Neutral citation [2007] CAT 35

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

17 December 2007

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

O2 (UK) LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

HUTCHISON 3G (UK) LIMITED

Interveners

RULING ON THE APPLICATION FOR PERMISSION TO AMEND THE NOTICE OF APPEAL

I BACKGROUND

1. The Appellant ("BT") has made two applications to amend the notice of appeal which it lodged in this case on 29 May 2007. The first application, made in a letter to the Tribunal dated 8 November 2007, seeks permission to correct what BT refers to as "errata" in the original notice. None of the parties objects to these amendments and the Tribunal grants BT permission to make them.

2. The second application, made in a letter to the Tribunal dated 13 November 2007, seeks to insert new paragraphs in the notice to introduce an additional challenge to the decision which is the subject of this appeal.

3. The appeal by BT concerns the statement made by the Office of Communications ("OFCOM") entitled "Mobile Call Termination" which was published on 27 March 2007 ("the Decision"). In the Decision, OFCOM exercised its powers under section 87(9) of the Communications Act 2003 to impose a price control regime on the mobile network operators in order to regulate the charges that they can impose on other operators, including BT, for mobile call termination services. Mobile call termination ("MCT") is the service which is provided by a mobile network operator to another operator to connect a customer of that other operator to a subscriber on the mobile network operator's network.

4. In the appeal, BT challenges the levels chosen by OFCOM in setting the prices which the mobile network operators ("MNOs") are permitted to charge for mobile call termination. In selecting those levels, and choosing and applying the methodology and the principles OFCOM have used to arrive at them, BT contends that OFCOM has made a number of errors of fact or law and has wrongly exercised its discretion. The result of this is that the prices which the MNOs are allowed to charge BT and other operators are too high.

5. The appeal is brought pursuant to section 192(2) of the Communications Act 2003 ("the 2003 Act"). That subsection provides that a person affected by a decision to which section 192 applies may appeal against it to the Tribunal. Section 192(1) lists a wide range of decisions to which the section applies, including all decisions by OFCOM under Part 2 of the 2003 Act other than those specified in Schedule 8 to the Act.

6. Sections 193 to 195 of the 2003 Act set out the procedure to be followed in appeals brought under section 192(2). Broadly speaking, that procedure requires the Tribunal to identify whether the appeal raises any "specified price control matters" as defined. If it does, then those matters are to be referred by the Tribunal to the Competition Commission for its determination. Matters raised by the appeal which are not price control matters are to be decided by the Tribunal. Once the Competition Commission has notified the Tribunal of its determination of the price control matters referred to it, the Tribunal must decide the appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the Competition Commission, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the Competition Commission's determination would fall to be set aside on such an application.

7. It is accepted on all sides that the issues outstanding in BT's appeal constitute "specified price control matters" which must be referred to the Competition Commission for their determination. This appeal is linked with another appeal brought by Hutchison 3G UK Limited ("H3G") against the same Decision. That appeal raises both non price control matters for the Tribunal to determine and also specified price control matters. The specified price control matters in the H3G appeal will be referred to the Competition Commission at the same time as the matters in BT's appeal in a combined reference. At a case management conference held on 6 November 2007 in the H3G appeal, the Tribunal considered an application by H3G to amend its notice of appeal. In its ruling of 23 November 2007 in *Hutchison 3G UK Limited v OFCOM* [2007] CAT 33, the Tribunal gave reasons for exercising its discretion under Rule 11(1) to allow the application to amend in part but to refuse to allow the introduction of a new point raised by H3G in relation to the non price control matters.

8. Turning to the notice of appeal in the present case, Section E of the notice of appeal as originally served is headed "Grounds of Appeal" and is divided into four parts. The first part is headed "Ofcom's treatment of Spectrum Costs". Spectrum costs are the costs that the MNOs paid for the permission to use, for a 20 year period from the year 2000, parts of the radio spectrum which they need in order to establish their 3G networks. Spectrum costs constitute a substantial part of the overall costs which OFCOM took into account in arriving at its conclusions in the Decision. A significant

proportion of the price which OFCOM has allowed MNOs to charge is referable therefore to the recovery of these spectrum costs. BT's appeal raises several fundamental challenges to OFCOM's approach to spectrum costs in setting the price for 3G MCT.

9. The second part of the notice of appeal, comprising paragraphs 149 to 159 sets out BT's challenge to the way in which OFCOM dealt with the administration costs incurred by the MNOs and how they should be reflected in the level of MCT charges. The third part, comprising paragraphs 160 to 184, deals with the surcharge allowed by OFCOM when setting the price control for network externality. The final part of Section E alleges that OFCOM failed to take proper account of the potential cost savings arising from network sharing between the MNOs.

II. THE PROPOSED AMENDMENT

10. The amendment that BT now seeks to make relates to BT's challenge to OFCOM's approach to spectrum costs. In paragraph 85 of the notice of appeal, BT summarises what it alleges are the errors made by OFCOM in this regard. The opening words of paragraph 85 state that "BT believes that Ofcom have made at least the following main errors of principle" in their approach to spectrum costs. There are then nine subparagraphs, each of which sets out a particular way in which it is said that OFCOM erred. BT then further alleges, in paragraph 86, that the methodology used by OFCOM is at variance with many of the points that OFCOM themselves state in the Decision and contains "numerous errors of fact, principle and appraisal". These errors of methodology are then summarised in paragraph 87.

11. Paragraph 88 of the notice of appeal states:

> "Each of these matters is described in more detail in the sections headed "Errors of Principles" and "Methodology" below, although the division is somewhat artificial, and there is some overlap, inevitably, between these sections."

12. The "Errors of principle" in relation to spectrum costs are then enumerated and explained in paragraphs 90 to 123 under the following headings: (i) reliance on actual auction fees; (ii) ignoring the Commission's view; (iii) OFCOM's failure to cap the value at the cost of providing 2G spectrum; (iv) treatment of information from

impairment reviews; (v) overstating the value of 3G spectrum for use in relation to voice call termination; (vi) failure to conduct a forward looking valuation on the ground that it involves too much uncertainty; (vii) error in adopting a conservative approach; and (viii) lack of transparency and inadequacy of reasoning.

13. BT's letter of 13 November 2007 seeks permission to amend the notice of appeal by the insertion of an additional allegation in respect of OFCOM's treatment of spectrum costs. They therefore seek to add a new subparagraph into the "summary" paragraph 85 and then to add four new paragraphs under the existing heading "overstating the value of 3G spectrum for use in relation to voice call termination".

14. The point BT is seeking to introduce by the amendment is that in calculating the asset values of the 3G spectrum OFCOM has included "notional holding costs rolled up into the asset value". These rolled up interest costs arise for the periods between the point when the MNOs acquired the 3G spectrum rights and the point at which 3G spectrum started to be used. This inclusion of notional holdings costs has, according to BT, greatly increased the asset values and hence the spectrum costs which OFCOM then feeds into the model used to arrive at the price control levels. BT asserts that the inclusion of these holding costs results in the 3G spectrum asset costs in the model being more than half as much again as the actual purchase price that the MNOs paid for the right to use the 3G spectrum.

15. Amendment of a notice of appeal in Tribunal proceedings is governed by Rule 11 of the Tribunal's Rules (S.I. 2003 no. 1372) which is in the following terms:

> "11(1). The appellant may amend the notice of appeal only with the permission of the Tribunal.
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> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.
>
> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless—
>
> (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or
>
> (b) it was not practicable to include such ground in the notice of appeal; or

(c) the circumstances are exceptional."

16. The Tribunal's Guide to Proceedings provides further guidance on the circumstances in which an appellant may seek permission to amend its notice of appeal. In so far as material, it reads as follows:

> "Amendment of pleadings
>
> 11.11 Rule 11 provides that a notice of appeal can be amended only with the permission of the Tribunal. Since the form of the notice of appeal is not that of a traditional pleading, such as a statement of case in High Court litigation, but rather a narrative presentation of factual and legal argument, the concept of 'amendment', as traditionally applied to civil proceedings, cannot be directly transposed to proceedings before the Tribunal. Thus it will not normally be necessary to apply formally to 'amend' simply to put into different words the written submissions made in support of a ground of appeal which is already set out in the notice of appeal. Permission to amend will however be necessary where the appellant seeks to raise a new ground of appeal that lies outside the four corners of the original appeal. In that event, the conditions of Rule 11(3) apply to the exercise of the Tribunal's discretion to permit the amendment – which will only be possible where the new ground:
>
> (a) is based on matters of law or fact which have come to light since the appeal was made; or
>
> (b) it was not practicable to include the new ground in the notice of appeal; or
>
> (c) the circumstances are exceptional."

17. The Rule therefore distinguishes between amendments that raise new grounds and those that do not. Where an amendment raises a new ground, then the Tribunal must be satisfied that one of the conditions in paragraph (3) is satisfied. Where the amendment falls within Rule 11(1), the Tribunal has a wide discretion as to whether to permit the amendment and will exercise that discretion in accordance with fairness and justice, having regard to all the circumstances.

18. BT's letter of 13 November 2007 applying for permission to amend was copied to the other parties in this appeal and prompted letters in response from them. On 21 November 2007, the Tribunal wrote to the parties indicating that it intended to decide the application on the papers and inviting the parties to submit written observations on the application by 28 November 2007. On 22 November BT wrote again to the Tribunal and the parties setting out further explanation of its proposed amendments and submissions as to why permission to amend should be granted.

19. BT argues that the amendment should be allowed for the following reasons. First it says that this point is not a new "ground" but merely a new argument. So the test that the Tribunal should apply is that set out in paragraph (1) of Rule 11 not that in paragraph (3). The amendment, BT argues, consists of a particular of the grounds of appeal outlined at paragraph 85.1 and 85.6 of the notice. The opening words of paragraph 85.1 allege that OFCOM "have failed to use a current economic valuation of the value of 3G spectrum in providing voice call termination". Paragraph 85.6 states "In any case, they have overstated the value of that part of the 3G spectrum which they have considered will be used for voice call termination". The inclusion of the notional holding costs in the asset value of 3G spectrum demonstrates why, amongst other reasons, OFCOM have failed to use a current economic valuation of 3G spectrum when setting their price control and shows that they have overstated the value. Therefore BT state that the holding cost amendment "is really a new particular" in support of the existing grounds of appeal.

20. BT go on to argue, in relation to the exercise of the Tribunal's discretion under Rule 11(1), that this is a matter which the Competition Commission would find it difficult to ignore when looking at the question of whether a current economic value has been used because it is so plainly at variance with using such a model. They argue that no prejudice is caused to the other parties by including the amendment. As to why the point was not included in the notice of appeal as originally served, BT say as follows:

> "BT was not aware of the Holding Charge Amendment point at the time that it served its NOA and Ofcom's methodology was not apparent to it from the face of Ofcom's Statement. It is a point which is raised now following on from a detailed look at the model which has taken place both within BT and by Dr Maldoom [BT's expert witness] for the purposes of preparing evidence for the Competition Commission. The Ofcom Model consists of approximately 145 spreadsheets and diagrams. It is a vast and complex economic model designed by Analysis Ltd on behalf of Ofcom to determine an efficient charge benchmark for MCT rates. We understand that to interpret and understand the Ofcom Model, a significant degree of expertise is required and that there are no written explanations in the Model which draw attention to this Holding Charge. …."

21. BT go on to argue that if they are wrong on the first point and the proposed amendment does raise a new ground and not simply a new argument the amendment should still be allowed. They submit that all the conditions in Rule 11(3) are satisfied because the amendment is based on matters of fact which have come to light since the appeal was

made; it was not practicable to include the point in the notice of appeal because BT was not aware of it at that stage and that the circumstances are exceptional "on account of the complexities of the Ofcom Model, the fact that no attention is drawn to the point in Ofcom's Statement or by way of a written explanation in the Model itself and the level of expertise required to interpret and understand the Ofcom Model."

22. OFCOM responded to BT's application by letter dated 28 November 2007. OFCOM submits that BT's proposed amendment raises a matter which is distinct from the matters currently raised in the challenge to OFCOM's treatment of spectrum costs. OFCOM therefore considers that what BT is really doing is adding to its notice of appeal, under the general umbrella of OFCOM's treatment of spectrum costs, a new ground alleging a further main error of principle with particulars which it had not previously identified. Given that, in OFCOM's submission the Tribunal should apply the test in Rule 11(3) and not Rule 11(1), OFCOM further submits that there are no exceptional circumstances which would allow the Tribunal to grant permission to include this amendment. They reject the suggestion that BT could not be expected to have spotted the point from the OFCOM Model. OFCOM point out that the modeling spreadsheets were provided to BT in March 2007 at the same time the Statement was issued and that the same calculation methodology was explicit in the previous version of the spreadsheets sent to BT in September 2006 during the consultation process. BT is a very substantial well resourced company with significant expertise in regulatory economic issues and it is not credible, in OFCOM's submission, to suggest that it was not practicable for them to have identified and included this point earlier.

23. OFCOM's alternative submission in the event that the Tribunal concludes this is not a new ground, is that the Tribunal should exercise its discretion against allowing the amendment. The application comes nearly six months after the notice of appeal was served and there is a tight timetable set for the litigation. As the litigation proceeds, the balance must increasingly be against allowing the introduction of new grounds or new arguments in the interests of dealing with appeals expeditiously and fairly.

24. The interveners' stance on the application varied. Vodafone did not express any views on the application. H3G did not express a view as to whether the amendment amounted to the introduction of a new ground but considered that on either basis the

circumstances justify granting BT permission. H3G point out that the BT appeal clearly raises the issue of whether OFCOM failed to use a current economic valuation of the value of 3G spectrum and this issue must therefore be investigated thoroughly by the Competition Commission. It would not be right therefore to preclude the Competition Commission from considering the inclusion of the holding charge in the context of OFCOM's alleged failure to use current economic valuation of the value of 3G spectrum. H3G therefore do not object to the grant of permission to amend.

25. The other interveners, O2, Orange and T-Mobile all oppose the grant of permission. O2 argue that BT is wrong to suggest that paragraphs 85.1 and 85.6 of the notice of appeal are grounds of appeal. Those subparagraphs are part of a summary of those grounds of appeal and arguments relating to those grounds are set out in further detail later in the notice. The proposed amendment does not in any way expand upon or particularise the existing paragraphs. O2 argue that none of the conditions of Rule 11(3) applies since the model information was made available to BT in plenty of time for the point to be included in the original notice. O2 make a further point that the time limits for appeals are designed to ensure legal certainty in respect of regulatory bodies and O2 is entitled to base its commercial decisions on the expectation that a decision will be applied to it save insofar as that decision is the subject of an appeal. To introduce a new ground of appeal six months afterwards undermines that principle of legal certainty that the Tribunal's rules are intended to protect.

26. Orange also submitted that the amendment was a new ground, particularly because it is not based on the same factual material as the other points raised. Orange contest BT's assertion that the existing grounds of appeal "attack Ofcom's inadequate treatment of spectrum costs generally". Orange argue that it would not have been open to BT to attack the approach to spectrum costs "generally" because such a plea would have been lacking in particularity. Paragraph 85 of the notice identifies and enumerates the different respects in which it is alleged OFCOM erred and this new criticism does not appear on that list. Orange also reject the suggestion that there are exceptional circumstances within the meaning of Rule 11(3). In the alternative Orange contend that the Tribunal should refuse permission under Rule 11(1). Orange state that the new expert report which BT intends to serve accompanied by lengthy exhibits in support of this point will involve significant further work and expense for the other parties. It

would, Orange state, require instructing an expert economist to analyse and respond to BT's expert report.

27. Finally, T-Mobile also consider that the amendment falls within Rule 11(3) and that none of the conditions set out there is satisfied.

28. Despite the differing views among the parties about whether these amendments should be allowed, the Tribunal considers it appropriate to determine the matter on the papers rather than holding an oral hearing. The Tribunal has regard to the need, in accordance with Rule 19 of the Tribunal's Rules, to conduct these proceedings in a way which is just, expeditious and economical. The Tribunal has borne in mind that any oral hearing involves the attendance of at least the seven parties to these proceedings and that those parties are also the parties to the H3G appeal and are at present working to comply with the orders made by the Tribunal leading up to the hearing of the non price control matters in the H3G appeal in January and February 2008. The parties were given an opportunity to make written submissions on the point and have taken full advantage of that opportunity.

III. THE TRIBUNAL'S ANALYSIS

Is the amendment a new ground within the meaning of Rule 11(3)?

29. In considering whether a proposed amendment constitutes a new ground for the purposes of Rule 11(3), it is first necessary to identify where in the notice of appeal the grounds are set out. In line with the Tribunal's Guidance quoted above, BT's notice of appeal sets out a narrative presentation of factual and legal argument. It is important nonetheless for an appellant to distinguish those parts of the pleading which set out background facts relating to the market or the product concerned, or which describe the procedures leading up to the taking of the decision under challenge, from those parts of the pleading which set out the ways in which it is alleged that the decision is defective. A clear distinction is necessary to enable the respondent and the interveners to know which paragraphs of the notice of appeal raise points that they have to address.

30. In BT's notice of appeal, Section E is helpfully headed "Grounds of Appeal" and BT rightly does not attempt to rely on any paragraphs outside that section as forming a ground in support of which this new point is being introduced.

31. BT relies on the broad wording of two sub-paragraphs of paragraph 85 which appears towards the start of the part of Section E, as establishing that a ground of challenge was made which could now encompass the holding costs point.

32. In the Tribunal's judgment BT cannot rely on sentences in the subparagraphs of paragraph 85 as constituting grounds which can justify the insertion of a new point. That paragraph is headed "Summary of errors in Ofcom's approach" and paragraph 88 expressly states that each of the matters set out is described in more detail in the subsequent sections. An appellant cannot, by including broadly worded summaries in the notice, create an opening for a subsequent assertion that in fact that summary is a ground which goes wider than the later particulars suggest and can encompass additional arguments which do not appear at all in those later particulars. Summary paragraphs are simply summaries of the subsequent sections and not free standing grounds in themselves.

33. The Tribunal therefore holds that BT cannot rely on the broad wording of the opening sentence of paragraph 85.1 (which reads "They have failed to use a current economic valuation of the value of 3G spectrum in providing voice call termination") as comprising a free standing broad ground which this new argument supports. Paragraph 85.1 would fairly have been read by OFCOM and the other parties as a summary of the specific point explained later in paragraphs 90 to 100. There the point is clearly limited to a contention that OFCOM erred in relying on the auction fees paid by the 3G operators for their 3G spectrum in 2000.

34. Similarly, although paragraph 85.6 is expressed in broad terms as "… [OFCOM] have overstated the value of that part of the 3G spectrum which they have considered will be used for voice call termination" it is not to be treated as a wide free standing ground alleging that the asset values were too high. Paragraph 85.6 was intended to be a summary of the point currently made in paragraph 116 of the notice. Paragraph 116 does not make a point that 3G spectrum has been overvalued in the sense that, from an

accounting perspective, inflated or incorrect figures for the asset value of 3G spectrum have been included in the computation of the price level. Rather the point made in paragraph 116 is a specific point that the 3G range of spectrum is not needed for voice call termination so that the value to be attached to 3G spectrum for this use is indicated by any cost savings which result from the use of 3G rather than 2G spectrum for this purpose.

35. What then are the grounds of appeal as regards spectrum costs? It is not correct to say that the ground is as broad as "OFCOM erred in its treatment of spectrum costs" because we have some sympathy with the point made by Orange that such a broad "ground" of appeal lacks sufficient particularity. Conversely the Tribunal determines that it would be wrong to regard each of the nine separate points made under the heading "Errors of principle" in paragraphs 90 to 123 of the notice of appeal as constituting a separate ground of appeal.

36. The points raised in paragraphs 90 to 123 are directed towards BT's assertion that as a matter of principle the 2000 auction fees were an inappropriate starting point for ascertaining the value of 3G spectrum and that a different starting point should have been used. BT's argues that reliance on the auction fees was wrong in principle for a range of reasons, for example because the circumstances surrounding the auction meant that the bids were inflated; because the Competition Commission had made it clear that OFCOM should not rely on them and because the fact that 2G functionality is adequate for voice calls means that 3G MCT prices should not exceed the charges for 2G MCT and so forth. All these issues therefore ask the Competition Commission to conclude that the underlying approach of OFCOM in referring to scenarios based on the auction fees paid in 2000 was wrong and that an entirely different approach should have been adopted.

37. The proposed challenge to the addition of holding costs to the base figure for the auction fees is not a further argument along those lines. It does not go to the question of principle whether OFCOM should have relied on the auction fees or arrived at the valuation of spectrum costs on some entirely different basis. Thus, if the Competition Commission concludes that OFCOM was wrong to use auction fees as the basis for ascertaining spectrum costs, the point about the inclusion of holding costs falls away.

The proposed new point appears to be that even if it is right to refer to the auction fees as the basis for valuing the spectrum asset, it is wrong to gross those fees up by adding in the notional rolled up interest charges for the years when the spectrum was not used.

38. In the Tribunal's judgment, therefore, the point about holding costs is a different ground from the other challenges to the spectrum costs. It is not, in reality, another reason for saying that auction fees should have been disregarded when ascertaining the asset value of the 3G spectrum. Nor it is suggesting an alternative basis for arriving at that value. It is a reason for saying that even if OFCOM were right to base their scenarios for spectrum costs on the auction fees, they erred in the way they calculated the current asset values, having regard to those auction fees.

39. None of the other points raised in relation to spectrum costs relates to the way in which OFCOM calculated the asset value from the auction fees rather than the fact that they used auction fees as a basis for calculating that asset value. In the Tribunal's judgment, therefore, this point does raise a new ground of appeal and is not simply an additional argument in support of an existing ground.

Are any of the conditions in Rule 11(3) satisfied?

40. The Tribunal is, however, satisfied that the conditions in Rule 11(3)(b) and (c) are met in this case and that permission to make the amendment should be granted.

41. With regard to whether it was practicable to include the point in the notice of appeal, the parties opposing the amendment rely on the fact that the model spreadsheets were made available to BT well in advance of the lodging of the notice of appeal and that BT ought to have picked up the point sooner.

42. The Tribunal recognises that BT is a well resourced appellant with considerable expertise at its command and that it is very familiar with the regulatory process. But the Tribunal accepts that BT was not *in fact* aware of the point on which it now seeks to rely before Dr Maldoom produced his report. Since it was not aware of it, it clearly was not practicable to include it. The Tribunal must go on, however, to consider whether it was nonetheless practicable for BT to include the point in its notice of appeal because BT *ought* to have noticed the point and included it in the original notice.

43. It is clear that the cost model is very complex. BT describes it as "vast and complex" comprising 145 spreadsheets and diagrams using over 50 megabytes with many tens of thousands of cells, many of which contain a formula. The Tribunal accepts that even an appellant with the resources of BT may require external expert assistance to complete a full examination of every aspect of the model and that it may not be practicable to perform such an examination any sooner than BT has done in this case.

44. Secondly, BT point out, and OFCOM appears to accept, that there is no reference to this uplift of the auction fees by the inclusion of holding costs in the Decision (paragraphs 9.44 to 9.56 of which discuss 3G spectrum costs) or its appendices (particularly Annex 14 which devotes 99 paragraphs to a discussion of 3G spectrum costs) or in any commentary accompanying the model. OFCOM argues that there was no reason why it should have "exceptionally highlighted that part of the model that related to the "holding charge"".

45. BT asserts in the proposed amendment that the effect of including the holding charge is to increase the asset value included in the model for spectrum costs so that it exceeds the amounts which the MNOs actually paid for 3G spectrum by more than half as much again as the purchase price. These notional costs therefore make a significant contribution to the overall asset value and hence represent a material proportion of the overall figure set for the 3G MCT rates.

46. Whether or not it was incumbent upon OFCOM to draw attention to the holding costs uplift in the Decision or Annex 14, the Tribunal accepts that the absence of any mention of this apparently important factor of the 3G spectrum asset value contributed to BT's failure to appreciate the point in time to include it in the original notice of appeal. The Tribunal considers that this is a relevant factor when considering whether BT should be debarred from including a point which it in fact only recently discovered on the grounds that it ought to have discovered it sooner.

47. The Tribunal also concludes that there are exceptional circumstances in this case which justify the grant of permission pursuant to Rule 11(3)(c). The circumstances which have led the Tribunal to take this view are as follows. There is no doubt that the whole question of the treatment of spectrum costs will be an important part of the Competition

Commission's investigation of the specified price control matters in this appeal. Given that it is now clear that a substantial component of the 3G spectrum asset value is attributable to these notional holding costs and that they have a significant impact on the overall price control figures, it would be undesirable in the public interest to preclude consideration of the point now that the parties are aware of it. The Tribunal accepts BT's submission that the inclusion of notional holding costs is a matter which the Competition Commission would find difficult to ignore when looking at the question of whether a current economic value has been used because it is so plainly at variance with using such a model.

48. Regulation of MNOs in the United Kingdom must also to be seen within the framework set for the EU as a whole. National arrangements for the allocation of spectrum have varied widely, and differences in these arrangements may lead to a proper differentiation between the national regulatory controls imposed on the spectrum users. In the United Kingdom 3G spectrum has been allocated for a period of 20 years and the way in which the fees paid in 2000 for that spectrum are treated in the context of a price control formulation is likely to arise in future regulatory action by OFCOM over that 20 year period. The point that BT seeks to raise constitutes an important element in the treatment of those costs. The Tribunal concludes that it is desirable in the public interest for the Competition Commission to be able to consider and determine this issue alongside the other challenges to the treatment of spectrum costs with a view to minimising the scope for disputes in relation to future price controls relating to the use of 3G spectrum.

49. The Tribunal further accepts the point made by BT that no further detailed investigation will be required in order for OFCOM to be able to respond to the issue. OFCOM presumably knows the reasons why it decided to include these sums in its model and must have available the background information from which the figures were derived. This is very different from the position in relation to H3G's application to amend to include the new point which was the subject of the Tribunal's ruling of 20 November 2007 referred to in paragraph 7 above. There the respondent and other parties would have suffered serious prejudice because the point raised was one which had not been investigated by OFCOM and in relation to which OFCOM had no formed view. Here clearly OFCOM has carried out whatever investigation or information gathering was

needed in order to satisfy itself that the inclusion of these costs was appropriate. The Tribunal notes that OFCOM in its letter of 28 November 2007 does not point to any specific prejudice to it from allowing the amendment.

50. Although Orange argue that they will have to undertake extra work to respond to Dr Maldoom's evidence, in fact only a few paragraphs of that witness statement refer to this point. It is accepted that there will be further work for the interveners in any consideration by the Competition Commission of the reasons why OFCOM decided as a matter of principle to include these notional holding costs and of the methodology behind the figures included. But again, the issue of principle and the figures used must have been raised between the MNOs and OFCOM during the investigation so this does not require them to carry out new research.

51. In the light of those circumstances the Tribunal unanimously gives permission to BT to amend its notice of appeal as proposed to challenge the inclusion of notional holding costs in the asset values of 3G spectrum.

52. The Tribunal notes that BT has not also sought permission to adduce the additional witness statement of Dr Maldoom. This is in line with the Tribunal's indication in its letter of 21 November 2007 that the Tribunal does not consider that Rule 8 of the Tribunal's Rules precludes the Competition Commission from receiving additional evidence from the parties which has not been filed and lodged with the Tribunal. Rule 8, which provides that the notice of appeal should have annexed to it as far as practicable the witness statements and expert reports on which the party relies, must be read in the light of the information gathering powers conferred on the Competition Commission for carrying out investigations in appeals under section 193 of the 2003 Act.

Vivien Rose Andrew Bain Adam Scott

Charles Dhanowa
Registrar Date: 17 December 2007