Here, as I

have sought to persuade the Tribunal, there are very finely grained conclusions which need to be looked into in relation to exactly who would be hit, the impact on vulnerable consumers, different types of price increase and so on. So to place it in terms of "taking you completely by surprise" would not be right.

Secondly, when one comes to the stage of the provisional Determination itself there are a number of points. First, a purely practical point. Given that the appeal process is now almost running to its end when this document arrives just before Christmas, with only three weeks left, essentially, before further decisions the process is going to have to be resolved, then it is very hard to say that at that stage we should have been opening up an application to the Tribunal to adduce new evidence.

The second is an institutional point. On our approach to how the appeal process works, the Competition Commission has reached the answer to Reference Question 1 which it was designed to reach. It has dealt with the price control matter by reference to the ground of appeal. Its own test in para.2.59 of the document tells one what should happen: the appeal should essentially succeed and be resolved. This question of remedy which involves further information gathering is to be carried out by the industry regulator. That is what one should expect.

The third point is a competence point. For the reasons I have given, the industry regulator is well placed to carry out this work when the CC is not. I have referred to the practical implications of how this would play out in the CC's process with different parties trying o commission different surveys. You have a situation where the appeal body, the CC, does not have its own information gathering powers. It is Ofcom which does, and so if you have reached this point in the process, the right course is: decide the appeal and remit to Ofcom for Ofcom to do the further work. That is what one would expect, rather than a prolongation of the appeal process.

THE CHAIRMAN: The trouble is the process, in terms of finalising the price control, is going to be prolonged either whichway. It is a question of whether one prolongs the process of these particular appeals, or whether one kicks it back to Ofcom to start all over again. There is going to be a delay either whichway, is there not?

MR. TURNER: Because Ofcom is institutionally clearly the more competent body to undertake this exercise, it is the body which should do so. If one asks the Commission to continue its process and to obtain surveys from the various parties which it must then consider, it is a far less efficient or practical way of conducting matters. Indeed, if one takes the point that the Commission has not been given information gathering powers by Parliament, one asks what

is the intent of the legislative scheme? The intent is that where the appeal succeeds because the grounds of appeal have been shown to be correct materially, the reasoning and methodology have been shaken, and where the Commission does not have all potentially relevant material, in accordance with what one might regard as normal principles, underlined by this statutory process which requires a remittal in every case, remittal for further work to be done is the appropriate route to take.

THE CHAIRMAN: It is clearly common ground that the CC has got no independent investigatory powers in this case. It follows from that that the CC is dependent upon evidence from the parties in order to reach its conclusions on price control matters arising out of an appeal, and that chimes with Rule 8 of the Tribunal Rules.

If your approach is right, and the parties are not to be the prime movers in filling evidential gaps and providing the material on which the CC can reach a safe conclusion, is there not a perverse incentive introduced on the part of parties to put in extremely detailed notices of appeal, but no evidence on the basis that the CC can then say: "This is very difficult, you raise a lot of very good points, we have no material to answer them, we will have to shoot it back to Ofcom." It seems rather the wrong way around.

MR. TURNER: Certainly that is not this case.

THE CHAIRMAN: No, no, I am giving you an extreme case, but sometimes extreme cases help in understanding how things should work.

MR. TURNER: It is not relevant here, because I cannot answer a case where a party takes that strategic objective in which case one might say that you really have not made any attempt to put forward your best case on appeal and there might be at the extreme a case for saying that that should be reflected in the approach that the appeal bodies take.

We are here concerned with a case where the parties had put forward their best evidence. When the provisional determination emerges the CC is told: "This is not a satisfactory situation". The CC itself presses ahead, the response cannot be: "Well, it is your own fault, party, for not applying to the Tribunal for a prolongation of the exercise" particularly when, as I say, the institutional mechanism should be that in these circumstances there is an allowance of the appeal and a remittal to Ofcom.

Add to that, almost if one puts aside any question of fault, I referred the Tribunal on the first day to the provisions of s.88 and s.195(5). You have a duty consistent with the orderly conduct of the appeal to refer the matter to the regulator giving it directions to take such action as is in accordance with its ordinary powers, and that includes making its own price control determination again under s.88.

In this sort of case you should, therefore, have regard to that duty also. We say that we cannot fairly be criticised for having considered that the right approach when this lands on 21st December is to consider that the Commission ought to allow the appeal, or tell you to allow the appeal and so on.

If we are wrong about that, as we stand here today you have the option of, as it were, remitting it back to the Commission if you detect a failure and taking that view yourself. But it would be quite wrong, and it would not be consistent with the orderly conduct of the appeal to say that the process must now come to an end on the technical ground that EE did not (at Christmas time) apply to the Tribunal for permission to put in further evidence to the Tribunal which it would have resisted. Mrs. McKnight will make some separate submissions on that point.

THE CHAIRMAN: I am sorry, Mr. Turner, to plague you with hypothetical examples, but can I throw one more at you?

MR. TURNER: Yes.

THE CHAIRMAN: We were speaking earlier about civil litigation and bifurcated trials. Can I give you another example of what parties often are forced to do in terms of the evidence they adduce in cases? Often there are long term and short term objectives in that it may be very useful to adduce evidence which will be helpful in a particular case but which is damaging to that party's long term goals and so the party makes a decision not to adduce that evidence – it damages its case in the shorter term, but for the long term objectives that is a rational decision that the party takes. Let us suppose that we have such a situation here where a party appeals an Ofcom decision, puts in a notice of appeal and, quite deliberately, perfectly *bona fide*, decides not to put in certain evidence, but that evidence would be, let us say, compelling, in terms of demonstrating that Ofcom got it wrong. In that situation where there is an evidential gap, deliberately created but quite properly, what is the CC to do if it spots it?

MR. TURNER: The first point is that, of course, I have just referred the Tribunal to the facts of this case which are that, as Miss Dunn says, the evidence we put forward was the very evidence that we have used ourselves for our internal processes, so your example ----

THE CHAIRMAN: I am not suggesting for a moment, Mr. Turner that this is the case, it is purely hypothetical.

MR. TURNER: No, no. Secondly, if the Tribunal finds a situation where relevant evidence, which goes to the question whether Ofcom's methodology was wrong, is not there then it will reach a finding based on the evidence that it has on that issue. There we are back to the

question of whether the appellants have demonstrated that Ofcom's methodology was so unsound as to render its decision unsafe. If they fail to do that, and that is because they have chosen to withhold some important piece of evidence for strategic reasons, then that is their own fault.

We are faced with a situation of a completely different nature where they have put forward all of the evidence required to show that Ofcom's conclusions and methodology were wrong. They have succeeded on that. They have put forward all the evidence used themselves for the company to show what the true position should be, and then accepting that Ofcom's conclusions and reasoning have been shaken, we arrive at the situation upon the 21st December when they say: "This is how we now see the map."

At that stage, the decision taken by Ofcom has become unsafe, and the question is how one goes about things? The proposition is that it still stays as part of the appeal because it is the appellate body's job to hang on to the case until a final correct answer can be given. If that is the proposition then I would respectfully disagree. The purpose of the appeal is to resolve the case by reference to the grounds of appeal in the notice of appeal. That is the Tribunal's job. The structure is that there is then a remittal to deal with the consequences and that is appropriate where it is the regulator's primary duty to make the decision the price control and to do it correctly.

Mr. Gregory draws my attention to this, and I should draw the Tribunal's attention to it in case they are not aware of it, that the Competition Commission itself can ask for evidence on any point if it feels that it is missing, and it is not therefore a question of the party itself requiring to make an application to the Tribunal to introduce new evidence. If the Competition Commission perceives that its job is to reach the right answer, thinks it has not got all the relevant material, it can then – rather than oppose the parties putting in new evidence – gather it.

THE CHAIRMAN: Yes, indeed, I was postulating that the CC would rather rigorously follow its rules as set out in the letter and that an application would be necessary but you are obviously right. If the CC says: "We need the evidence, can the parties please provide it?" Then the nature of any application would probably be confined to one seeking to adjust the timetable for the CC's response to producing its final report.

MR. TURNER: Yes. This Tribunal, in a completely different context, you will be aware in the *Floe* litigation in the Competition Act context, has itself considered what to do where an error has been found, and in a case where it has sought to retain control of the process, after having decided the appeal, the Court of Appeal found that the Tribunal acted wrongly.

THE CHAIRMAN: Yes, we were very firmly wrapped over the knuckles by the court.

MR. TURNER: In this case, once the appeal has been decided by reference to the grounds in the notice of appeal we move into the territory of remittal so that a fresh decision ----

THE CHAIRMAN: Absolutely so.

MR. TURNER: I say that it is therefore a parallel to be borne in mind rather than the requirement to prolong the appeal process until a final result is achieved by the appellate bodies.

THE CHAIRMAN: Going back to Mr. Holmes' various options you would say And you would say that would be a factor pointing in favour of remittal rather than referring a new question to the CC.

MR. TURNER: It is a factor. It is also the scheme of the legislation which, as I say, requires the appellate bodies to do their job of deciding the appeal by reference to the grounds, and then the consequences are as written expressly into this Statute, a remittal for the appropriate action to be taken, if any. That appropriate action is not limited to mechanically implementing numbers which have been arrived at in the appellate process.

That is all I was going to say in relation to Ground 1. I am conscious I have taken some time about it.

THE CHAIRMAN: You have been interrupted a great deal, Mr. Turner.

MR. BOWSHER: Sir, can I just interrupt my learned friend briefly on ground 1 before he moves on, just to make sure the submissions are made on the full facts. You should have regard to the fact, sir, that there was evidence on this point put in with the PD response by EE, and that is referred to in the PD response document that you have been shown – it is para. 106 of that document. When you are looking at ground 1 my learned friend's reply should really be seen in that context.

THE CHAIRMAN: Yes, that point was made yesterday, I think.

MR. TURNER: On Grounds 2, 3 and 4 I will be very brief, as I was yesterday. Ground 2 is the point that the reasoning in the conclusions of the Commission included an issue that if you lose subscribers, or you drop usage, you may actually improve allocative efficiency rather than lose it, which was not put to us fairly, which was not in the notice of appeal, which was not in any of the pleadings, and the way in which this point cropped up, as was referred to in the Commission's Final Determination, para. 2.807, was by way of saying, as we saw from the provisional Determination: "We put this to Vodafone in its oral hearing, and Vodafone said …" Our point is, first, if a point is not in the notice of appeal, is not in the pleadings, it is outside the appeal; and secondly, that is not a fair way for the point to arise in this sort of process, particularly when, as I said on day one, it feeds through into the

conclusions because it is mentioned as part of the final reasoning, and that was an unfairness which is material.

There is only one party who, in its written submissions, has suggested that the point was raised in its statement of intervention, and that was 3, Mr. Kennelly, and I said if he wanted to deal with it orally I could respond. He did not deal with it orally. I am in your hands. I will leave it there, but I will simply say it is para. 127 of his skeleton, he says: "This is where we address this in our pleadings". In fact, as you will see from what is said there, he addresses a different question which is: what is the effect of losing multiple subscriptions. It is not the question of whether reducing subscriber numbers increases our allocative efficiency. That is Ground 2.

Ground 3 is the vulnerable consumers point. As well as what I say under Ground 1 the point there was that there was an inconsistency between what is said in one part of the Final Determination and what is said elsewhere.

It is said that the Commission was not persuaded that a significant number of vulnerable customers would give up their phones, but then it refers elsewhere to the elasticity of demand and how vulnerable consumers may be taken to be more price sensitive. The two do not stack up together. I have made my point about that. I did not apprehend any specific response.

In relation to Ground Four, Mr. Palmer is not quite right to say that we say it is purely a bolt-on to Ground 1 and stands or falls with it. We adhere to the points that we have made in our written submissions. The point is that there is a difference. If one has a more sudden drop in a glide path, then it means that people who might otherwise not have given up the phones, or dropped their usage if there had been smaller increments in price, would therefore do so. It was a matter to have been considered; there was no consideration given to it.

Sir, I am conscious of the time. Subject to any points from the bench, those are our submissions.

THE CHAIRMAN: Thank you very much. I have got no further questions. Mrs. McKnight.

MRS. McKNIGHT: I wish, in my reply, to deal principally with Ground B, but I think at this time it is probably sensible that I leave that until after the break and I will start instead with a small point on Ground A.

Mr. Bowsher yesterday took objection to what we said in respect of Ground A. This is the tariff mediated network effects. The Ground A which I dealt with in my written reply relates to our allegation that the Competition Commission has overlooked altogether a

particular form of competition detriment which would arise from reducing MCT charges from LRIC+ levels down to LRIC. We say that they have looked at the converse effect but they have not looked at this particular effect adequately or at all.

The way we put our case is that Vodafone adduced two types of evidence to make out to the Competition Commission that there would be a detrimental effect on competition by reducing MCT charges from LRIC+ to LRIC. We adduced academic literature to show the mechanism which the academics have recognised by reference to which this effect could occur, but of course, like all academic literature it proceeds on the basis of assumed facts about market conditions. Vodafone perfectly well accepted that the literature could only show the possibility of such an effect, the mechanism by which it could occur, but without factual support we could not show that such an effect would actually arise. Vodafone therefore, in its Notice of Appeal, describe a simulation model which it had developed, which Frontier Economics had developed for it, which used facts relating to UK market conditions to demonstrate that the type of effect identified in the literature was in fact made out and could be material in the UK market, and that therefore it would be necessary to take account of this in the balancing exercise of the type that Mr. Turner has described as relating to Reference Question 1.

The Notice of Appeal contained an annex which described the assumptions, that is the market condition assumptions, which had been used in the model. The way in which it developed was that at our oral hearing, Vodafone's bilateral hearing with the Competition Commission, the Commission asked questions to which Mr. Bowsher took you, and the Chairman asked whether the Commission could have a copy of the simulation model so that they could look at it in more detail. No objection was taken at that stage to the fact that the model itself had not been presented with the Notice of Appeal. Of course, you have seen documents which demonstrate that the Competition Commission feels it was perfectly proper, in the course of its work, to ask for supplementary materials which underlie evidence presented.

THE CHAIRMAN: Yes. I understand the model was provided and the CC had no questions.

MRS. McKNIGHT: That is right. The only point I want to make in reply is that Mr. Bowsher perhaps sought to give the impression that the parts of the transcript which he took you to showed that the Competition Commission had had regard to the model and had thought about it. We say clearly they had not thought about it at that stage because they had not got it. We then presented it to them at their request. In the email which is in bundle [B] 3 tab 34 (I will not take you to it) Herbert Smith sent the soft copy (the electronic copy) of the

model under copy of the accompanying email and said at the time that if you have any further meetings, I think it was, if you would like to have a meeting to discuss it with the staff, we are available; let us know. We heard nothing more.

It seems to us that it is very difficult for the Competition Commission to say now that they rejected Vodafone's case on the basis that the academic literature did not prove this effect and therefore the model was of secondary relevance, and the fact they did not follow up does not really matter because they had rejected the case on the basis of the academic literature, because the way in which our case was put was that the academic literature was not purporting to be the whole of our case; it would only ever be the first half of our case: this is a mechanism which can occur; let us now show you through the simulation model that it does occur.

Since the Competition Commission is saying we did not have enough information to evaluate the model, they must be conceding that they did not have regard to the totality of what the model could tell them because they did not ask for it. Our case is that we do not see how their case can represent a complete answer to the points that we are making. They failed to have regard to the model but on their own admission they had not asked for the information they needed to understand it fully. That is how we put our case on Ground A.

Again, I think it is probably sensible if I go to another of my -- what should logically be a -- final point but can be dealt with in short order. That is on timeliness. The Competition Commission has, particularly in respect of Mr Turner's Ground 1 but I think also in respect of our Ground B, suggested that the quality of assessment and work that they can be expected to do must be informed by the overall objective of getting a timely (as quick as possible) resolution to the price control issues raised on appeal and hence setting the final price control correctly if it needs to be revised.

We say that they attach undue significance to that as a consideration and imply that the only way that one can reach a timely resolution is by the CC itself coming up with the revised price control numbers if it finds fault with what Ofcom has done. But we say that that is not right because the Competition Commission has itself recognised that it does have the option of recommending that you direct Ofcom to adopt an interim price control while further work is done, such as Mr. Turner has described as being appropriate work for Ofcom to conduct. Of course, it is also in respect of Ground B. If we succeed in demonstrating that the network costing model is so deficient that it does not form a proper basis for setting the LRIC price control, it would be open to the Competition Commission to say that we have succeeded in our appeal in showing that Ofcom could not properly set a LRIC based price

control, that the thing it should have done then (the best judgment it could have exercised) would have been to set LRIC+ based price control until such time as the LRIC model could be rendered non-deficient (I will not say perfected in the light of Mr. Kennelly's criticism of my language). We say that would have been a perfectly proper thing for the Competition Commission to do. Indeed, it is not merely a theoretical possibility.

We say that in Section 7 of the Final Determination the Competition Commission does discuss the possibility of setting an interim price control. They say that some of the errors they have found can be corrected immediately, others they agreed were more difficult. They contemplated the possibility of remitting substantive matters to be considered further to Ofcom, or recommending that you should do so. In respect of 3's appeal which was successful, they agreed that making immediate errors and doing further recalibration in consequence was more difficult. They contemplated suggesting that Ofcom should immediately revise the price control to remedy some of the errors, but should then do further work before reaching the final final price control when the further work was done.

So we think that the Commission has presented you with an overly simplistic view of the options available to deal with matters in a way that protects the public interest while work that really needs to be done is done.

THE CHAIRMAN: How does such an interim price control work in terms of the statutory process in the 2003 Act?

MRS. McKNIGHT: Interim is not actually a technically correct word. It means that there would be two stages of remedial action. The appeal would be resolved by saying that certain of the price control questions have been answered in such a way as to show that Ofcom is in error. Some of the errors admit to an immediate identification of the corrective action that needs to be taken, and the price control can be revised in consequence of making those corrections. Other errors do not admit of an immediate identification of the corrective action that is required. Those matters require further consideration so that the price control that is adopted immediately by Ofcom, after the appeal, corrects some errors but leaves open the work to be done for the further errors to be corrected.

The way in which that is justified is that they are two sets of remedial steps that need to be taken in consequence of the success of the appeals, and that there is no impropriety in Ofcom's setting a price control at stage one of the corrections in the knowledge that it is not a perfect price control, and it is further stated that work is going to have to be done.

THE CHAIRMAN: I am just trying to understand. I quite understand this idea of dividing up the three year period. I am just interested in how, as a matter of process, it would work.

Presumably, what would happen is that the CC would answer whichever reference question it was by saying: the answer is that it should be LRIC+ until the regulator, Ofcom, can review questions A to D, and then Ofcom should impose whatever new price control in the light of those questions it sees fit. That would then be an outcome that would be notified to the CAT under s.193(4).

MRS. McKNIGHT: That is right. They would certainly notify that. I envisage they would notify their answers to all the questions.

THE CHAIRMAN: Yes, they notified on this continuing basis pending answers to further questions, it should be, say, LRIC+. We, then, are bound by that pursuant to s.193(6) absent an argument about judicial review. So there then might be a judicial review of the whole process. We then determine that. Let us suppose we say yes, the judicial review and the CC's decision stands on the merits. We then remit it back to Ofcom with those directions, saying for however long it takes you to do your revised decision you run at LRIC+, and Ofcom then starts the process all over again on the basis of these questions with a consultation and a fresh decision, which is then appealed (if the parties are minded to appeal) all over again.

MRS. McKNIGHT: Clearly, if the appeal is ultimately resolved by the remittal of questions to Ofcom, which do not require it merely mechanistically to implement something that the directions tell them to do but require them to do further work to reach a new judgment on what is the right level of the price control, then if that is a new decision which is amenable to appeal, that is not a function of the point I am making that you might have to use stages. That is just a function of the fact that the appeal results in an outcome where the Competition Commission itself has not been able to settle on a final figure.

THE CHAIRMAN: This is a very curious form of interim price control, because actually what you get are two styles of decision.

MRS. McKNIGHT: Yes, that is right, sir. I acknowledge that in the layman sense or the non-technical sense, it is interim; it is something that is adopted until some further work is done, but it will be an amendment or a replacement of existing price control, and it will be done in the knowledge that it is expected there will be a further price control set, not just at the next periodic review such as Mr. Holmes described, but before then if this further work is done.

THE CHAIRMAN: I had some sympathy with Mr. Holmes' submission that the present process is like painting the Forth Bridge. It seems to be adding an altogether new dimension where you are going to have to double the number of painters basically.

MRS. McKNIGHT: I am not suggesting this is what should be done in respect of any particular argument we are arguing, though we may come to that later this afternoon. What I am arguing is that the Competition Commission seems troubled by the thought that if it cannot reach a final decision on what the right answer is but the appeal is successful, the matter will be remitted back to Ofcom who will be instructed to set aside the decision which they took which was wrong, there will be no price control in place, and nothing will apply until such time as they have done whatever work has to be done. Regrettable though it may be for Mr. Holmes and his client that they have such work to do, clearly they would have to do it and that would be the right outcome, if there was something really deficient in the original decision and the CC cannot ascertain the right answer.

THE CHAIRMAN: What you are saying, Mrs. McKnight, is that a more nuanced response to a reference question can be contemplated in an appropriate case?

MRS. McKNIGHT: Yes.

THE CHAIRMAN: Whether this is an appropriate case or not we are not going to debate, but I understand. That is helpful.

MRS. McKNIGHT: Yes. Just a final point, when we are talking about work that should be undertaken by Ofcom we should bear in mind that you are entitled, if the facts justify it, to give directions that Ofcom reconsider their decision by reference to particular considerations, not that they just open up everything for reconsideration. So we should not assume it is a full price control review that is required to be undertaken.

THE CHAIRMAN: Would that be an appropriate moment?

MRS. McKNIGHT: Yes, certainly, thank you.

THE CHAIRMAN: Indication as to time?

MRS. McKNIGHT: Perhaps I could indicate when we come back. I would like to speak to Mr. Turner about whether I could helpfully elaborate on some points he made. I think my own would not take more than an hour.

THE CHAIRMAN: 3 o'clock would be a very satisfactory end time.

MRS. McKNIGHT: Yes, for me too. At 2?

THE CHAIRMAN: We will resume at 2 o'clock.

Adjourned for a short time

THE CHAIRMAN: Mr. Turner?

MR. TURNER: It is Mrs. McKnight's turn, but there are two matters which it was agreed that I could very briefly deal with rather than her taking it through in the course of her

submissions, and only two very brief matters. The first is in relation to your question to me before the short adjournment about perverse incentives.

THE CHAIRMAN: Yes.

MR. TURNER: It is a good question, and one answer which perhaps I should have given is as follows: it is not a realistic scenario in this sort of circumstance because it posits that you have an appellant who can put forward all of their case, including the evidence, to succeed in knocking down Ofcom's methodology and therefore its conclusions, but hold back on the part of it which would be needed to see what would be needed to put in place afterwards. That is a dividing line which, in practical terms, it is not possible to draw. It is not as though there are neatly parcelled out sets of evidence, because it all falls within the same pot. It cannot be divided in that way when you are putting forward your case.

The second point is this: in relation to the discussion about the question of what is to be done if we were right, and I speak only for our case rather than Mrs. McKnight's, the two situations which were being considered were sending it to Ofcom on a remittal after the appeal is disposed of, or sending it to the CC. One has ringing in one's ears the siren cries of Mr. Holmes about the work that would be involved for Ofcom and certain practical difficulties that they apprehended would follow from that.

What was drawn to my attention over the short adjournment is this point, which is a good one: Ofcom is a party at the banquet in the appeal itself, of course. It is one of the parties to the appeal. It is possible to ask the CC, if there is this one missing piece of evidence, to arrange for Ofcom to obtain the relevant evidence and for that then to be used to achieve a final result in the appeal. The advantages of that course are that it achieves the quickest practical decision about which, from the judicial or Tribunal's point of view, no one can really legitimately complain. It minimises the scope for further applications or tactical appeals, or an appeal from this Tribunal to the Court of Appeal or whatever, but it is a way in which, if you do detect error, as we have alleged, the matter can most practicably be brought to a conclusion.

I do not say that is the case in relation to my friend's Mrs. McKnight's error, which is why I am speaking to it, but on reflection, in relation to your questions, that did something necessary to bring to your attention.

THE CHAIRMAN: That is very helpful. It is very easy to overlook that Ofcom is a party as well as ----

MR. TURNER: I had, frankly, overlooked it. What we would require, therefore, would be a direction from this Tribunal under the statute to the Competition Commission essentially

saying something like, having regard to your conclusions about the location or the nature of the price changes, you should arrange to gather the appropriate empirical evidence, and then form this conclusion on Reference Question 1. I say no more about it, and that is all I wish to add.

THE CHAIRMAN: Thank you. Mrs. McKnight?

MRS. McKNIGHT: Thank you. I will go to the issues relating to our ground B. You heard yesterday from both Mr. Bowsher and Mr. Kennelly submissions to the effect that Vodafone's ground B is not a proper judicial review ground, it is an attempt to reopen the merits; or, even if it is framed as a judicial review ground, it cannot possibly succeed by reference to the test that one has to apply on judicial review. Mr. Kennelly sought to position this submission within an overall framework which invited you to consider the function of Ofcom, the Competition Commission, the Tribunal, in respect of this subject matter. I think I should come back and explain how we see those issues.

Sir, we say that it falls to Ofcom initially to decide whether there is a significant market power (SMP) in a particular market and then to set price controls if they think that is the right thing to do. We say that when they are making those judgments, and particularly once they have decided there should be a price control and they are then having to set it at the level, or by reference to a methodology and at a level which meets all their statutory objectives. Since they are charged with doing what is best to maximise consumer welfare, to protect incentives to invest, all these considerations, and since it is widely recognised that the imposition of a price control is a very intrusive measure of regulation, and that is not just a matter of policy, it is actually recognised in the 2003 Act, that s.87 provides for the imposition of conditions where you have found significant market power. Section 88 says you are not to impose a price control unless you are satisfied that it is necessary to meet particular objectives, or to avoid particular risks.

When we say what sort of standard of conduct an investigation is required to be undertaken by Ofcom before doing this, we do engage the double proportionality test. It is a part of the proportionality principle of public law. We say that not only must the measure be substantively the least intrusive necessary to achieve its legitimate objectives, but proportionality requires that in deciding what that final price control should be, a high degree of consideration and refinement is required to discharge the substantive proportionality obligation to the requisite standard.

I think that if you are going to set a price control, you set about setting a price control at the LRIC level. I think it is particularly important that the task is undertaken to a high standard

because LRIC is, by reference to all the potential standards contemplated, the lowest. Therefore, if you decide to go for LRIC but then undershoot it, your methodology is apt to understate the correct measure of LRIC. You risk doing quite a lot of damage, falling short of attaining your statutory objectives and causing more damage than if you were trying to set LRIC+ and undershot that slightly because in this case you have heard, even from the Competition Commission, that the factors which favour LRIC over LRIC+ are quite marginal in efficiency terms. That is their case. If you have gone for LRIC+ but undershot it you would not be doing much damage, but if you have go for LRIC and undershoot you really are going too low.

We say that we start from the fact that Ofcom had to do a very careful and refined job to set price controls in compliance with its statutory and public law duties.

They have taken their decision, it then goes to CC. I think there is absolutely no dispute that is for the CC to review Ofcom's decision on the merits by reference to the grounds of appeal. I am not going to focus at this stage in my exposition on what is the significance of the limitations imposed by the grounds of appeal. I want to take it as read that we are within the grounds of appeal, but I will come back to the tension that you identified, sir, between the grounds of appeal and getting the right answer.

A merits review means that the Competition Commission should look at each substantive element of Ofcom's steps towards its final decision to the extent those steps are challenged by the grounds of appeal. Because it is a merits appeal, they should not decide whether Ofcom did something reasonable at each step along the way, but whether Ofcom reached the right decision and where the decision entailed not just a finding of fact but the exercise of judgment, whether they made the best available judgment.

We perfectly accept that there are areas of discretion. Judgment and discretion merge at some point sometimes. The case law is quite clear. You were taken yesterday, I think, to *Hutchison 3G v. Ofcom* [2009] CAT 11. Of course what that says is that it is a matter of the Competition Commission substituting its judgment where it thinks that Ofcom did not reach the best judgment among those available. Where there was a range of possible judgments and you cannot choose between them, or among them, as to which is best then it is perfectly acceptable for the CC to say, "We will not overturn Ofcom's judgment, because we cannot honestly say anything else was better". While Ofcom essentially defends its decision by saying, "We did enough, it is not perfect but it is an approximation, we did enough", that is, in itself, a judgment that has to be questioned. So the Competition Commission, when a point is raised on appeal, should say, "Did you do enough, you had a double proportionality

obligation, you had to do the right amount of work with due diligence and refinement to reach your decision, and you are saying you called a halt at that point, you did not do any more, but was that right having regard to the potential materiality of this factor, the sort of work that would have been required, did you make the right judgment?" All of those things, we say, are part of the profound and rigorous scrutiny on the merits that is required of the Competition Commission.

I have focused on the fact that this has to be applied by reference to points raised in the notice of appeal, but of course it applies equally to points raised in the defence or statements of intervention in support. If we have a case where 3 comes in in support of Ofcom and say that Ofcom made the right decision, not just for the reasons they gave, but for some other reasons, and then Vodafone says, "No, those reasons do not help, our initial grounds of appeal still show some error", clearly the same degree of rigour is required in the scrutiny of points raised properly through the pleadings.

We say that if the Competition Commission concludes after doing this task properly that Ofcom's decision is unsafe in some respect, that is Vodafone has succeeded in showing some real deficiency in what Ofcom has done which shows that the end result is unreliable, then the appeal should succeed.

If we can go further and say that the best way to remedy that deficiency is this way and it leads to a different answer, bingo, we definitely win. We are saying that we do not have to do that, and indeed sometimes the greater the deficiency the harder it is to put it right because it is so embedded in the model, or whatever it is, that very substantial work would be required to put it right which an individual appellant with its own resources could not necessarily do. We should, in principle, be able to win by showing a real deficiency in the method that led to the price control figure, even if we cannot put that deficiency right.

THE CHAIRMAN: You are making Mr. Turner's point that there is a difference between identifying a mistake and correcting a mistake?

MRS. McKNIGHT: Yes, clearly, yes. It was raised, I think, by Mr. Holmes this morning that what we are telling you now is quite different from what one has observed in previous MCT appeals. I think Mr. Holmes put it to you that parties have in the past shown a deficiency and shown how it should be remedied. We agree, that is ideal, but this price control appeal is quite different. Until 2007 Ofcom was using a network costing model which had been designed for the purpose of setting a LRIC+ charge control. It had to measure total network costs and then the total network costs were allocated among call termination and other traffic services by the application of so-called routing factors. If an incoming call from -----

THE CHAIRMAN: Mrs. McKnight, can I just interrupt you. I must say, speaking for myself, I would not be minded to decide against you on the basis that something had not been argued in the past. It seems to me that you have made a point now that the model is deficient, but that you cannot identify how that model could be made better, and you are saying you do not have to.

MRS. McKNIGHT: I will not then take you to the particular distinction. All I will say is that you should bear in mind that this is the first time this model has been adapted, if adapted at all, or used, to set a LRIC charge control. All the matters now in issue in this challenge relate to the suitability of the model for that new task. We say much more should have been done to make it work. So it is not surprising in a way that we cannot come up with the right answer. We can just show what is wrong.

THE CHAIRMAN: I think, Mrs. McKnight, Mr. Holmes might have been making a more subtle point, and if he was not then I will make it now. It is common ground that all models are imperfect ----

MRS. McKNIGHT: Yes.

THE CHAIRMAN: -- in the sense they are not an absolutely clear cut and perfect representation of what is going on in the real world. So you cannot say, given that that is the common ground, you cannot say that this model is deficient because it imperfectly reflects the world.

MRS. McKNIGHT: And we are not saying that.

THE CHAIRMAN: So you have to go further and say it is deficient, and I suppose the question is: what does deficient mean? It does not mean that it does not properly represent the real world because we know that all models share that unfortunate characteristic. So is it not inherent in showing that the model is deficient to show at least in some way that there is a better way of doing it?

MRS. McKNIGHT: Yes, well that could be one way of doing it. I think if I were arguing that Ofcom has done a moderately good job in approximating to reality, but they should have done a better job I would be entitled on a JR to argue that because what I would be saying is that because the Competition Commission just deferred to Ofcom's assessment of what they should do, they did not properly address their minds to whether a higher degree of refinement was required to meet the double proportionality test, but I might have difficulty persuading you that you should set the bar higher for double proportionality, or that there was any possibility that it could have been set higher so I could succeed.

I am not arguing that. What I am saying is that Vodafone said the model is being used to do something quite different from what it was originally designed to do. We look at the

outputs and we see that they are implausibly low, and we can immediately see some reasons why that might be so – potential deficiencies. They were not just that it could have been done better, but the way you have set about this is structurally inapt to produce a model that will be fit for purpose.

What I am going to be saying to you, when I get to this bit, is that 3 came forward and said to the CC: "Do not even trouble about worrying about all these alleged deficiencies, you can satisfy yourself that the model is structurally apt through the iterative calibration. So if you think that is right, CC, then you can essentially say these supposed deficiencies are not really important, but if Vodafone can actually show that it can be improved then let us go case by case through and see where we can improve it.

What we then say is that the CC in addressing and picking up and running with Hutchison's suggestion found that that was an answer to Vodafone's case, but that it is not an answer at all because it is self-contradictory, it is irrational.

I think if we have alleged deficiencies of a type which go beyond just saying: "It could be a better approximation", we are saying: "There is something fundamentally wrong with the way this model sets about trying to do LRIC", and then the CC says: "No, there is not", we do not look at those particular deficiencies to test it, we have another reason for saying it is fine, but the reason they give for saying it is fine is irrational in simple JR *Wednesbury* terms, then that must be enough for us to succeed on JR.

PROFESSOR MAYER: Could I just ask a related, slightly different question. You are arguing that there is a real risk of error in moving to a LRIC approach, but is there not also a risk of error in sticking with a LRIC+ approach insofar as there may be a risk of error with action, but there is also a risk of error with ----

MRS. McKNIGHT: Sorry?

PROFESSOR MAYER: There may be a risk of error in action but there is also a risk of error in inaction in sticking with a model that is not allocating costs appropriately?

MRS. McKNIGHT: Just so I understand the question, are you suggesting that if I am successful in showing that the model is not apt to do LRIC and we default to LRIC+, is your concern that the model does not accurately predict LRIC+ either, or for reasons of allocative efficiency and everything else that might not be the right answer either?

PROFESSOR MAYER: The latter.

MRS. McKNIGHT: Yes, well what I would say is if you conclude that I have demonstrated that the model cannot safely be relied upon to produce a LRIC number I think you would have no option but to set aside, or to direct that the charge control be set aside. Perhaps I will

caveat that by saying that I will come at the end of my submissions to what you should do if think there is some halfway house of sending it back to someone to sort it out. But, I think you would have to conclude that the 0.69ppm that has come out of this model is not a safe number to be a foundation of a charge control.

The question then is what you should do or what Ofcom or someone should do in the meantime. In my submission Ofcom considered that the two best candidates for setting a charge control would be LRIC+ or LRIC. If, on balance, it would have been better to do LRIC, if LRIC could be done properly, but LRIC cannot be done properly, I would submit that the best attainable option is a LRIC+ charge control; the other option is no charge control at all. I am not authorised to speak for all the MNOs but I think it is correct that they all consider that there is a bottleneck monopoly in the provision of call termination for the time being and some charge control is appropriate.

You would be setting a charge control which is the best attainable on the basis of the information one has and the model one has.

PROFESSOR MAYER: I suppose my point is in your terms that there is a lack of safety on both sides. There is a lack of safety in sticking with LRIC+ and there is a lack of safety in moving to LRIC, and I am not quite sure how to balance those two elements of risk.

MRS. McKNIGHT: I think in that situation at least you would have to direct that charge control be set aside, because the whole underpinning for this charge control is that the model is apt to justify a conclusion that 0.69 ppm is the best level at which the charge control can be set. We would have demonstrated that that was not a safe conclusion. The best thing to do then is to set aside the charge control. If you did not consider that the best option, once that has happened, is to set a LRIC+ charge control, then I think we would be left with Ofcom, or whoever it is, being charged with deciding what is the best thing to do.

THE CHAIRMAN: Mrs. McKnight, I think Professor Mayer is making a point of two evils being weighed one against the other, which are unfortunately incomparable in the sense that they are apples and oranges, rather than apples and apples. Let us suppose one has reached a clear view that a LRIC based cost control is, for various reasons, unequivocally better than a LRIC+ based cost control, and so that is what one should be aiming at. But, because it has not been used before modelling the world with a LRIC charge control rather than a LRIC+ charge control involves a new endeavour, striking out on a new course which has not been modelled before because it has not been used before, and you say that unfortunately, because it has not been modelled before it is actually a rather difficult question. The old

model, the LRIC+ model had been nicely road tested and been used for years and one knew what one was dealing with. The new model is new and ----

MRS. McKNIGHT: Just to stop you, it is not new, that is our problem. It is much the same, but anyway that is not my point ----

THE CHAIRMAN: No, I am using the phrase "new model", it is modelling a new type of charge control, it is a new model on that definition. The two evils that you are balancing out are, on the one hand, your suggestion that one divert back to LRIC+, which is undesirable because on my hypothesis LRIC is the more appropriate control, we will just assume that. On the other hand, if you go for LRIC charge control you have a model that is less well road tested, and that entails its own disadvantages. Now is it not a question of judgment for the regulator to decide the balancing of those two evils, and it is not enough for you to say: "The model could be better because it is new."

MRS. McKNIGHT: We are not saying just "the model could be better". We are saying there is something seriously wrong with the model, and the decision that the CC has made rejecting that is self-contradictory and irrational.

If we are right in that, if we can establish to your satisfaction that this decision is *Wednesbury* irrational, then I think we come back to the point that Mr. Turner was making to you today about what then happens. We establish an error in the CC's determination which we say is fatal to the conclusion they reach. The question then is do you say if the CC had realised that they had made this error, that they had then been faced with the knowledge that, on the one hand LRIC was better in principle as a methodology, but the method that had been used to do it was unsafe, would that have made a difference to the judgment they would have made, or if this had been Ofcom the judgment they would have made?

We say you cannot decide that; it is not proper for you to decide that. If we establish our irrationality ground of challenge to their conclusion that the model is safe, then I think you have no option but to conclude that the determination has to be set aside. If you were then to say whoever looks at it next should first see whether they could put the model right. If they cannot they should consider whether on fresh examination something can be done to make the model usable, if not perfect, and I do not suggest for a minute that perfection is the standard, if not substantially improved or whatever, and you weigh that against the detriment of going for LRIC+ instead. That may be an appropriate next step but it is not one that can be taken as the resolution of this challenge, because if we succeed at all we

would have succeeded in showing that there is something fundamentally deficient in the CC's determination.

PROFESSOR MAYER: Is this not the type of judgment that arises in numerous circumstances? To take another example, if you have a patient that could have two courses of treatment there are risks associated with both, there are advantages and drawbacks of both and one has to take a judgment.

MRS. McKNIGHT: Yes, but if, in judicial review territory, we say that the judgment that the Competition Commission made proceeded on the basis of an irrational assessment of whether there was a risk to one of those treatments and they concluded there was no risk, or the risks were minimal, which is perhaps the analogy for saying it is a good enough model, if we show that that was irrational you set aside the doctor's decision that that was the better course of treatment and you say there was something fundamentally wrong with your assessment of the risks of one of those courses of treatment, either you or someone else in your place must now look at that course of treatment again, see what the risk assessment is and then compare the two, but I do not think that there is anything on which you could found a conclusion that even if the Competition Commission had realised the model was not as sound as it was, and was not sound at all, they would still have thought one should go for a LRIC based charge control, and that would have been self-contradictory in itself, because if you conclude there is a real risk that this model does not compute LRIC, it computes something it calls LRIC, but because of the actual or potential unsoundness we cannot be confident that what pops out at the other end is the LRIC number, then it could not possibly be rational to go with that.

To take your medical analogy it is a bit like saying the patient has one particular illness, two courses of treatment are presented and evaluated by reference to their pros and cons, but it then becomes apparent that one of those courses of treatment does not necessarily treat that illness at all, it might do something quite different. Once that becomes apparent you would have to bring that to bear, and it would almost no longer become an option I suspect.

THE CHAIRMAN: Mrs. McKnight, suppose an entirely new technology is developed by a communications provider in circumstances where that provider has SMP and all the prerequisites for the imposition of a charge control are met, but because it is an entirely new technology the data from which one could build a model in order to work out how to impose the charge control simply does not really exist, it is not there because the technology is new, and so the regulator pulls together the best it can in terms of analogy and builds a model which it frankly acknowledges is almost certain to be an inaccurate reflection of how

the real world would work but is the best he can do drawing upon, as I say, whatever assumptions the regulator has seen fit to use as data for the model. Let us suppose for the sake of argument that the only way in which one can get all the data to make the model run is to involve a certain degree of inherent inconsistencies and points of detail that one can tell are not internally consistent. Is it your case that because of such deficiencies the model has got to be rejected?

MRS. McKNIGHT: I simply cannot answer that in the abstract because our case is not there are just some internal inconsistencies and that amounts to irrationality. It is that faced with different design parameters for different years and a question as to whether those different design parameters reflect some underlying reality and are therefore a good reflection of reality, or are conversely just random pulling of calibration levers.

We are willing to make the assumption, for the purposes of this part of the discussion, that they might be consistent, that the reason you see different design parameters from one year to the next is because something different is happening in those different years. It does not trouble us *per se* that there are different design parameters; it troubles us that faced with different design parameters the way in which first Ofcom decided to do its subtractive approach failed to recognise the importance of taking account of the earlier year parameters and doing the subtractive ex-MCT run. When the CC was asked to re-evaluate it, the justification it came up with for saying that the model was working fine is itself self-contradictory. It is the self-contradiction on the CC's reasoning that troubles us, not differences in the parameters.

To go back to your question again, I know you are only posing this as a sort of theoretical point for testing my submissions, but I genuinely think it is not a helpful suggestion because with the new technology, and presumably a new entrant has invented it and is using it, it is inconceivable that Ofcom could think it proportionate to impose a LRIC price control when all the competition literature and thinking is that it is a massive disincentive to innovation if as soon as you are successful you have a LRIC based price control slammed on you. The problems that arise here arise from the fact that it is a multi-service mobile network and we are talking about breaking down different traffic increments. I do not think one can posit that a new entrant would face this difficulty. Indeed, when Hutchison entered, it was not price controlled. That is my recollection.

THE CHAIRMAN: Just one last question unrelated to my example. To what extent do you accept that pulling together a model, creating one, involves questions of judgment?

MRS. McKNIGHT: I accept it does, yes. I think so far I have talked about what I say is Ofcom's role and the CC's role in a merits review. I think I have got to the stage of saying that it is sufficient for us to prove deficiencies of the relevant kind to have the decision set aside, not jut that it is merely an approximation. That is not a deficiency, that is just a recognition of what a model is, not some structural inaptness in the way the model functions. Then I have moved on to what is the Tribunal's role. We say that once the Competition Commission has made its Determination the Tribunal should refuse to follow that Determination if a challenger makes out a case where the Commission's Determination would fall to be set aside on judicial review grounds (s.193(7)).

You might be asked to set aside a decision on the basis that instead of conducting a proper merits review the Commission just applied the wrong test, it mischaracterised the task allocated to it; or it might be that it did not test particular elements of the judgment so it applied on the whole a proper merits standard of review, but it overlooked certain elements of the judgment which were material in the decision making process; or it might be that we say that it set about doing a merits review, but in making a judgment on particular issues as to whether Ofcom had got it right, had made the best judgment and best decision, the reasoning that caused the Commission to conclude it was all OK was irrational in *Wednesbury* terms.

I am going to go on to explain how those considerations apply to this case. I am going to be explaining that part of our case is a pure *Wednesbury* irrationality case. That is essentially paras.3.66 to 3.72 of the Final Determination. Then I am going to say that I think it is 3.71 which is the paragraph which says although we think the model is essentially sound as is to derive LRIC, we do acknowledge that if Vodafone can make out a case for a particular adjustment on a case by case basis for the ex-MCT model, then such an adjustment should be made. I am going to say that in deciding that particular adjustments should only be made if Vodafone demonstrate them by appropriate evidence to be a better alternative, a better parameter, the CC approached that in a legally erroneous way. What the CC was doing was saying: Vodafone has appealed and said it would be better to have this adjustment to the model, so they have to prove it would be better. That is not what we were doing. What we were doing was saying there are certain areas of factual uncertainty - for example, when we observe a different proportion of microcells and picocells at different traffic levels, there is an area of factual uncertainty as to why there is that difference. It could be wholly related to traffic; it could be driven by different coverage attainments in the different years, or it could be something else, just technology is changing.

Faced with that factual uncertainty which cannot be resolved practically speaking, there is no way of finding out what drives that, it was not proper to say: we leave the parameter as it is in the later year because Vodafone cannot prove it should be changed. What the CC should have done is it should have said: faced with this uncertainty as to whether the later year parameter or the earlier year parameter is more apt for modelling the ex-MCT network, what we should do is test whether Ofcom applied a fair and balanced approach so as to come out with a result which is not systematically skewed towards getting a lower LRIC number. I do not say skewed in the sense of motivated by a desire to skew, but by the application of a test which had that result. We say that the test that Ofcom applied was to say Vodafone and others in the same camp have not proved this is traffic related so we will not make an adjustment. That was a skewed test. A more balanced test would have been quite different.

So the CC endorsed Ofcom's judgment and applied the same test itself. We say they should not have done that. They should have said: is that the best judgment? They were not even considering whether that was the right approach. They saw this as a case where Vodafone was trying to prove there should be an adjustment; it is an appeal on the merits; they have got to prove it.

When we look at the Final Determination we see that is not what Vodafone's case was at all. Vodafone said the model is unfit for the purpose of determining LRIC, and the reason it is unfit is because it does not have a way properly of modelling the ex-MCT network in any given year; it does not make potentially appropriate parameter adjustments to reflect the lower traffic levels associated with the ex-MCT volumes.

Vodafone put forward a series of sanity checks and plausibility assessments to say: look, the model is telling us that nothing changes in this regard with traffic, or the model is telling us that coverage assets are as big as this when that seems implausible. Vodafone suggested what might be a more reasonable assessment for those parameters, but it was not putting them forward as adjustments it could prove; it was saying: these are all elements that go to illustrating and convincing you, the CC, that the model is not achieving a realistic result because it is not structurally apt.

The proper thing to have done would have been to test the soundness of the model by reference to those considerations. But the way the CC set about it, they said before we look at any of those points you are putting forward as deficiencies in the model, or evidence that it is deficient, we are going to decide by reference to what 3 told us about calibration over time, we are going to test whether it is overall OK for those reasons. If it is, if we are

convinced that it is fundamentally sound, none of the points you have raised will be of relevance unless you can prove there should be a particular adjustment.

Can I take you to some documents to make good this point? Would that be an appropriate time?

THE CHAIRMAN: By all means. You can give us references and we can catch up reading after the event.

MRS. McKNIGHT: OK. To make good the points that our Notice of Appeal put forward the various deficiencies in the model I think I would like to take you to the Final Determination. Can we turn that up at A2 right at the beginning, chapter 3. I would like to take you first to para.3.36 on p.3-9.

> "Vodafone and EE alleged the following key deficiencies in the 2011 Model.
>
> (a) Ofcom had wrongly specified the ex-MCT network".

That is dealt with in the paragraphs that I have taken you to before. The arguments of the parties are set out at paras.3.39 and following, and then at 3.66 we get the CC's assessment. But then all the following, (b) to (o) are further allegations, well for the most part they are further points made by Vodafone to show that there were deficiencies in the model, it was producing implausible results, it did not work well at low traffic levels. None of those were instances where Vodafone had said: the correct way to remedy that is to do this. We were not trying to prove a particular adjustment. All of these were put forward as evidence that the model was not working.

Then in Part 2 para.3.37, this is the part of Vodafone's appeal where Vodafone said the LRIC model is so bad for LRIC implementation we cannot put it right for you, but what we can do is we can suggest various other ways of getting a rough approximation to what might be a LRIC number, some of them using a subtractive approach, some using a quite different approach. None of them were put forward as corrections to the model; they were put forward as further corroboration that other methods which might be expected to home in on the LRIC number were coming up with something much higher.

So what the Competition Commission has done is in paras.3.66 to 3.72, it has said: before we even start thinking about all the points made in (b) to (o) what we should do is we should assess separately whether the LRIC model is sound, and they relied on the time shift argument, as we say, to conclude that it was sound. They then said: since we have convinced ourselves without even looking at Vodafone's criticisms that it is sound, when we approach each of these alleged deficiencies we will do so on the premise that what we are supposed to be looking at is whether, when we have got a basically sound model to start

with, there is a case for making an adjustment to any of these lines. We say that their assessment of all of these is tainted by the fact they had wrongly convinced themselves that they had a sound model to start with. That is the inherent irrationality of paras.3.66 to 3.72, or, if you read it as Mr. Bowsher encourages us to, it is not reliant on time shift at all, the absence of any reasons to found such a confidence in the model.

Could I take you to 3.71. This is part of the reasoning I have already discussed with you. It says:

> "We also agree with Ofcom that it is not appropriate to treat costs as being wholly or partly the avoidable costs of the final increment unless there was an evidential or analytical basis on which Ofcom could conclude that those costs would not be incurred by the hypothetical efficient operator in the absence of providing MCT services."

That is where they have said in the previous paragraphs that they are satisfied that the model is sound as is, so an adjustment has to be proved. That forms the foundation for everything that follows. They then go on to look at these things. We say that all of that is then tainted by the fact that they have wrongly convinced themselves that they have got a sound model to start with.

PROFESSOR MAYER: Could I just raise, one of the issues that you emphasised yesterday and have reiterated today is point about the constancy of the parameters, and I did pursue this a little bit yesterday and heard a response that the parameters do not vary sufficiently as to make it necessary to change the period over which one is doing the analysis of taking out MCT. I do not want to enter into a debate as to whether or not the parameters are constant or varying, but is it not fair to say that there is an element of judgment that has to be made – one can do some statistical tests, but to define it as being irrational to say that one is choosing to assume that parameters are constant or not does not seem to me to be a very obvious conclusion to draw.

MRS. McKNIGHT: Well, Professor, I am not sure who actually said to you that the parameters do not shift much. I thought the point that was made by Mr. Kennelly was that, of all the parameters, we have identified five that adjust. I do not think it was suggested the adjustments were not significant in themselves. There is a question as to whether the five parameters are material as to the final output, or have I misunderstood?

PROFESSOR MAYER: It was put in terms of it was not necessary to shift over time to do the ex-MCT adjustment, at least that is how I understood it.

MRS. McKNIGHT: My answer to that would be this: we say that the five parameters or so that we have identified, one was the HSPA adjustment which I agree is not so pertinent. The parameters which we have been discussing, cell radii, cell breathing, picocells and microcells, and a couple of others, they are material to the end result.

Could I take you to Mr. Roche's witness statement, Roche 3, I can illustrate that.

PROFESSOR MAYER: If I can just say, my point is not so much whether or not it is correct that the parameters are constant, but that is at the end of the day a matter of judgment.

MRS. McKNIGHT: I think that it is a matter of judgment possibly, but it is not a judgment that the Commission has exercised. What the Commission has said is that the model predicts, or dimensions, a network from year to year using the particular year's version of the model, and it has design parameters. Because it calibrates to real world outturns for each year we can be confident that it is working well over all traffic levels. We say that logically that is simply not correct if you have several design parameters which shift over time and you have not examined why they shift. The fact that they then go on and say, "In other words, it operates like a time shift" suggests that they have not addressed their minds to that because that creates a clear impression that they are suggesting that for the ex-MCT run of the model you would apply the earlier year design parameters because you are essentially treating the ex-MCT traffic growth as a model that is running a few years behind the principal model.

So the CC has created by its reasoning a question as to why can you be confident that the model is operating effectively to this attractive approach as implemented by Ofcom when you have, yourself, identified that the principal basis for confidence is matching to verifiable outturn data at total traffic volumes in a different year where there are different design parameters.

We say that if they are suggesting that it is operating as a time shift when they know it is not, that is self-contradictory. If they are saying it does not matter, the differences are not big enough to matter, so you can run the ex-MCT traffic volumes through at the later year, they have not explained why they think those differences are not material, so there is an absence of reasons. They had very clear submissions from us that they were material, and indeed they are material. We say that either it is self-contradictory or if they are trying to reconcile the apparent contradiction by saying the differences in the parameters really are not material, they have not provided any reasons for that.

Their position has shifted even over the last few days, because previously they were saying that they were adopting Ofcom's reasoning from the MCT and they chided us for not having raised these points in our notice of appeal if we disagreed. They now say in oral

submission that, of course, this is something that all arose during the course of the appeal proceedings thanks to Mr. Mantzos's evidence. 3 are now saying that it was put forward as a useful analogy, Ofcom say the same. They are both suggesting that this is not, in itself, a very compelling reason. If the CC is placing more reliance on it than 3 did it is certainly incumbent on them to explain their reasons for finding this more compelling than anyone else does, and they have not provided any reasons. That would be our position as to that.

MR. LANDERS: In one of the passages you have just led us to, 3.70, it says that EE stated that there would be infinite number of ways that ex-MCT network could be hypothetically re-optimised. Does that not imply that there is an infinite number of ways that the model could be calibrated, that various elements could be adjusted?

MRS. McKNIGHT: Yes. So what we are saying is that if the CC is going to say that the model is essentially sound because it is calibrated over time in a way that is likely to be better than anything else you can do because at least it calibrates to real world data and a hypothetical network has never been built, it could not be calibrated with anything, we do not persist with our case that we should build a hypothetical network and model that. We still think it is a good idea, but that would be a merits point and we do not pursue it. What we say is that we take the CC's judgment that they do not want to go the route of building a separate model for the ex-MCT network from scratch, which is what Vodafone and EE were advocating. They are going to take the model for the full traffic service and the question is, does anything need to be done to make it suitable to deal with the ex-MCT traffic volumes? We say the reason they put forward for saying, "no, nothing needs to be done because it is like a time shift, it is already calibrated to the ex-MCT traffic volume because that was the full traffic volume in an earlier year", that reasoning, in itself, creates a question which they have not answered. It creates the question: which set of design parameters, the one for the year or the one for the volume, is more apt?

We are essentially giving up a large part of our case. We are saying of all the infinite ways you could have done it, we are not now suggesting you go for what we think is best. We are saying, let us narrow it down, you have got two possible ways of designing this ex-MCT network, either it is exactly the same parameters as the full traffic network for the relevant year or it is the different parameters for that particular traffic volume in the earlier year, or you come up with some rational way, a good way, of bridging the gap, of choosing or splitting the difference in some way. What we are saying is, the reasons that the CC adopted create that question and necessitate that it be addressed.

Our next point is the way they have addressed it is to say, for no reason, "The starting point, the presumed answer, is that we stick with the same parameters for the particular year, and you, Vodafone, have to prove that the other value, or some other value altogether, is more appropriate". We say that that is not a balanced or a fair approach, it is calculated to cause an understatement of LRIC.

MR. LANDERS: If there is an infinite number of hypothetical realities, then there must be an infinite number of ways that the parameters could have been adjusted, so really it is just a question of judgment, is it not?

MRS. McKNIGHT: No, I do not think that is a fair reading of this. That is addressed to a different point. That is saying that one reason we prefer Ofcom's model as a starting point is because it can be calibrated to the real world, whereas any network that is just built on the basis of a hypothesis as to how one would build a network that was never intended to provide an MCT service, there would be no way of cutting down the number of options. We are not troubled by that paragraph for JR purposes.

I have dealt with the basic JR grounds that we allege. Could I just deal with the point that was raised about tension between the overall review of the model and the grounds of appeal. I think, sir, you put it to me, and it was also raised by others, that we have alleged particular deficiencies in the model and none of those have been found to be good. If the CC rejects the deficiencies we identify but then says, "And what is more the model is fine for other reasons relating to time shift", do we have a valid complaint that they might have been irrational in that regard if our appeal would have failed anyway because the particular deficiencies we alleged have failed?

I can see that if that were the situation we may be in some difficulties, but that is not the situation. For the reason I have explained, we allege particular deficiencies in the model as evidencing the fact that it could not be working properly. The way in which the CC addressed those deficiencies was, as I have described, to say at the outset, "Before we even look at the deficiencies, we will judge the overall appropriateness and soundness of the model". They assessed the soundness of the model as a means of deciding whether our deficiencies had any validity. Because, in our view, they reached an irrational judgment on the overall soundness, that then tainted the way in which they examined our particular evidence of deficiency. Therefore, is not just an *obiter dictum*, it is not that they have rejected our case and then said that the model is sound for other reasons. The finding of soundness is the basis which causes them then to examine and reject our deficiencies. That

is the nexus between the grounds of appeal and this requirement that they do the job properly in this regard.

Could I just also turn now to the individual adjustments which Mr. Kennelly touched upon? He pointed out that I had only had time to address microcells and picocells and he, therefore, did the same. He suggested to you that I do not have a proper judicial review ground in respect of the treatment of the adjustment for microcells and picocells because what was actually happening was that the CC simply found, in the manner in which it was entitled to do, that on the evidence there was no adjustment justified by reference to traffic. I start with the point that founds this element of our challenge, that that was not the right test to set. It should not be for us to prove it is traffic related because that skews the outcome against us. The CC should have said that when Ofcom decides there should be no adjustment unless a particular party can prove a traffic related justification, that is not the best or a fair way of approaching it, because it is calculated to load the dice against an adjustment. Therefore, that was not a proper approach for the CC to apply because they had not addressed their own minds to whether Ofcom was doing it properly, it was applying the right question. What is more, if we look at that part of the Final Determination, in paras.3.130 and 3.131, we find that the CC did not, in fact, find, as Mr. Kennelly suggested, that their evidence was accepted so as to dispose of the matter that it was not traffic related. It said:

> "We agree with Vodafone that the proportion of microcell and picocell sites increased in certain periods in the 2011 Model. However, we agree with Ofcom and Three that there is insufficient evidence to suggest that the proportion of microcells and picocells is related to termination traffic."

I have made that point, that is an error.

> "In particular, we were persuaded by Ofcom's explanation that a proportion of microcells and picocells are built for coverage purposes."

So Mr. Bowsher this morning said we made no finding as to what caused it and that is the proper reading of that paragraph and I think that becomes clearer if one goes back and looks at para. 3.113 and 3.114, which is the summary of the evidence which we led. 3.114 has 3 admitting, it says: "3 stated that this did not prove that there was no positive correlation between traffic levels and the prevalence of microcell and picocell sites, but it did suggest that it would be inappropriate to assume one for modelling purposes in the absence of further evidence." But this again all pre-supposes you can guess the evidence whereas the point we are making is you have modelled to the Nth degree based on the available

evidence, the question now is how you choose between two different design parameters, either of which or some mid-point of which might truly reflect underlying reality, where underlying reality cannot be observed, and therefore some intellectual principle needs to be applied to choose, and the CC should have recognised that Ofcom did not apply the right principle. It should have asked itself whether this was the right principle to put the burden on Vodafone to prove it was traffic related.

PROFESSOR MAYER: The normal way in which one would do that is to have an underlying hypothesis, the null hypothesis, which might be that it is unrelated to volume of traffic and that unless a statistical test demonstrates that that hypothesis is incorrect then one would essentially stay with the null hypothesis.

MRS. McKNIGHT: I think if I were the CC hearing Ofcom say that that was a hypothesis they had applied I would want to check why they thought that was the right hypothesis to start from, and why it was always the right hypothesis to start from for any observed differential in parameters. We would say if it is just a default position then that is a question the CC should have been asking. There is no evidence the CC asked why this was the default position. Indeed, the material I took you to in the technical hearing transcript showed that it was not. The uncontroversial evidence as to why you deploy microcells/picocells did not suggest that one could start from a hypothesis that is not traffic related, because one of the principal reasons advanced for putting in more microcells is growing density of traffic. I think if this were a merits appeal yes, your point would be something we would have to address, but I think it is just not a point that is available, and that is not considered here.

PROFESSOR MAYER: Well is that not then raising a merits' point in terms ----

MRS. McKNIGHT: No, because if the CC had said: "Where Ofcom is faced with two different design parameters they have to have some method of choosing between them or splitting the difference. Ofcom has given us several reasons why it considers the right hypothesis to start from is that changes over time are not traffic related and we find those compelling for the following reasons". That would be fine, and we might not agree but if they were sound reasons we could not challenge it. The CC did not address its mind to it because it seems to have just started from the point that Vodafone is trying to prove the adjustment so it has to prove it, and that is not what we were doing, we were saying there is a question here as to whether an adjustment is needed and no thought has been given to it.

Could I address the *E* case, proceeding on the basis of an underlying error of fact, in respect of an uncontroversial fact? We say that this is not such a case because the point we have just been discussing, we see two different design parameters for microcells/picocells and no

one knows what is the true fact. No one knows whether the change is explicable by reference to different traffic volumes, coverage or something else, and everyone seems to be agreed you cannot really do much more to find out the fact, engineering insight has run out at this stage. So it is an unascertained fact.

What we are saying is that if you cannot ascertain it you have to have some method of deciding what you will do, how you will resolve that question, and it must be a fair and balanced approach. Professor Mayer has suggested it may be fair to apply a hypothesis that is not traffic related and we say perhaps that would be but it is not considered or demonstrated. The example I would give you is imagine you have a car park where people pay £1 to park for an hour but they only pay for complete hours that they have used. If you discover that on average people pay £3 to park their car you could not infer that they must have parked for three hours on average because they pay £1 for each complete hour and there would have been some people who parked for 3 hours and 59 minutes but did not trigger the obligation to pay the next £1. So if you had a rule that said the default position is we just assume everyone has parked for three hours because £3 is the average payment you would say that is not the right default position because it makes more sense to assume an even distribution throughout the hour. Yet, what is happening here is that by saying it is assumed not to be traffic related unless you can prove that all or some of it is, absent any good justification for thinking otherwise it is just not the right starting point. We know consideration has been given to whether it is in fact the right point.

If I could just move on to application of the rationality test in this case. You heard from Mr. Turner about the EU element of the judicial review you are conducting. Our position is, like his, that although EU law may engage a higher standard of review we consider that the case we have made out would succeed under domestic English judicial review tests as *Wednesbury* irrationality amounting to self-contradiction, absence of reasons and a failure to address the correct question in the assessment of each individual adjustment.

As regards the duty to give reasons, I have explained what I think is the deficiency in the reasoning, namely that if the CC considers that it can be confident the calibrated model is operating well, faced with two different sets of calibration adjustments – one for the year and one for the traffic volume, it has not reasoned as to how it chooses which is better, and what I would say is that presented with this challenge you must ask yourselves can you work out what the CC's reasons were? If you cannot, how do you know they passed the rationality test? We just say that it is just not clear from what they say. We think it is very striking that Mr. Bowsher did not attempt to clarify this – perhaps he thinks it is so crystal

clear that he need not even bother, but we say that that is just not a plausible position for him to adopt. The paragraphs I have taken you to could not in any sense be said to be clear without some further elaboration.

As regards materiality, we say that the particular parameters that change over time are material, but there are only five or so out of a large number, but that does not render them non-material to the output, and Mr. Roche's third witness statement does show what happens if you time shift some of the parameters forward, and it demonstrates a 20 per cent uplift in the measure of LRIC.

Mr. Kennelly says in his written reply that some of the parameters that Mr. Roche has shifted are not justified. Mr. Roche has, in his witness statement, explained why he considers them to be justified as ones that you might roll forward on a traffic related basis, but the point is we do not need to prove what the actual difference would be. We need to demonstrate, as Mr. Turner has explained, that it could have been material to the outcome, for that is the JR test, that you cannot rule out the possibility this could have made a difference.

Mr. Bowsher also drew your attention to the tail end of s.2 of the Final Determination saying that we had not drawn your attention to that part of the Determination which also addresses Vodafone's argument that the model is deficient and cannot be used to produce a robust LRIC measure. He is correct it does address that but that is purely a formal matter, that we sought to make our case under two limbs. One is, as we have described, and is addressed in Chapter 3 of the Determination, that the model is not apt to produce a LRIC number, and to show therefore that it should be set aside to the extent that Ofcom has attempted to do so. [***Suggest running next line on here (as part of the same response).***]

We have put forward the further argument which is addressed in our Q1 that the fact that the model cannot produce LRIC is another reason to go for LRIC+.

I am conscious of the time, perhaps I could just address the question of what should happen if we were successful in this ground of a challenge. We would say that if we are successful in persuading you that the CC's decision is irrational in respect of paras. 3.66 to 72 and that that taints the rest, it would be proper to direct that the Ofcom decision be set aside, because it adopts what purports to be a LRIC based charge control, but is not set at a robust assessment of LRIC, and you would then remit the matter to Ofcom to do further work to set a more appropriate charge control, whether LRIC+ or LRIC, in a manner that does not exhibit these deficiencies. I think that addresses the point that you raised earlier, sir, and

Professor Mayer, as to whether you would weigh up how bad the deficiency is against the other options.

The other option would be to refer the matter afresh to the Competition Commission to ask them to reconsider what they have said in paras. 3.66 to 72 in the light of the irrationality we have identified, and in consequence to reconsider the rest of the chapter that is tainted by that error. We consider that if that was so the Competition Commission might well conclude there was quite a lot of work to be done to consider how you could convert this model to become more suitable or adequately suitable to determine LRIC. We consider that it might be more appropriate for the matter to be left to Ofcom since substantial modelling work is more appropriately undertaken by Ofcom, but that is a question which goes to relief rather than to the substance of my case.

Thank you, I will not detain you any further unless you have questions.

THE CHAIRMAN: No, thank you very much, Mrs. McKnight. Mr. Palmer?

MR. PALMER: I rise because during his reply Mr. Turner referred to a case which was not referred to in opening or, indeed, in EE's written submissions, which is the *Simplex* case, and I wondered if I could just have two minutes to address you very, very briefly on the significance of that case? It was developed in the context of Mr. Turner's submissions on Ground 1 in a way which had not been developed previously. It is simply to draw your attention to the fact that *Simplex* was considered by the Court of Appeal in *E* at para. 59, which is the paragraph immediately after the one which Mr. Turner did draw your attention to and quite clearly treat *Simplex* as an example of an error of fact case, and a discussion of materiality arises in that context. What Mr. Turner does is, having disavowed any reliance on *E*, takes a case whose true ratio is effectively on all fours with *E*, extracts the principle of materiality from that context and seeks to rely on it in an entirely different context, and we say that *Simplex* does not support the proposition – as does not *E* –that a decision is unsafe and needs to be reconsidered if any material evidence is lacking. There is nothing in *Simplex* which suggests that, there is nothing in *E* that suggests that and that consideration is helpful.

One very small footnote to that: in the transcript of yesterday Mr. Bowsher's submissions, p.64, line 32 onwards, he made a submission which is precisely that which I developed in my submissions. It was suggested I was going off on a frolic of my own, but in fact it was a development of the CC's reasoning which he encapsulated at that point, so I draw that to your attention.

THE CHAIRMAN: Thank you for that. We will obviously be reading quite a lot of the authorities again, but thank you for that cross-reference.

MR. BOWSHER: There are particular points of fact which I need to deal with and there is also a point of discussion about interim remedies which I need to just make a short observation about. It is a point of fact which are not correct and I think it is important that I put those right, and I am sorry to trespass upon the time.

It was suggested that the simulation model, the short model, had not been considered by the Competition Commission before the bilateral meeting, and that is clearly not the case if you look at the transcript because you can see the chairman is actually saying he has seen it. What had not been received was the electronic copy.

The second point is I think we may have been at cross purposes about this question about Dunn 3 simply from your response to my intervention on that point. The point about Dunn 3 is it was produced at the time of the response to the provisional Determination and not at any point further. One can tell that from the response. We have the email, but when you look at it you will see. I gave you the paragraph reference.

The third important point arises because you were having a discussion about, as it were, the possibility of interim remedies, and I think it is necessary for the CC and for Ofcom just to simply note if there are any thoughts of some creative interim solution that will be something which we would have to come back to you on because it would raise some quite tricky questions, not least because under s.4A Communications Act if there is ever an order which departs from LRIC, which departs from the Recommendation, that has to be notified to the EU Commission. That then, of course, engages a whole separate set of problems.

It has not arisen in this case because of course we the CC adopted LRIC independently of the recommendation and you have been spared too much discussion of that perhaps. I just note that we would have to go away and think about what our position was if we were going to be put in that interim situation.

THE CHAIRMAN: I understand.

MR. KENNELLY: Sir, I have two references that emerged in reply that I did not raise in my opening and that is why I need to give them to you now, just two references. In relation to Professor Mayer's question about the risks that apply equally to LRIC+ and LRIC as a new matter, the reference is in Mantzos 2 bundle B3 tab 21 paras.2.23 to 2.31. That addresses Professor Mayer's point.

In relation to Professor Mayer's second question, again which did not come out in my opening, about needing to show that they were traffic related before allocating them to

MCT, it is para.6 of the EC Recommendation, authorities bundle 1 tab 9. Thank you for your patience.

THE CHAIRMAN: Thank you. Mr. Turner, do you want to have the very last word?

MR. TURNER: No! What I need to say on behalf of everyone in this room is we are very grateful to the Tribunal for indulging us at this hour on Thursday, the run off day in this case.

THE CHAIRMAN: Can I, on behalf of the Tribunal, say thank you to all the advocates for the assistance that you have given. I doubt it will come as a surprise that we will reserve on this matter. We will try to produce something as quickly as possible.

MR. TURNER: I am obliged.

THE CHAIRMAN: Thank you very much.