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

Case No 1024/2/3/04  
1027/2/3/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

30<sup>th</sup> January 2006

Before:  
MARION SIMMONS QC  
(Chairman)

MICHAEL DAVEY  
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**FLOE TELECOM LIMITED**  
**(In administration)**

Appellant

supported by

**WORLDWIDE CONNECT (UK) LIMITED**

Intervener

and

**OFFICE OF COMMUNICATIONS**

Respondent

supported by

**VODAFONE LIMITED**  
**T-MOBILE (UK) LIMITED**

Interveners

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**H E A R I N G**  
**DAY ONE**

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## **APPEARANCES**

Mr. Edward Mercer (of Taylor Wessing) appeared for the Appellant.

Mr. Brian Kennelly (instructed by Taylor Wessing) appeared for the Intervener Worldwide Connect Limited.

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

Mr. Charles Flint QC (instructed by Herbert Smith) appeared for the first Intervener, Vodafone Limited.

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

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1 THE CHAIRMAN: Before we start can I mention three things. First of all this morning we have  
2 been handed up a witness statement of John Stonehouse which is apparently an amended  
3 witness statement, which is not the witness statement that is in the bundle. We have not  
4 looked at it because we do not know what status this amended witness statement has – it may  
5 be that it is just the wrong one got into the bundle – perhaps we can deal with that in a  
6 moment.

7 Secondly, the matter the letter which is dated 25<sup>th</sup> January, which we received on 27<sup>th</sup>  
8 January, and which relates to the matters in T-Mobile's skeleton argument, paras. 46 and 47.  
9 We find the summary of the representation in T-Mobile's skeleton argument as ambiguous.  
10 We feel that probably in the interests of fairness Ofcom ought to provide us with a true and  
11 comprehensive account of the representation made by the Secretary of State to the MNOs or to  
12 any MNO when the licences to the MNO were issued. I mention it now because we have some  
13 concern that when the Vodafone witnesses are cross-examined, or before they give evidence to  
14 us they should have possibly the opportunity to consider such representations so that at least  
15 they know that they were made – if they were made to Vodafone, I am not sure if they were  
16 made to Vodafone. We are not clear as to what relevance this may have on the matters which  
17 we may have to decide but having reached the hearing today without having had this evidence,  
18 and because we are not clear actually what the representations actually were then subject to  
19 any submissions on this it seems to us that the approach should be at least that we have this  
20 evidence before us *de bene esse*. Those are the two substantive matters.

21 The third matter that I wish to mention is that this case is listed effectively for four  
22 days and timetabled for four days. There is the reserve day of Friday. As you may know, I am  
23 representing the Tribunal at a Seminar on Friday morning at the British Institute of  
24 International and Comparative Law. I will be free from that at about quarter past eleven, so if  
25 it turns out that we do need Friday, Friday will start some time between 11.30 and 11.45. Just  
26 so you all know what I am doing, because some people may know and some may not, there is a  
27 Panel at this seminar which I am on as a representative of the Competition Appeal Tribunal,  
28 and the other people who are on it are, I believe, Vincent Smith, Polly Weitzman, Paul  
29 Lassoock, Mark Hoskins and Sam Slezenger. It is about the cases of the last year and that will  
30 exclude anything to do with Floe, so there will be no mention of Floe.

31 MR. ANDERSON: Could I just address you on the second of your two substantive items, this  
32 question of the representation that may or may not have been made. We are talking about  
33 1994 when this licence was issued in relation to a representation that may have been made by  
34 the Secretary of State, not Ofcom, so this is not a question of Ofcom going back into its files.  
35 More importantly though, it is not an issue that cannot conceivably be relevant to any matter

1 arising in this case. If I could just explain very briefly, and this was the point we made in our  
2 letter, whether or not Vodafone and T-Mobile had the benefit of exclusive licences those can  
3 only be exclusive licences in relation to the radio equipment defined on the frequencies  
4 defined. So the question of whether or not another licence could have been granted to Floe  
5 simply is unaffected by that position. If the licences were exclusive and no further licence  
6 could be granted, that does not affect Floe's position because Floe would need a licence in  
7 respect of GSM Gateway equipment; so whether or not it is exclusive to Vodafone and T-  
8 Mobile is utterly irrelevant to the points in this case. So what you would be asking Ofcom to  
9 do is to request that the Secretary of State investigate files to determine what representations  
10 may or may not have been made (and it may not be a simple document) for an issue that  
11 simply cannot arise or be of relevance to any issue in these proceedings.

12 THE CHAIRMAN: Mr. Anderson, we did understand your point. That appears to us to be looking  
13 at it from your point of view. It is not clear to us what the representation was and if there was  
14 a representation that they had those frequencies then the way that you are putting it may not be  
15 in accordance with the representation. Now, we are not clear as to what the representation  
16 was.

17 MR. ANDERSON: But with respect, ma'am, it does not matter what the representation was because  
18 it cannot affect the outcome of this case. Floe did not have a licence, did not apply for a  
19 licence, it cannot affect whether or not Vodafone was in abuse of a dominant position – at the  
20 most it could be a dispute between Floe and the Regulator as to whether or not they could have  
21 a licence but that cannot affect any issue in this Appeal. It is not a point raised at any stage in  
22 the Notice of Appeal which is, of course, what defines the parameters of this Appeal. So I  
23 would, with respect, submit that it really does not matter what the representation was one can  
24 proceed on the basis of both for your purposes, ma'am, that it was and it was not an exclusive  
25 licence. It tests the proposition either way. The outcome of the case cannot in any sense be  
26 affected by whether the licence is exclusive or not.

27 THE CHAIRMAN: Well what you say, as I understand it, is it is an exclusive licence for those  
28 frequencies using the base station.

29 MR. ANDERSON: Yes.

30 THE CHAIRMAN: And that there can be another licence granted on those frequencies for mobile  
31 stations.

32 MR. ANDERSON: In theory there could be. It may well be that as a matter of policy there never  
33 would be but that is a complete red herring as far as this case is concerned, because that is not  
34 the situation that you are asked to adjudicate on which is whether Vodafone was entitled to  
35 terminate the supply of services to Floe ----

1 THE CHAIRMAN: How does anybody use a mobile station? What about Vodafone? If Vodafone  
2 wanted to use a mobile station on your basis they would not be licensed to do so?

3 MR. ANDERSON: But it is self-use because it would be ----

4 THE CHAIRMAN: No, what happens if they supply it commercially to a customer?

5 MR. ANDERSON: Well, our position, as we have made clear is that if they are supplying those  
6 services to a third party it does not have the benefit of the exemption, it is not covered by their  
7 licence and they could not do it.

8 THE CHAIRMAN: But they were doing it, and they say they were doing it.

9 MR. ANDERSON: That would be explored in submission as to what their understanding of the  
10 legal position is, but we have made quite clear what we say the scope of the licence is and the  
11 scope of the regulations, and any representations that may or may not have been made at the  
12 time licences were issued in 1994 cannot affect either of those points.

13 THE CHAIRMAN: But the problem is that if, for example, the representation was made that they  
14 could do what I have just suggested, then that would put a different complexion on the conduct  
15 of Vodafone to a situation where they could not do it and they were doing it.

16 MR. ANDERSON: Well it may or may not put a different complexion on it but it will not affect any  
17 issue that you have to decide in this case. It cannot do, with respect, ma'am, if one looks at  
18 what the issues actually are.

19 THE CHAIRMAN: Because you say?

20 MR. ANDERSON: Because we say the scope of their licence did not enable them to authorise the  
21 supply by Floe of the GSM Gateways, and GSM Gateways, of the kind that are in issue in this  
22 case, which are Commercial Multi-User GSM Gateways, do not benefit from the exemption.  
23 Therefore, it really does not matter whether their licence for the supply of non-Gateway  
24 equipment was exclusive or not exclusive. Therefore, one is embarking on something that will  
25 be a distraction that cannot be of any conceivable relevance to the case. That is what we were  
26 trying to explain in the letter. There is really no issue that this Tribunal needs to explore on  
27 that point. If you want some further clarification we would respectfully suggest –  
28 notwithstanding all that I have said – that the better course might be for T-Mobile to set out  
29 what it says the representation was and then at least one can focus the position more precisely  
30 but, as I say, it cannot conceivably be of any relevance to you, ma'am.

31 THE CHAIRMAN: Well let us see what T-Mobile say about this?

32 MR. PICKFORD: Madam, we are entirely in agreement with Ofcom on this issue. The only point  
33 that we raised at paras.46 and 47 of our skeleton argument was simply a point of clarification  
34 in that the statement that was originally made by Ofcom seemed perhaps, in our view, to go too  
35 far. It seemed to be a somewhat broad statement about their ability effectively to licence a

1 new mobile operator to come along and use exactly the same frequencies of T-Mobile in the  
2 same way as T-Mobile uses them. Our point was simply to say that that much could not be  
3 something that Ofcom could do - when we referred to the fact that there was a clear  
4 representation that they could not have done that is the understanding in T-Mobile because  
5 otherwise T-Mobile would not have rolled out many hundred million pounds network if in  
6 doing so it was running out a network that could then be effectively replicated by another  
7 mobile operator.

8 THE CHAIRMAN: So what is your answer to the question I posed to Mr. Anderson? If this  
9 situation is that you commercial supply gateways to customers, is that covered by the licence  
10 or not?

11 MR. PICKFORD: No, it would not be.

12 THE CHAIRMAN: It would not be?

13 MR. PICKFORD: No.

14 THE CHAIRMAN: You could not, under the existing licence, supply gateways commercially to  
15 customers?

16 MR. PICKFORD: No.

17 THE CHAIRMAN: On the same frequencies, yes?

18 MR. PICKFORD: No, because the nature of our licence is not simply in relation to frequencies but  
19 also in relation to equipment and for certain purposes, and it is quite clear that we are allowed  
20 to use base stations and transmit on certain frequencies.

21 THE CHAIRMAN: But you would have to go back and get another licence if you supplied a mobile  
22 station to a customer commercially?

23 MR. PICKFORD: No-one can use COMUGs on the basis of their licence under the Wireless  
24 Telegraphy Act, so the only way in which they could be used is either if there were an  
25 exemption in the Exemption Regulations or they were specifically licensed pursuant to a  
26 further licence.

27 THE CHAIRMAN: You have not got an exemption?

28 MR. PICKFORD: No, and we say there is no licence that has been granted in respect of any  
29 commercial use of gateways..

30 THE CHAIRMAN: You say the representation did not allow you to supply to your customers for  
31 self-use commercially gateways – commercially single use.

32 MR. PICKFORD: Single use, no.

33 THE CHAIRMAN: So you could not, for example, put into Barclays Bank a single use gateway?

34 MR. PICKFORD: A commercial single user gateway, no, not under our licence as it currently  
35 stands.

1 THE CHAIRMAN: And the representation did not allow you to do that?

2 MR. PICKFORD: No, the representation that we were referring to, we are meant to refer to in very  
3 general terms, which is simply that it could not possibly have been the case that when T-  
4 Mobile was originally granted its licence it was expected to roll out a mobile network costing  
5 hundreds of millions of pounds if it did not have some degree of exclusivity in relation to that  
6 because plainly if T-Mobile were to invest £200 million in its network and then it were to  
7 discover a week later that OFCOM were going to say, “Well, actually Newcom can along and  
8 they can use your frequencies again.” The whole commercial endeavour would have been  
9 utterly futile. The point that we were making in our skeleton is that in the whole nature of the  
10 licensing process it could not be that OFCOM could go so far as it appeared perhaps to be  
11 suggesting in its skeleton that it did. OFCOM then clarified that it was not going so far as we  
12 thought it was, and our response to that is that is absolutely fine as long as we are quite clear  
13 that we had a degree of exclusivity, albeit simply in relation to the particular equipment on  
14 particular frequencies to be used for particular purposes in our licence, then that is really the  
15 end of the matter. So we would entirely agree with OFCOM that there is not an issue here and  
16 it cannot possibly affect the determination of this case.

17 THE CHAIRMAN: Mr. Mercer. Actually, before Mr. Mercer, does Mr. Flint want to say  
18 something.

19 MR. FLINT: No, madam.

20 MR. MERCER: We have to get, during the course of this week, into the meaning of the licence and  
21 the meaning and the scope of Vodafone’s licence, and what it was meant to do, and what  
22 everybody thought it was meant to do and the way in which it was operated, Our  
23 understanding, madam, of the reason why Exemption Regulations were used, why 4.2 was in  
24 existence, why 4.1 was in existence, is because the RA did not feel it could grant any further  
25 licences in respect of the frequencies being used. If you think about it logically, madam, if  
26 they were not bothered about that, why didn’t they just issue a class licence rather than an  
27 exception to an exemption; why not just issue a class licence for the equipment they wanted to  
28 see covered? But, no, they went about it in this particular route. I am actually old enough to  
29 have been in practice at the time at which the original GSM licences were granted, and Mr.  
30 Pickford is quite right: no business in its right mind would have made the considerable  
31 investment that was necessary for the coverage requirements for GSM licences in the United  
32 Kingdom without being reasonably sure that they knew exactly what they are up against,  
33 which is the other three operators because at the time at which those licences were taken out –  
34 we did not actually know that GSM was going to be quite as popular as it was. In fact, as I

1 recall at the time, there was concern that suitable candidates would be found, certainly for the  
2 type of years those licences were originally known as PCF.

3 I find it slightly odd that the successor to the RA says, “Oh, well, if we wanted to we  
4 would grant a licence for these frequencies.” Theoretically, they could, but if they went out  
5 tomorrow and put an advert in the newspapers pursuant to the 1998 Act to say they were going  
6 to, I suspect there are a couple of people in this room who would object mightily to that going  
7 on because they have made the investment and done what they were told, and they will be  
8 getting out the same arguments as me about legitimate expectation. On those promises is the  
9 rationale for the regulatory position we end up with and which existed through the period of  
10 dispute. I say, madam, it is relevant to find out and to go back and see what exactly was said.

11 MR. PICKFORD: Madam, I do not know if it is of any assistance, if I could just clarify. We do not  
12 say that OFCOM could not licence a GSM gateway on the spectrum that corresponds to T-  
13 Mobile’s spectrum. In effect, if one thinks of it in terms of there being user spectrum and  
14 operator spectrum, on the operator side T-Mobile is licensed to use that spectrum in a certain  
15 way. That does not prohibit – and I do not understand that OFCOM disagrees with this  
16 position – OFCOM from licensing a GSM gateway operator on the complementary spectrum,  
17 but not on the user spectrum that is actually used by T-Mobile.

18 THE CHAIRMAN: They go both ways.

19 MR. PICKFORD: Yes.

20 THE CHAIRMAN: Right. And your licence goes this way.

21 MR. PICKFORD: It goes both ways. We are allowed to transmit on one frequency and receiver on  
22 another frequency.

23 THE CHAIRMAN: On the receive licence, can they licence someone else on the receive side?

24 MR. PICKFORD: For example, if we are allowed to transmit on frequency A, they could allow a  
25 GSM gateway to receive on frequency A, and they could licence a GSM gateway to transmit  
26 on frequency B which is the same frequency that we are allowed to receive on.

27 THE CHAIRMAN: In relation to the frequency that you are allowed to receive on, could they issue  
28 somebody a licence to transmit on that frequency?

29 MR. PICKFORD: Yes. We have never maintained that we could not. Our point is simply that what  
30 they could not do was effectively replicate our business on our frequencies because operating a  
31 GSM gateway is, firstly, different apparatus and, secondly, it would be operating in a different  
32 way on the complementary frequencies because it would not be transmitting on the same  
33 frequencies on which we transmit. I do not know whether that assists the Tribunal at all in  
34 relation to this particular point.

35 THE CHAIRMAN: I think that is what you were saying before. That is how I understood it.

1 MR. PICKFORD: I just thought it might be helpful for us to clarify that. Thank you.

2 THE CHAIRMAN: Thank you.

3 MR. ANDERSON: Two quick points. Of course, what Mr. Mercer has been submitting to you is on  
4 an entirely different point. That is, what is the scope of the Exemption Regulations and  
5 whether or not FLOE's use of GSM gateways fell within 4.2 or not. That is a matter the  
6 Tribunal has already decided and clearly cannot be affected by anything the Minister may have  
7 said to T-Mobile in 1994 when he issued the licence. The point Mr. Mercer makes, with  
8 respect, is not material to this debate. Secondly, you can see from the submissions I have  
9 made and Mr. Pickford has made that there is no difference between us on this issue and  
10 therefore there is no factual matter that needs to be resolved. Exclusivity or not, whatever the  
11 position is, is irrelevant to the position of a GSM gateway.

12 Just on your example about the placing of a gateway in Barclays, whether or not that  
13 would be permitted will depend on who is using the equipment. If all T-Mobile -----

14 THE CHAIRMAN: My example is that Barclays are using it.

15 MR. ANDERSON: Then it is self use and it does not require a licence. If Barclays is using the  
16 gateway to provide services to its own employees, that is self use. If Vodafone or T-Mobile  
17 was using the gateway to supply services to Barclays, then that would be single user  
18 commercial use and prohibited. T-Mobile is in no different a position than Floe in that respect;  
19 they are governed by the same regulations and T-Mobile's licence does not help it one way or  
20 the other as far as gateways are concerned.

21 THE CHAIRMAN: (After a pause) Can we leave this discussion over, and proceed with today and,  
22 if necessary, we will come back to it.

23 MR. MERCER: Ma'am, if I might despatch your very first point? The only difference between the  
24 witness statement that you handed up this morning and that which was last sent to the Tribunal  
25 is Mr. Stonehouse's signature at the bottom. We made a correction to the witness statement  
26 because it contained a misquotation, "some time, a little time ago", but failed to put in a signed  
27 copy which we corrected this morning.

28 THE CHAIRMAN: So what we have in the bundle is with the correction but without the signature.

29 MR. MERCER: Correct, ma'am.

30 THE CHAIRMAN: Does everybody accept that?

31 MR. ANDERSON: (After a pause) Our difficulty is that the one in the bundle is also signed.

32 THE CHAIRMAN: 26<sup>th</sup> August?

33 MR. ANDERSON: Yes.

34 THE CHAIRMAN: That is our difficulty. I think it may be because there is some -----

35 MR. MERCER: The revised version says it was 5<sup>th</sup> December.

1 THE CHAIRMAN: Which we never received, or we do not think we received it.

2 MR. ANDERSON: It is the unamended version.

3 THE CHAIRMAN: Yes, I think that is what Mr. Mercer is saying, and everybody else has seen the  
4 amended version, have they – apart from the Tribunal? (After a pause) We did get it, so the  
5 one that is in the bundle – I think everybody agrees – should be the one that has the amended  
6 signature on it. We have looked at the unamended one, can you just let us know which  
7 paragraph or what was amended? You said there was a quotation, did you?

8 MR. MERCER: I have actually got a red line of the relevant pages if that would be of use to you  
9 ma'am?

10 THE CHAIRMAN: Just so we know what it is.

11 MR. MERCER: Underlined is added, struck through is deleted. Would you like us to distribute a  
12 red line version?

13 THE CHAIRMAN: No, no, I would not do that. I just wanted to know what it was. (After a pause)  
14 Right, thank you.

15 MR. MERCER: Thank you ma'am.

16 THE CHAIRMAN: Is there any other housekeeping before we start? (After a pause) Well, Mr.  
17 Mercer?

18 MR. MERCER: Yes, ma'am. The first on the list is Mr. Burns, and I have no questions in cross-  
19 examination of Mr. Burns.

20 THE CHAIRMAN: Well we had better call Mr. Burns to start with, is that where we are at the  
21 moment?

22 MR. ANDERSON: I have no questions for Mr. Burns.

23 MR. FLINT: Nor have I.

24 MR. PICKFORD: I have no questions for Mr. Burns.

25 THE CHAIRMAN: Is Mr. Burns here?

26 MR. ANDERSON: He is outside.

27 THE CHAIRMAN: Is he released? We have a question for Mr. Burns.

28 MR. JOHN BURNS, Sworn

29 Examined by Mr. ANDERSON

30 THE CHAIRMAN: Thank you. First of all, we need to establish that this is your witness statement.  
31 Does one of you want to do that or shall I?

32 MR. ANDERSON: I am perfectly happy to if that assists you?

33 THE CHAIRMAN: Thank you.

1 MR. ANDERSON: (To the witness) Do you have a copy of bundle 1? Before you open that and  
2 turn to the relevant page, could you state your name and address for the Tribunal and answer  
3 the Tribunal rather than me? A. Yes, the name is John Burns – home or business address?

4 THE CHAIRMAN: Business address? A. It is Aegis Systems Limited, 30 Anyards Road,  
5 Cobham, Surrey.

6 MR. ANDERSON: Could you turn in the bundle to tab 28? Is that a letter of instruction that you  
7 received from the parties in these proceedings? A. Yes it is indeed.

8 Q Could you turn to tab 34? Is that a copy of the report that you prepared in answer to those  
9 instructions? A. Yes, that is correct.

10 Q Does your signature appear on that? That is a copy of the report that you prepared? A. That  
11 is correct. The report was forwarded by email so there would be no signature as such, but I can  
12 confirm it is the report.

13 Q You confirm that that is the report? A. Yes.

14 Q In the previous tabs, tabs 30, 31, 32 and 33, are various letters sent to you by the parties?  
15 A. Yes.

16 Q You confirm that you received those letters? A. Yes, that is correct.

17 Q And are those the letters that you seek to answer in the annex to your report? A. That is  
18 correct, yes.

19 MR. ANDERSON: Thank you.

20 Questioned by THE TRIBUNAL

21 THE CHAIRMAN: It has been indicated by all the parties that they have no cross-examination of  
22 you. The Tribunal does want to ask you one or two questions. First, the matters which you  
23 have referred to and/or commented on in your report, what is the source of those matters?

24 A. The various sources, some of which are indicated in the report, some are publications from  
25 international Bodies, such as the International Telecommunications Union, or the CEPT, which  
26 is the European Conference of Post and Telecoms Administrations. I think there is also a  
27 reference to something produced by the GSM Association as well, which is sourced in here.  
28 But most of the material, a lot of the material is based on my own experience and background  
29 having worked in the field of radio communications, dealing with the management and  
30 regulation of radio spectrum for many years.

31 Q In your evidence to us, and with your experience, are there matters in this report which are  
32 controversial, in other words, that somebody could hold a different opinion? A. I think  
33 inevitably there may be certain elements that could be interpreted in different ways and I think  
34 that part of the problem which I may have alluded to in the report is that my interpretation of  
35 interference relates to the issue of “wanted” and “unwanted” electromagnetic energy and I do

1 not think there is any formal definition of what constitutes unwanted energy, so I have made  
2 my interpretation clear in the report here. It may well be that others will have a different  
3 opinion but my own interpretation is based on many years of experience and I think that is all I  
4 can say. I cannot say definitively that it would not entitle others to have an alternative opinion.

5 Q Is your route through wanted and unwanted something which has been formulated in your own  
6 mind, or is it taken from some source material? A. I think it is taken from source material  
7 which is specifically the Radio Regulations of the International Telecommunications Union  
8 which refers quite explicitly in its definition of interference to the terms “wanted” and  
9 “unwanted” electromagnetic energy is the term used – it is cited in the report anyway. As I  
10 say, where there is perhaps a degree of uncertainty is in the definitions of those terms,  
11 “wanted” and “unwanted” but the fact that those terms are fundamental to the concept of  
12 interference is there in the Radio Regulations if anyone cares to check that.

13 Q You say that there may be some difference of opinion in the definition of those terms – why do  
14 you say that? A. I merely say that because they are not formally defined in those  
15 regulations. I think it is fair to say that my experience, and having discussed the matter of  
16 interference on those occasions over the years that my view reflects the views of other expert  
17 colleagues with whom I have worked over the years, but clearly that does not preclude others  
18 from taking a view and I know that alternative views have been expressed in some of the  
19 documentation that I have read as briefing for this appearance. I personally would not agree  
20 with those interpretations but that does not deny the right for people to hold those opinions and  
21 interpretations.

22 THE CHAIRMAN: From what you have read of those interpretations, could someone with your  
23 experience express those interpretations? A. I think no. I think my interpretation of  
24 interference in the context of radio communications is really a very simple one in that it  
25 requires the simultaneous presence of both a wanted and an unwanted radio signal at any given  
26 time on any given radio frequency, and my understanding of the problem as it has been  
27 presented in the various briefing material here is that that is not actually the case. It is clear  
28 that there is an issue in terms of congestion perhaps, but at any given time within the network  
29 and on any given frequency there is only effectively one signal present, and in the absence of  
30 an unwanted signal at the same time, it seems to me that that cannot really constitute  
31 interference in the sense that it is referred to in the regulations, so that is really the fundamental  
32 basis of the argument I am presenting. Does that make sense?

33 Q And apart from what has been written here for the purposes of this case, is there any  
34 authoritative material, textbooks etc, which express the views that are contrary to your view?

1 A. I am not aware of any material like that which would express a contrary view, no; not that  
2 I am aware of.

3 THE CHAIRMAN: Can I just raise with Mr. Anderson and Mr. Pickford, in both your skeletons you  
4 summarise what you say that Mr. Burns is saying, and then you comment on it. I think it is  
5 only fair that Mr. Burns should be able to read what is in your skeleton and say whether or not  
6 he accepts what you are saying. I know that it has been taken out of the correspondence you  
7 have had with him, but I have not gone back to check whether what you have said in your  
8 skeletons is identical to what was said in the correspondence. Do you see my point?

9 MR. ANDERSON: That is a matter for you, madam, What is in our skeleton is our submissions.

10 THE CHAIRMAN: Do you have a spare copy of both your skeletons so that we can hand it up? I  
11 am sorry, I was asking the wrong person; it is Mr. Flint. The Vodafone skeleton is Mr. Flint.

12 MR. FLINT: Can I ask which particular paragraphs you have in mind?

13 THE CHAIRMAN: It is paras.100-101 of Vodafone's skeleton, and it is effectively para.39, 40, 41  
14 and 42 of T-Mobile's skeleton.

15 MR. FLINT: And which paragraphs of Ofcom?

16 THE CHAIRMAN: No, it is not; I do not think it is Ofcom's skeleton. I did not record anything in  
17 your skeleton. I had assumed that you were going to put these points to him. Did you make  
18 any similar remarks in your skeleton?

19 MR. ANDERSON: Para.89.

20 THE CHAIRMAN: Absolutely.

21 MR. ANDERSON: (Microphone off) Most of paras. 89 and 90 are our submissions -----

22 THE CHAIRMAN: Absolutely. Were you going to say something? No. If we start with divider 32,  
23 is that what you are looking at? A. Tab 32, yes, that is correct.

24 Q This is Vodafone's skeleton argument in which they summarise what you have said. I want to  
25 make sure that that is effectively what you said and how the correspondence between you and  
26 Vodafone – when they ask you questions. It is p.22. A. The entire page on p.22

27 Q It starts at para.93 where they are dealing with the meaning of harmful interference. If you  
28 turn over to para.97 it starts, “The view of Mr. Burns are that ...” A. Paragraph 97 seems to  
29 be reasonable.

30 Q If you could just read it down to I think it is para.102, though for the sake of completeness you  
31 may wish to read it to 104. Do you have any comment on it? (Pause) It is really para.100.  
32 A. Yes, I think my -----

33 Q If it is all in the correspondence between you, then there is no more to be said, but if you want  
34 to comment on how they put it? A. I think I would comment, first of all, the argument that  
35 the definitions I have used are too narrow and rely on a particular technical definition as

1 opposed to the more general definition of interference, I think, again, to come back to the point  
2 my argument is based very much on the way interference is defined not in a general everyday  
3 sense but in terms of how it is defined within the IT regulations, and that specifically refers to  
4 the wanted and unwanted interference. With regard to the issue of interference that might be  
5 generated within a receiver as its altered inter-modulation effects, again ultimately such inter-  
6 modulation effects that the receiver required the presence of signals being received at the  
7 receiver which ultimately have to come from transmitters within the network, if those  
8 transmitters and the receiver are compliant with the relevant standards, then it is most unlikely  
9 that inference will be generated within the receiver that would constitute harmful interference,  
10 in other words would exceed the limits that are defined in the relevant standards, that is a point  
11 I would make. I am not sure that the argument about inter-modulation interference is  
12 particularly relevant to the issue in hand here. If the GSM equipment, the terminals are  
13 operating in accordance with the standards and the receiver at the base station is also operating  
14 in accordance with the standards then the inter-modulation interference should not arise, at  
15 least not at the level that would constitute harmful interference, that is all I would say. That is  
16 probably all I can say at this stage.

17 THE CHAIRMAN: Thank you very much. If you can then turn to tab 33 – the page numbers are on  
18 the left hand side, and harmful interference starts at p.15, para.38. It is 38, 39, 40, 41 and 42.

19 MR. PICKFORD: Madam, in relation to that, our summary of what we say Mr. Burns says I think is  
20 39 through to 41, and then 42 is our submission which is responding to it, but we are not  
21 purporting to summarise beyond 41 of what Mr. Burns has said. But he is welcome to ----

22 THE CHAIRMAN: What about 42.3? It may not be summarising what he said, but is that  
23 something that ought to be put to him?

24 MR. PICKFORD: We would say “no”, it is a matter of legal submission but if the Tribunal would  
25 like him to read it.

26 THE CHAIRMAN: I do not want to be in a position where he does not see what the focus is of what  
27 he is trying to comment on. I think up to 42 then. A. (After a pause) Okay, well I am  
28 reasonably content with what I read up to para.41, which seems to be a fair summary of ----

29 Q And 42.3 I think – 42.1 and 42.2 are definitely legal arguments, but 42.3? A. I’ll leave those  
30 to the lawyers. 42.3 ----

31 Q It refers back to 40. A. (After a pause) I am not sure that I specifically agree that the GSM  
32 Gateways “interfere with the operation of a mobile cell.” I think there is an issue in terms that  
33 it may lead to congestion or it may affect the functioning of the network. I think we need to  
34 be a bit careful about how we use the term “interference”, or “interfere”. Whether it is used in  
35 a more general sense as it is in every day language, or whether it is used specifically as one

1 would relate it to a radio communications' link. I do not think I would actually agree with 42.3  
2 as it is here, but that is just my opinion.

3 Q Are you saying that because of your knowledge of telecommunications and the use of these  
4 words within telecommunications you do not agree with it? A. I think there are two separate  
5 things and it is worth just looking at a copy of the R&TTE Directive here – I have it in front of  
6 me here – which refers to harmful interference in Article 3.2 in fact, but there is also Article  
7 3.3(b) talks about things such as the misuse of network resources leading to an unacceptable  
8 degradation of service and it would seem that there is a distinction there within the R&TTE  
9 Directive which I give as an example of “harmful interference” relating specifically to a radio  
10 communications' link and there being other factors, whether you call it “misuse of network  
11 resources”, whatever, that may be considered from the point of view of the network as a whole.  
12 I come back to my main argument which is that “harmful interference” – my interpretation of  
13 the term “harmful interference” as it is used in the Radio Regulations and, as I understand it to  
14 be used in the authorisation Directive and in the R&TTE Directive is that it specifically relates  
15 to the physical radio link within a network, rather than to the network as a whole, so that issues  
16 such as congestion I think would not constitute interference – not harmful interference as it is  
17 defined in those various instruments.

18 MR. PICKFORD: Madam, as you have taken Mr. Burns to that particular point and he has indicated  
19 some disagreement with it, I think it is appropriate that I need to put a question to him.

20 THE CHAIRMAN: I was going to ask each of you whether, having regard to what he has now said  
21 you wanted to put a question, but since we are on the T-Mobile one ----

22 MR. PICKFORD: Yes, I shall go first.

23 Cross-examined by Mr. PICKFORD

24 Q Mr. Burns, you said that you do not agree with para.42.3 as it is currently expressed, just  
25 dealing with the first clause there, that GSM Gateways, and it says “... interfere with the  
26 efficient operation of a mobile network by blocking its availability to other users.” If one is to  
27 take the word “interference” there in a general colloquial sense, rather than in a technical  
28 sense, do you agree with that particular part of the sentence? A. Yes, I think I would be  
29 happy to accept that point in the wider sense that the word is used.

30 MR. PICKFORD: I think that is all I need to ask, thank you.

31 THE CHAIRMAN: Mr. Flint, do you have any questions arising?

32 MR. FLINT: No, ma'am.

33 THE CHAIRMAN: Mr. Anderson, do you have any questions arising?

34 MR. ANDERSON: Mr. Burns was not asked whether para.89 of our skeleton argument accurately  
35 summarised what we say he says and just for the sake of completeness perhaps he could just

1 confirm or deny. That is at tab 31 of the bundle, para.89 which summarises, we say, the thrust  
2 of your evidence. Then para.90 is our submissions in response to that. A. (After a pause)  
3 Certainly I agree with your interpretation of my statement in para.89. With regard to 90 I think  
4 all I would do is refer once again to the example I gave earlier, which is in the R&TTE  
5 Directive which refers separately to the harm of networks through the mis-use of network  
6 resources leading to unacceptable degradation of the service as distinct from harmful  
7 interference. I think there are two separate issues involved here, one being related to  
8 congestion and mis-use of resources on the network, etc., and the other being I agree what I  
9 interpret as a much narrower argument relating to harmful interference as defined within the  
10 Radio Regulations Authorisation Directive and elsewhere.

11 Q Thank you. If I ask a similar question to Mr. Pickford's, setting to one side for the moment the  
12 technical meaning of the word "interference" you would accept the sorts of problems that we  
13 have identified in para.90 could exist if the gateways were unregulated in that context?

14 A. Potentially I suppose, yes, but certainly the example you have given in *Tetra*, for example,  
15 it would be possible.

16 Q It would be possible – please speak up a little, because there is a transcript being taken.

17 A. (After a pause) I would agree insofar as what you are saying which is that the network  
18 could become congested and clearly that could be a problem for the network operator. But  
19 then there are ways of dealing with that sort of problem within the network, but yes I agree as  
20 far as that goes.

21 MR. ANDERSON: Thank you.

22 THE CHAIRMAN: So that we do not wonder afterwards, you say there are ways of dealing with it  
23 within the network, what are the ways of dealing with it? A. If demand within the network  
24 at a particular location increases then there are ways that the capacity of the network at that  
25 location can be increased to cater for that demand.

26 Q To provide more capacity? A. To provide more capacity, yes, which is what they do  
27 anyway where demand fluctuates.

28 THE CHAIRMAN: Thank you. Are there any other questions? Mr. Mercer?

29 MR. MERCER: No, ma'am.

30 THE CHAIRMAN: Mr. Flint, you are not asking any questions?

31 MR. FLINT: No.

32 THE CHAIRMAN: All right. Thank you very much for coming and thank you very much for your  
33 report. A. Thank you.

34 (The witness withdrew)

35 THE CHAIRMAN: Mr. Mercer?

1 MR. MERCER: I think we said we would start with Mr. Taylor, madam.

2 Mr. SIMON TAYLOR, Sworn

3 Examined by Mr. MERCER

4 Q What is your full name, Mr. Taylor? A. Simon Taylor.

5 Q And what is your address, Mr. Taylor? A. 28 Derby Road, East Sheen, Richmond, London.

6 Q I would be grateful if he could be shown tab 7 in vol.1. Is that your witness statement? Can  
7 you check and see if there is a signature at the end? A. Yes, it is.

8 Q And it is your signature? A. Yes, it is.

9 Q That is my formalities over with. I am afraid I must now throw you to the lions!

10  
11 Examined by Mr. FLINT

12 Q Mr. Taylor, that statement is true, is it? A. What, my name and address?

13 Q Your witness statement. A. Yes.

14 Q Thank you. You have said that throughout you have been completely open and honest in  
15 keeping Vodafone informed. Is that correct? A. I believe so, yes.

16 Q And you were the chief executive of Floe in 2002 and 2003? A. I was indeed, yes.

17 Q So if anybody was fully aware of Floe's intentions, you were? A. Absolutely.

18 Q And does it follow you were equally open and honest with Ofcom in its investigations?  
19 A. I believe so, yes.

20 Q So we can take it, can we, that where a statement was made by Floe to Ofcom, that statement is  
21 true, accurate and complete? A. I would like to think so, yes.

22 Q Would you look, please, at bundle 2(d) at tab 46. This is a note of a meeting between Ofcom  
23 and Floe. You were not present but Mr. Stonehouse was. I just want to ask you about a  
24 statement that was made. Will you look at para.28 on p.5 and read that to yourself. Do you  
25 see that: "Mr. Stonehouse confirmed that the time of disconnections all customers were being  
26 routed into Floe's distributed network rather than having on-site customer premises equipment.  
27 Furthermore, John Stonehouse stated that 'no SIMs were dedicated to an individual  
28 customer.'" Is that accurate? A. Well, I would say it varied in the fact that we had a  
29 mixture of what has become – at the time when we were involved in this there was, in my view  
30 and in my opinion, no law that differentiated private and public, so in answer to your question,  
31 we had on-site customer premise equipment and we also had distributed equipment where  
32 many customers could come into one point.

33 Q So what Mr. Stonehouse is saying here is incorrect, is it? A. Incorrect in the fact that we had  
34 customer premise equipment and distributed equipment.

1 Q So he is wrong in saying that all customers were routed into a distributive network rather than  
2 having on-site customer premises equipment? A. I think we had both basically, but we had  
3 a sophisticated network. In terms of finer details on how that network was run by John and his  
4 team, he is a technical expert and I guess when he takes the stand he can answer that more  
5 accurately than I can.

6 Q This is not a matter of finery or technical expertise. Did you or did you not have dedicated  
7 gateways on customer premises? A. Yes, we did.

8 Q So what is said at para.28 is wrong? A. Yes.

9 Q Thank you. Are you aware Mr. Stonehouse was specifically asked by statutory notice to  
10 confirm the accuracy of this statement and said it was true? A. No.

11 Q But your evidence is that it is inaccurate? A. I am saying the interpretation in the way John  
12 may explain this, we have in Telecoms a distributed network. We had equipment on site. We  
13 had equipment in facilities management centres. How we distributed the network is a question  
14 you need to ask him.

15 Q But, you see, he is saying that no SIMs were dedicated to an individual customer. Are you  
16 saying that is wrong also? A. I am saying that is potentially incorrect.

17 Q "Potentially" I am afraid is not good enough for me. Is it true or false? A. I would say it is  
18 false.

19 Q At March 2003 your company was running a distributive network. That is right, is it?  
20 A. That is correct.

21 Q You had gateways at Floe sites? A. That is correct.

22 Q To which customers gained access by dialling in or carrier pre-select? That is how some  
23 customers got into the network? A. Yes.

24 Q They dialed in or they had carrier pre-select in either event through a fixed network into a Floe  
25 site? A. Yes, that is correct; we had indirect access and customer pre-select as our access  
26 mechanisms.

27 Q And some customers had direct piped lines into your Floe sites? A. We had direct  
28 connections with major banks, yes.

29 Q But in all those cases the gateways were not on the customer's premises? Correct?  
30 A. Incorrect.

31 Q Some gateways were on customer premises, you are saying? A. I believe so.

32 Q All right. So leaving those aside, the major banks that were piped in or the other customers  
33 who dialled in, they were being connected indirectly to a gateway on a Floe site?  
34 A. No, I believe a variation actually.

1 Q All right, some. A. Both of those things. To qualify what I am saying, it would depend  
2 upon the size of the organisation, the size of the bank etc. on the methodology we would use.

3 Q All right. Take your small/medium enterprise customers. A. Yes.

4 Q They would generally dial in or carry a pre-select? A. I would say generally, yes.

5 Q You describe that as indirect connection into a Floe site? A. Yes.

6 Q And at the Floe gateways you had switching facilities to redirect the calls on to the appropriate  
7 network? A. Yes, we did.

8 Q And you had load sharing facilities to switch the calls around to various entry points on to each  
9 network? A. I am unsure about how we manage load management. I understand the term  
10 but again it would be a question for John.

11 Q And you had what you describe as wholesale switching to some carriers. Correct?  
12 A. I would describe we had a wholesale business, yes, for volume customers.

13 Q Under which, on a wholesale basis, you took calls into a Floe gateway and redistributed them  
14 out on to the various mobile networks at various points? A. That is pretty much correct, yes.

15 Q So at March 2003 if Mr. Stonehouse's statement there, which I showed you earlier, is  
16 incorrect, how much of your business do you say at March 2003 actually consisted of the  
17 provision of a gateway dedicated to one customer at a customer's premises? A. I do not  
18 actually know what the percentage is, but I would guesstimate – I cannot say this hand on heart  
19 – but I would say it may have been a 60-40 split.

20 Q Which is 40 and which is 60? A. I would say we would have on distributed, if you like, the  
21 more wholesale methodology, and 40 major banks and customer sites etc. The point I need to  
22 make here though is if you look at any form of telecoms, fixed lines, datacoms, IB, and I have  
23 worked in all of them, if you run a network you use the best economies to switch your traffic  
24 amongst your customer base. That is the way it works. So John designed a network that gave  
25 us the best efficiencies to switch minutes around our customer base for the best apportionment  
26 of the network, and also within that he avoided such things as congestion and issues that have  
27 been raised today.

28 Q You negotiated the contract with Vodafone which was entered into on 12<sup>th</sup> August 2002?  
29 A. I did.

30 Q And you negotiated it with Mr. Young? A. And a couple of other people, yes.

31 Q Who are the couple of other people? A. In terms of main negotiations, it was certainly  
32 Mr. Young, but Mr. Young, in the period while the contract was being negotiated, suggested to  
33 me that the contract was being distributed via many different parties within Vodafone. That  
34 was the policy because it needed sign-off from various departments.

35 Q Yes, but who did you negotiate with? A. Jonathan Young in the main.

1 Q Anybody else apart from Mr. Jonathan Young? A. At the time of signature, a gentleman  
2 called John Overton became involved.

3 Q Did you negotiate with him? A. No. I believe from memory he was really signatory and I  
4 do not recall anyone else broadly involved in negotiations, no.

5 Q Did you tell Mr. Young that you, in your provision of Floe services, would be testing the  
6 regulatory regime? A. I was unaware of any law at that time testing regulating any  
7 regulatory regime.

8 Q So the answer is you did not tell Vodafone or Mr. Young that Floe would be testing the  
9 regulatory regime? A. I was unaware of any law at that time testing the regulatory regime.

10 Q I am not asking about a law testing a regulatory regime; I am asking about Floe's intention to  
11 conduct its business to push the boundaries of the regulatory regime. That is my wording,  
12 "pushing the boundaries". Your wording is "testing the regulatory regime". A. I think from  
13 a business prospective, you know, I am not a technical expert or a regulatory expert. From my  
14 perspective their words, and many of the MNO's words at that time was sort of corporate  
15 handset market was somewhat saturated, and by putting equipment of this nature into the  
16 switch room of companies gave competitive edge. So Vodafone could possibly sew up a deal  
17 for themselves and then may be collect handset business from Orange at a later stage. What  
18 I was hearing was this was a very good opportunity for Vodafone to win competitive business,  
19 and ourselves, Floe Telecom, off other MNOs.

20 Q Your company told T-Mobile that it took its regulatory responsibilities very seriously?  
21 A. Which I believe we do.

22 Q So no doubt you made proper enquiries before embarking on this business? A. We believe  
23 we did.

24 Q Did you take legal advice? A. We certainly spoke to the DTI, and I believe John Stonehouse  
25 spoke to what was then Oftel. As to legal advice, we were unaware of any law regulating this  
26 market.

27 Q I see. So you did not think there was any law regulating this market. Is that your evidence?  
28 A. I was unaware of any law.

29 Q You thought there was not a law or you did not know what it said? A. As far as I was  
30 concerned, we were given a contract from Vodafone to operate under their licence and went  
31 into business to create the best business model we possibly could.

32 Q Without bothering too much about the legalities? A. No, because there is a path we need to  
33 go down here. I was, before Floe, a director of Telecom FM, and Telecom FM was being  
34 actively encouraged to develop Gateway equipment by Vodafone. So much so we put multi-  
35 line, multi-SIM product in to test with their technical people. We sent to see distributors of

1 theirs such as Martin Dawes who had gateways ganged up on their premises that I have seen *in*  
2 *situ* and I felt Vodafone were actively wanting this market to develop.

3 Q Could you look at bundle 2(a), please, tab 23? A. Yes.

4 Q This is your company's business plan, your internal business plan? A. Yes.

5 Q Which seems to have been generated in the course of 2002, the version we have in the bundle  
6 is dated 24<sup>th</sup> September 2002, but it seems to have been drafted between May and September?  
7 A. I think that would be about correct.

8 Q Would you look at p.35, please? A. Yes, indeed.

9 Q Headed "Legal and Regulatory"? A. Yes.

10 Q Presumably as chief executive you paid some considerable attention to this aspect, did you  
11 not? A. I guess as chief executive, yes, I take my regulatory and legal responsibilities – so  
12 yes, is the answer.

13 Q Could you just refresh your memory then of that page? A. Yes. (After a pause) Okay.

14 Q Right. Is this right that is how you saw yourself – in the second paragraph – "as a mobile  
15 service provider"? A. Yes.

16 Q Which was not licensed? A. Yes.

17 Q And which proposed to test the regulatory regimes? A. Well let me just take you back again  
18 to the fixed line and now the IP world. When I was working for Cable & Wireless and  
19 Mercury Communications there was supposed to be a duopoly in this country, and I think it is  
20 fairly proverbial that BT used to constrain Mercury from doing business at certain times, and  
21 anytime you cut new rope in the telecoms' market you do come across issues, and I believe to  
22 the best of our ability we spoke to the DTI and had conversations with the regulator and  
23 believe that is about as much responsibility as you can take.

24 Q Right, you say you spoke to the regulator, that is Oftel, is it? A. Yes.

25 Q Who spoke to the regulator? A. I believe John Stonehouse spoke to Oftel.

26 Q Did he get, as he told you at the time, did he get clearance that it was all okay to do what you  
27 planned to do? A. I am unsure of that answer. One thing I can say with confidence is that  
28 he approached the DTI who turned around and said "Well we would not mind your service in  
29 our own building", or words similar to that effect.

30 Q Was it your understanding at August 2002 that the DTI had told your company that your  
31 proposed services were lawful? A. No, I mean I don't think they said that. I'm unsure about  
32 what "lawful" means here – if I'm honest – because I was unaware of any law regulating this  
33 market at that time.

1 Q Well you understand the market is regulated? A. Well I understand that if Vodafone give  
2 me a contract to do business under their licence and when they are testing and using this  
3 equipment themselves I believe, you know, what more should I check out?

4 Q I see. Just going back to what was written here, it is right, is it, that you did propose to test the  
5 mobile telecoms' regulatory regime in the United Kingdom? A. My comment is that I think  
6 anything you do in ground breaking technology you test the regulations.

7 Q So the answer is "yes"? A. Yes, I think "yes".

8 Q And you were proposing to test Oftel? (After a pause) Yes, or no? A. I can't answer that.

9 Q You cannot answer that? A. I do not consciously go into business going to test Oftel.

10 Q Your evidence is that someone in your company spoke to Oftel? A. Yes.

11 Q You have not mentioned that in your witness statement, nor does Mr. Stonehouse. Are you  
12 saying that is the case? A. I did not feel it was part of my witness statement frankly.

13 Q I see, but it is true, is it, although not part of your witness statement? A. I think what I have  
14 said – to the best of my knowledge John Stonehouse spoke with what was then Oftel and  
15 definitely spoke to the DTI because I was involved as well in that conversation.

16 Q What is set out in the second paragraph on p.35 you did not inform Vodafone of any of that,  
17 did you? A. Most definitely, yes.

18 Q You did tell Vodafone that you were going to test the regulatory regime? A. Sorry, not that  
19 particular part of that paragraph, no. There had been applications and services and everything  
20 that is in that business plan, yes, we did.

21 Q Well let us look at what is in your business plan. If you go to p.23 of this same document?  
22 A. Okay.

23 Q You see here we have "Phase 1 Products"? A. Yes.

24 Q And in the third paragraph it says "There will be three broad products within Phase 1" and  
25 there is reference to Gateways and hybrid private exchange solutions? A. Yes indeed.

26 Q And that is the proposal to put a Gateway on to a customer's private exchange, is it not – have  
27 a direct connection? A. A Gateway can go anywhere.

28 Q Yes, but what you were proposing in Phase 1 was that it should go at the premises of the  
29 customer, were you not? A. Not necessarily, no.

30 Q I see. A. And I will tell you for why, I at this time was speaking to Slough Estates, for  
31 example, where the conversation there was they had many hundreds of companies on a large  
32 business park and with facilities management rooms where we could site equipment and  
33 interconnect many different companies and offer them competitive services. So to answer  
34 your question, if it was more viable to put a gateway into a shared facility then back to what I  
35 said earlier I would have done that.

1 Q Yes, so your plan right from the beginning was to have multi-use Gateways? A. Our plan  
2 from the beginning was to have Gateways, full stop

3 Q Yes, including multi-use – “shared” as you put it? A. Shared, yes.

4 Q Right, if you look at p.27? A. Yes.

5 Q “Enhanced Mobile Routing Solutions”? A. Yes.

6 Q You refer in the first paragraph to “... users who wish to benefit from the reduced call costs  
7 that can be achieved by intelligent routing.” A. Yes.

8 Q Then at the end of the second paragraph you say:  
9 “... routing, switching and billing will be handled by Floe and thus a true indirect  
10 mobile service will be launched using all the major mobile network operators.”  
11 A. Yes.

12 Q You were planning to run a true indirect mobile service – correct? A. Yes.

13 Q And one sees in the next paragraph that mobile users could dial in? A. Yes.

14 Q Then at p.29 “Projects Currently Under Consideration. Mobile Points of Presence”, “... high  
15 density, small footprint mobile points of presence for connection to wholesale fixed line  
16 networks.” That is a reference, is it not, to Floe Multi-Use Gateways? A. It is indeed.

17 Q At the bottom of the page “Wholesale Aggregation of Mobile Call Traffic”, you were planning  
18 to have a wholesale business right from the word “go”? A. Okay. Let me answer that.  
19 There is a phone saying in telecoms: “Your business plan when you start out is the most  
20 obsolete document in six months’ time.” I am sure Vodafone and their own strategy would say  
21 that.

22 Q But you had this intention right from the beginning, did you not? A. Our intention was to  
23 offer a just competition to consumers and businesses. In every other sector I mentioned, fixed  
24 line, datacoms, IP, you can have a distributed network. You can pump as much traffic as you  
25 can down a DSL pipe, you can use time of day routing, you can use all sorts of multiplexing  
26 and aggregation techniques, so to answer your question, if our network could run effectively  
27 by using wholesaling facility management centres, then that gave us the best form of  
28 competition to offer to our customers – sorry, the best form of network to offer competition to  
29 our customers.

30 Q This business plan we are looking at at the moment was the one that was in circulation in your  
31 company at the time you were negotiating with Vodafone? A. This is our business plan,  
32 yes.

33 Q And it is not the business plan that you disclosed to Vodafone, is it? A. I am unsure.

34 Q Look at tab 24? A. Yes.

1 Q Do you dispute the evidence that this is the business plan that your company were given ----  
2 A. 24?

3 Q Tab 24, do you see the heading on the first page? A. Yes.

4 Q “Floe Telecom Limited’s Business Case Response to Vodafone Corporate”? You specially  
5 prepared a document for Vodafone, did you not? A. Yes, this looks like – yes.

6 Q And you were responsible for its preparation, presumably? A. Most definitely, yes.

7 Q And you were careful to withhold from the document you disclosed to Vodafone anything  
8 about wholesale aggregation of traffic? A. I don’t – well – okay.

9 Q Well, we can look at this document, we do not need to look at it in detail, but I will just give  
10 you a chance to answer the fundamental points. This whole document is based, is it not, on the  
11 proposal to place Gateways at customer premises? A. Yes.

12 Q You did not tell Vodafone you were planning to engage in wholesale aggregation of mobile  
13 call traffic? Correct? A. It depends how you are defining “wholesale”.

14 Q Well, shall we start with something that is perfectly plain? A. Yes.

15 Q You had a plan to put Gateways not just at customer premises but at Floe sites? A. Most  
16 definitely.

17 Q You did not tell Vodafone that in this business plan? A. Okay, in the business plan maybe, I  
18 don’t think, you know, back to my statement – if you’re a telecoms’ operator, Vodafone  
19 themselves, you distribute your network if you want to get efficiencies. So if you can get 66  
20 customers running through a 30 channel primary rate box that is just commonsense, rather than  
21 put in ---

22 Q But why did you not tell Vodafone “Look, this is only a part of what we are proposing to do,  
23 actually it is going to be much bigger, we are going to have Gateways at our own sites”?  
24 A. Because when we signed this agreement we just had test and beta test products out there.  
25 The market evolves, you find things out every day. You understand the dynamics of a market  
26 after three, six, nine, twelve months, you evolve.

27 Q Would you look at p.20. Do you see “Hardware Details”? A. Yes.

28 Q “Floe will use a range of unique customer premise direct mobile access equipment as a cost-  
29 effective solution for SME customers.” A. Let me just see this.

30 Q Page 20 of 20 at the top of the page, tab 24? A. Yes.

31 Q “Floe will use a range of unique customer premise direct mobile access equipment as a cost-  
32 effective solution”. A. Right, okay. I have got in every business I am involved with  
33 customer premise equipment in facilities management sites. All of it is customer premise  
34 equipment, every product that is listed, it is all CPE; it is all CPE. It is just that if we put it in  
35 a distributed network, you get better efficiencies.

1 Q Ah, I see. So what you meant here – is this what you are saying to the Tribunal – that referring  
2 to customer premise equipment, you mean that would not be located at customer premises?  
3 A. Yes.

4 Q I see. And where we have ‘analogue single line solution’ where it says ‘connects to PBX’ –  
5 the private exchange – do you mean does not connect will be remotely located? A. It  
6 depends on the situation.

7 Q Why didn’t you give Vodafone your full business plan, the one you had internally at the time?  
8 A. I am not sure.

9 Q You are unsure why you did not give Vodafone your full business plan. Let me suggest a  
10 reason to you: it is because you were not being open and honest with Vodafone. You were  
11 taking a chance on the legality of your services, and you knew it? Is that right? A. No, I  
12 disagree. I would suggest that when you have a business plan as a company you do tend to  
13 tailor things to the situation you find yourself in. That is common practice. I was unaware (as  
14 I keep saying) of any law or any regulation that would not allow us to do what we do. My  
15 foundation, rightly or wrongly, is built on all the experience I have to date in the telecoms  
16 industry.

17 Q Now, when did you first discover that there might be a law or was a law that might prevent you  
18 doing what you were doing? A. It was probably in the summer of 2003.

19 Q The summer of 2003 you first discovered there was a law which might prevent you doing what  
20 you were doing? A. Yes. It was the first time I had been told or anyone gave me any  
21 direction to private/public gateway. It was the first time that I felt that came into reckoning.

22 Q I see. You do not want to reconsider that answer? It is a considered answer, is it: the summer  
23 of 2003? A. Obviously – no, before that Vodafone took precipitous action against our  
24 company and then in the December of 2002 a T-Mobile representative came into our offices  
25 and said that some meeting had taken place and gateway SIMs were going to be vetoed. So I  
26 smelt there was a rat in the December of 2002 and, lo and behold, as we got into February and  
27 March three MNOs cut us off all within a very short period of each other.

28 Q Which was the third MNO that cut you off? A. It was T-Mobile, Vodafone, Orange.

29 Q Orange. And when did Orange cut you off? A. I cannot remember the date, I am afraid.

30 Q Before or after Vodafone? A. It was after, I believe.

31 Q Do you remember you asked for a Vodafone director to come to a review meeting on 6<sup>th</sup>  
32 February 2003? A. Possibly, yes.

33 Q Let me just place the meeting for you in the documents. It is only fair to do so. Bundle 2(b),  
34 tab 15. Do you have 2(b), an email from you of 30<sup>th</sup> January? A. I am sorry. Which  
35 section are we in again?

1 Q 2(b), tab 15. A. Yes.

2 Q This is your email and you were keen to have a director of Vodafone present, were you not?

3 At the bottom of the page from Jonathan Young, he tells you that he has invited his director

4 along. A. OK.

5 Q At that meeting on 6<sup>th</sup> February you met Mr. Rodman, Mr. Young and Mr. Overton, didn't

6 you? A. I believe so, yes.

7 Q And you discussed gateways? A. Yes, we did.

8 Q And Mr. Rodman explained that Vodafone had problems with public gateways. Right?

9 A. Yes. But from my perspective I did not know the differentiation at the time between public

10 and private.

11 Q Did you say to him, "I don't understand what you are talking about"? A. Possibly.

12 Q Well, yes or no on your recollection? A. I cannot remember. I certainly felt that Mr.

13 Rodman, you know, was telling me his interpretation of everything and I felt perhaps – I just

14 did not feel comfortable with that, let us say, as it were.

15 Q Did you tell Vodafone about the problems you were having with your gateways? A. Which

16 were?

17 Q That you had been cut off by T-Mobile on the grounds of illegality? A. I did not discuss

18 that, no.

19 Q Would you look back in the bundle at 2(b), tab 11.. You should have an 11A there. Do you

20 see a letter of 14<sup>th</sup> January? A. Yes.

21 Q A letter of 14<sup>th</sup> January 2003 to Floe Telecom from T-Mobile saying that you were operating a

22 SIM box otherwise known as a GSM gateway in contravention of the Wireless Telegraphy

23 Act? Do you see that? A. Yes.

24 Q And they cut you off in January, didn't they? A. Yes.

25 Q And you took legal advice, did you not? A. I believe so.

26 Q If you would look at the next page, a letter of 16<sup>th</sup> January, a fax from Mayer, Brown, Rowe &

27 Maw, your company's solicitors? A. Yes.

28 Q Who had been instructed by you, hadn't they, because we see that at the first paragraph?

29 A. Yes.

30 Q And it refers to the Wireless Telegraphy Act? A. Yes.

31 Q And at the end of the second paragraph says,

32 "It is anticipated that in the event the Exemption Regulations are to be amended to

33 clarify this area of uncertainty, a statutory instrument will be prepared and laid before

34 Parliament in due course."

1 So you obviously had detailed legal advice, had you not? I do not want to ask you about the  
2 legal advice? A. We took advice. We were actually bemused why all this was happening.

3 Q You were taken by surprise? A. Saying that, the only issue we had was in the December.  
4 The account manager from T-Mobile had basically said "Buy more SIMs from us"; these  
5 SIMs will be outlawed next year. I thought, "Well, hang on, how can – further to some  
6 meeting" so that was my first indication. Yes, we then got these SIMs cut off.

7 Q If you look at the last but one paragraph on the second page, do you see what your solicitors  
8 say at the end of that paragraph? A. Yes.

9 Q "Clearly, in the event that the consultation process does not give rise to the anticipated  
10 outcome and, instead, makes clear that the use of GSM gateway devices does not fall  
11 within the Exemption Regulations, then it is recognized that it would be entirely  
12 appropriate for T-Mobile to then issue a suspension notice."

13 So you recognized, did you not, that the services you were providing at the time were illegal  
14 and what you hoped was that the law would be changed? A. I disagree with that statement;  
15 I was unaware of the law.

16 Q I see. When you met Vodafone on 6<sup>th</sup> February, are you saying you did not have an  
17 understanding of the legal issues relating to public and private gateways? A. I think that  
18 would be fair to say, yes. We felt we were operating under the auspices of Vodafone's licence.

19 Q I see. Did you tell Vodafone that Mr. Stonehouse had arranged a meeting with the Radio  
20 Communications Agency the following day to see if the Agency proposed to take enforcement  
21 action against your company? A. Possibly. I know at this stage John was negotiating or  
22 trying to understand and find a solution with the RA. I cannot remember the dates though.

23 Q But you were well aware that a solution needed to be found urgently, were you not?  
24 A. Yes.

25 Q Mr. Rodman asked you if you were using SIMs as public gateways? A. Yes.

26 Q And you denied it and said they were located at customer premises. Is that true or not true?  
27 A. I don't remember. I would also say I could not differentiate between private and public.

28 Q Yes, but you can differentiate between a gateway located at customer premises and located at  
29 Floe sites, can't you? A. Yes, and we had both; that is correct.

30 Q Did you tell Vodafone, "We have got gateways on our sites, not at customer premises"?  
31 A. I don't remember exactly what was said.

32 Q Do you deny misleading Vodafone as to your business? A. Yes, I do.

33 Q You do? A. Yes.

34 Q Do you say you told anybody at that meeting that Floe was actually running its own gateways  
35 at its own sites? A. I don't remember.

1 Q You don't remember? A. I don't remember; I am sorry.

2 Q But it was critically important, wasn't it? You knew that from the issue that had been raised by  
3 T-Mobile? A. It was a significant issue, yes. The only difference – there is a very  
4 significant difference in this though – we had a *bona fide* retail contract with Vodafone. We  
5 did not have a supply agreement resale agreement with T-Mobile. It was different as far as I  
6 was concerned, a different situation.

7 Q So did you discuss that with Vodafone on 6<sup>th</sup> February? A. Probably not.

8 Q Do you still maintain that you were not aware of the distinction between private and public  
9 gateways as at February 2003? A. I was unsure, frankly, yes.

10 Q Look, would you., at bundle 2(b) tab 5: a consultation paper of November 2002 issued by the  
11 Radio Communications Agency? A. Yes.

12 Q Did you read that at the time? A. No. I would not have, no, this minutiae. In honesty, this  
13 kind of stuff I would leave to somebody like John who is a technical expert. This is kindly  
14 beyond my knowledge, frankly.

15 Q Could you then go through to tab 45. A. Yes.

16 Q Do you recall going to see the Minister in March 2003? A. Yes.

17 Q This is the Department's notes of 26<sup>th</sup> March 2003 of your own meeting accompanied by your  
18 own MP with Mr. Timms. Would you look over the page. "Meeting with Floe Telecom and  
19 Anne Keen MP." A. Yes.

20 Q Do you see there para.14,  
21 "The Minister outlined his concerns. It was emphasised that Floe's activity was  
22 illegal."  
23 A. Yes.

24 Q Did that take you by surprise? A. At the time, I don't remember frankly. I remember -----

25 Q So you cannot recall if you were surprised by that? A. I think I was actually. I think I was  
26 surprised with the stance that the government took on this particular issue, yes.

27 Q At present at that meeting was Mr. Jim Davies of the DTI? A. Yes.

28 Q He is the person who met your colleague, Mr. Stonehouse, in February 2002? A. Yes.

29 Q So at this meeting did you say to Mr. Davies, hold on a moment, you told us last year all this  
30 was legal. Did you say that to Mr. Davies? A. Possibly, because that was our belief as a  
31 company.

32 Q Oh, you possibly did tell Mr. Davies at this meeting that you believed that he had advised your  
33 company that it was legal? A. My recollection is yes we did. We sought advice from the  
34 DTI. He was in the relevant department and I believe he said at that time, yes, it was a service  
35 that he would even take on himself.

1 Q So it is your evidence to this Tribunal, is it, that there was, in effect, a complaint, or you raised  
2 the point, that you had been given different advice by the DTI a year earlier? A. Potentially.  
3 From memory, yes.

4 Q Although it is not minuted, that is your evidence? A. Yes.

5 Q Look at para.18, will you,  
6 “Floe stated that they were currently challenging certain operators actions of switching off  
7 their gateway SIMs for ‘unspecified’ reasons and refusing to comment on their action.”  
8 A. Yes.

9 Q That is untrue, is it not? Both T-Mobile and Vodafone had told you you were being switched  
10 off because the activities were illegal? A. OK. They went wholesale switch off. They did  
11 not discriminate, differentiate anything between. It was just like universal, you know, so it did  
12 not matter if it was customer premises, it did not matter if it was facilities management; it was  
13 just a universal decision and, you know, I believe it was for anti-competitive reasons, you  
14 know.

15 Q But it was specified, wasn’t it? The letters told you that the companies considered the  
16 activities illegal? A. Yes.

17 Q When do you say your company first raised this story that you had received approval for your  
18 activities from the DTI? A. It was in 2002. Unsure of date.

19 Q That is when you say you got that advice. When in 2003 did you first say to anybody, “Look,  
20 we were advised in 2002 that it was legal”? A. I would have thought again – you know,  
21 hand on heart I cannot remember it – at the time we did some lobbying with parliament. At  
22 that time we reintroduced what the DTI had explained to us.

23 Q What I put to you is there is no reference to any such complaint or point being made on 26<sup>th</sup>  
24 March 2003 to the Minister or Mr. Davies? A. Okay.

25 Q Would you look back, please, to tab 35 in this bundle? A. Yes.

26 Q This is the letter from Vodafone of 10<sup>th</sup> March? A. Yes.

27 Q Would you look at the first paragraph? A. Yes.

28 Q Referring to the meeting of 6<sup>th</sup> February:  
29 “I believe you indicated that you supply gateway devices to individual ME and SME  
30 customers for their own use (and you bill them for calls) but did not supply a GSM  
31 Gateway service, on a wholesale basis to third parties.”  
32 A. Yes.

33 Q Is that a true record of what you said on 6<sup>th</sup> February? A. Unsure.

34 Q You are not sure? A. No, I am not.

1 Q You did not deny it, did you, in the response? A. The confusion in my mind was still to this  
2 day – I just don't differentiate between this private and public argument. It is not clear to me.

3 Q This does not mention “public” or “private” it uses perfectly ordinary words, it says “on a  
4 wholesale basis”? A. We buy minutes off Vodafone at a price they have given us under  
5 their licence, it is our business how we resell it and how we compress or multiplex or do  
6 whatever we want with that traffic, is it not?

7 Q You knew perfectly well you were engaged in the wholesale aggregation of calls switching  
8 between networks, did you not? A. Well, you say that. We took many customers into one  
9 box to give us sufficiencies of network, but when Vodafone switched us off they also switched  
10 Crédit Suisse off who, from my knowledge, was one of the biggest users with the highest  
11 traffic profiles, and from memory those boxes were on site, so no one can discriminate.

12 Q Well I will ask the question again. Are you saying it is accurate or inaccurate to record that  
13 you had told Vodafone on 6<sup>th</sup> February that you did not supply a Gateway service on a  
14 wholesale basis to third parties? A. I can't remember what we discussed.

15 Q If you would look at the response at tab 38? Was this drafted by you or Mr. Stonehouse – it  
16 has Mr. Stonehouse's reference on it? A. Okay, yes.

17 Q Why did you not come clean in this letter and say “Well, actually we are providing a wholesale  
18 service, but it is all legal”? A. I am still struggling with what you mean by “wholesale”. In  
19 the fixed line market you have an international resale licence, so you have a certain licence to  
20 operate at a certain level. We were operating under the auspice, we believed, of Vodafone's  
21 licence. In my view, if you buy minutes at a set price and you can put one box on a business  
22 park and have 93 customers coming into it. You can have three boxes in Crédit Suisse and fill  
23 them to capacity. All we were trying to do was get efficiencies of our network to offer good  
24 competitive rates to customers.

25 Q Do you not know what the words “providing services on a wholesale basis to third parties”  
26 mean? A. Not in the context of this conversation, no.

27 Q Would you look at tab 75 in this bundle? A. Yes.

28 Q Mr. Mittens was your chairman, was he not? A. Yes, he was.

29 Q And he understood your business all right? A. Yes.

30 Q And do you see what he says at the third paragraph? “Our Vodafone traffic falls into 3  
31 categories: 1. Directly connected Corporate customers----” A. Yes.

32 Q “2. Indirectly connected Medium and SME customers, who use dial-in----” A. Yes.

33 Q “3. Wholesale to selected carriers? A. Yes.

34 Q That is an accurate statement is it, of your business, as at March 2003? A. Yes, I believe  
35 that is correct, because there directly connected as far as we are concerned, and indirectly

1 connected have some form of, if you like, there is a presence of equipment on site, and  
2 wholesale is where you collect traffic in and pass it at competitive rates.

3 Q Do you see the next paragraph: “Vodafone has suggested they find Customer Premise  
4 Equipment acceptable ...” A. Yes.

5 Q That is what Mr. Rodman was telling you on 6<sup>th</sup> February? A. Yes.

6 Q And they asked you if you were doing anything else? A. Yes.

7 Q And you said “no”? A. I am actually unsure, as I stand here, as to whether there was any  
8 elements of wholesale in our business in February of that year, I am unsure, frankly, I don’t  
9 know if we had.

10 Q So can we not rely on Mr. Mittens’s letter as a statement of truth? A. This is 6<sup>th</sup> June, is it  
11 not, 2003.

12 Q Yes. A. And it is a long way ahead, and the business did evolve, it was another four years in  
13 the evolution – sorry, four months, I apologise.

14 Q Oh I see, so your business prospered, did it, after being cut off by Vodafone? A. No, it did  
15 not.

16 Q Well see what Mr. Mittens writes here: “Vodafone suggest that they find CPE acceptable.  
17 That is what Floe initially provided but there are numerous disadvantages to the customer and  
18 the MNOs in this singular approach.” A. Correct.

19 Q So is it right that you did initially provide that but later on had a different business model?

20 A. I think our business just evolved, frankly, that is fair to say, yes.

21 Q And if you go over the page:

22 “A further consideration is the fact that in the present economic climate many  
23 businesses are reluctant or unable to buy capital equipment and can only afford to  
24 access a Gateway service via the variable costs of an indirect connection. If we do not  
25 offer an indirect service we will only be able to provide competitive services for the  
26 larger, richer organisations.”

27 A. Yes.

28 Q And six paragraphs down, in the middle of the page: “We currently offer a limited wholesale  
29 service to four carriers who provide us with switching facilities.” A. Right.

30 Q That obviously was your business as at March 2003, was it not? Or are you saying that your  
31 business ---- A. I don’t know, we would need to check it, I mean our business started off  
32 with directly connected customers. We then took the kind of business park scenario and we  
33 had some carrier business, where we were being supplied with CPE and 1XXX-type services.

34 Q Now, Mr. Taylor, I will put the point to you. The point I am putting to you is that you were  
35 thoroughly tricky and evasive on 6<sup>th</sup> February, and were the opposite of open and honest. You

1 gave a false picture of your business to Vodafone. Do you deny that? A. I don't agree with  
2 it.

3 Q Do you deny it? A. Well I think equally and in everything, you know, negotiations I  
4 subsequently had with Vodafone that they were equally as tricky and non-committal to try and  
5 sort out any kind of compromise. The conversation was a complex one and I don't remember  
6 where we went with it, frankly. All I know is we didn't get a resolution.

7 Q Are you saying on 6<sup>th</sup> February your company was not supplying a Gateway service on a  
8 wholesale basis to third parties? A. I am unsure, I would need to check.

9 Q You are unsure? A. I need to check, yes. I would need to check.

10 Q I asked you at the beginning if the information given to Ofcom was true and correct. That is  
11 right, is it? A. I believe so. Again, the Ofcom and RA submissions were not directly  
12 controlled by me, but I believe to the best of our ability ----

13 Q Will Mr. Stonehouse have a better grasp of the business of your company at February, 2003 ?  
14 A. Possibly, yes, in terms of the technical and regulatory side.

15 Q And he was in charge of obtaining regulatory approval, was he? A. Yes, he was.

16 Q And did he report to you in February 2002 that the DTI had been given full information about  
17 your company's business and had approved it? A. He certainly reported that to me and we  
18 discussed it. When the dates were I am unsure, but he most definitely did engage in  
19 conversations with the DTI and I subsequently met the gentleman you mentioned earlier, and I  
20 believe we had a positive response from the DTI.

21 Q What I suggest to you is that your company has made up this story of getting approval from  
22 the DTI and it only surfaced for the first time in July 2003 in your complaint to Ofcom? A.  
23 Okay, well as far as I am concerned you would need to question John directly on that because I  
24 am unsure of what the dates were and what was said. All I know, a conversation took place.

25 MR. FLINT: Thank you, I have no further questions.

26 MR. ANDERSON: I have no questions for this witness.

27 MR. PICKFORD: I have no questions.

28 THE CHAIRMAN: Mr. Mercer, do you have any re-examination?

29 MR. MERCER: Just a couple of short points, ma'am.

30 Re-examined by Mr. MERCER

31 Q Do you recall being told by Mr. Stonehouse that he visited Mr. Davies at the DTI in the Spring  
32 of 2002? A. Yes.

33 Q When he came back did he give you any indication whatsoever of any form of difficulty raised  
34 by the DTI? A. No.

1 Q Thank you. Were you your company's technical expert, or was Mr. Stonehouse? A. I am  
2 certainly not, John is.

3 Q Who would have known where boxes were actually installed? A. John.

4 Q You negotiated with Mr. Young over a lengthy period, did you not? A. Yes.

5 Q Do you think it is possible that Mr. Young could have got the wrong end of the stick? A. I  
6 would say in fairness he might have.

7 Q In what way? (After a pause) I will put the question to you another way. Did you tell him, or  
8 did you inform him, or did he ask you if there was any form of Gateway you were not going to  
9 provide? A. No.

10 Q You have repeated over the last wee time again and again that you had difficulty in  
11 understanding the difference between public and private Gateways? A. Yes.

12 Q Did you have, in your mind, a firm understanding of the difference between public and private  
13 Gateways in the period, let us say, between January and May 2003? A. No.

14 Q You negotiated the contract with Vodafone? A. Yes.

15 Q That contract contains repeated references to handsets? A. Yes.

16 Q Was it ever intended there should be a handset contract? A. No.

17 Q At any time? A. It could have been peripheral business to Gateway but it was mainly our  
18 competitive urge was to win Gateway business within customers, yes.

19 Q Were you of a mind that during the relevant period, which is the period after the  
20 commencement of the Vodafone contract until they pulled the plug on the SIMs, that you were  
21 in effect authorised by them under their licence by that contract? A. Excuse me, sorry?

22 Q Were you authorised, did you believe, by the Vodafone contract? A. To operate by their  
23 licence?

24 Q Yes. A. Yes, I was.

25 MR. MERCER: No further questions, ma'am.

26 MR. DAVEY: Mr. Taylor, you say you believed you were authorised by the Vodafone contract?  
27 A. Yes.

28 Q To carry out the business you were doing? A. Yes.

29 Q Then how did you reach that view? A. Okay. It's a little bit of a story but I was the director  
30 and owner of a hardware and software company called "Telecom FM". Telecom FM were  
31 supplying fixed line routers to Vodafone probably going back as far as 2000. It got into  
32 negotiations with various senior managers about developing bigger and better Gateways, if you  
33 like, and then got engaged with a technical team and an evaluation team at Vodafone who then  
34 started load testing our products in Newbury at some premises, and Telecom FM were making  
35 bigger Multi-SIM Gateways. We then entered into a conversation where Vodafone potentially

1 wanted exclusivity on our hardware and software, and at that time I was also engaged in a  
2 conversation with Orange, who were expressing the same interest. So from my perspective,  
3 not being a regulatory genius, I was being asked in one hand to develop a better Gateway, a  
4 bigger Gateway on the hardware side, and at that point realised there was a great market to  
5 offer Gateway type services as a service provider, which basically gave very, very aggressive  
6 competition to UK consumers. So that was really the journey of events. I felt I was  
7 developing something with Vodafone's blessing.

8 Q You knew this was a regulated market? A. I didn't understand, I mean I didn't have a  
9 particular understanding of specific regulations. What I did understand, I felt if you were  
10 operating with the blessing of Vodafone and under their licence we were in shape; and the  
11 other thing was Vodafone used the equipment themselves, I mean they bought this equipment  
12 from Telecom FM and other vendors, and I ended up being sent to promote the product to  
13 some of their distributors.

14 Q You say that you did not understand the regulations, but you were aware that there were a lot  
15 of regulations about? A. There always is, sir, in telecoms. The business I am involved in  
16 now, the regulations crop up and you deal with them as and when.

17 Q And you had said in your big business plan that you were testing the regulators, is that right?  
18 A. I go back to just my experience to date ----

19 Q At this stage, you said that in your plan? A. Yes.

20 Q So what I am trying to get out, Mr. Taylor, is what led you to believe, if you were testing the  
21 regulator and so on, that Vodafone could authorise you to do that? A. I was kind of hoping,  
22 I guess, there would be some form of sub-licence available to a company like ours to operate  
23 as we went forward.

24 Q Some kind of sub-licence? A. Possibly, yes.

25 Q So you say that you were hoping that they could do that, did you know whether they could do  
26 it or not? A. I didn't. I didn't have a clue to be frank.

27 Q Right. You also said – I am taking you now to February 03 – you were saying you were not  
28 sure just exactly what the business constituted at that time? A. That is correct.

29 Q Way back about a year previously you had been producing this business plan which opened up  
30 the possibilities of doing all these things? A. Yes.

31 Q Were you not aware as to whether those opportunities had been availed of? A. Absolutely  
32 not. If you are a small hardware/software manufacturer and you feel you are being encouraged  
33 by the MNOs to develop something and you are being told they are using these things  
34 unofficially at the moment because Nokia and Ericsson had these products and they would  
35 gang them together in lines of eight – I have seen lines of 14. All we did was produce a

1 product with a switching mechanism to give efficiencies. If we had got that wrong we would  
2 have gone out of business, so we were completely unaware; and obviously other products were  
3 being used.

4 Q So you personally did not know where these things were or how they were being dealt with?  
5 A. I engaged with some of the Vodafone distributors and then understood their business model  
6 and, in fact, they had their own direct business out of Newbury selling fixed and fixed to  
7 mobile services.

8 Q No, no, I am speaking specifically about February 03. You did not know in February 03 where  
9 these various things were, or what the nature of the business was at that time? A. Sorry, are  
10 we talking about the equipment, where it was sited and things?

11 Q Where it was sited, what kind of equipment was being used. You were saying you had to  
12 check? A. We used a variation of equipment and as to where the sites were I know we had  
13 some banks, and we had some FM centres, and so I would need to check that.

14 Q It is the fact that you have to check it that I am wondering about, Mr. Taylor. This was the  
15 way you envisaged your business going, apparently, back a year previously. Were you not  
16 interested in it developing? A. Of course. Sorry, just so I am clear on what you are asking  
17 me. You are saying in February 2003 where the business was coming from, or where the  
18 equipment was sited?

19 Q What I am trying to get at, Mr. Taylor, is that you said that you did not know what was going  
20 on in February 2003 ---- A. Hand on heart ----

21 Q -- what I am trying to find out is why not? A. Hand on heart, I know we had a number of  
22 facilities management centres dotted around the UK. As to the location of every one I don't  
23 know. I know we had a few major banks as customers, Crédit Suisse, we had Goldman Sachs,  
24 Merrill Lynch, we had some decent sized City banks, and as to what equipment was sited  
25 where I was not particularly on top of that because I do not feel day to day you need to be  
26 really, you leave your network design to your engineers.

27 Q So you did not know where the equipment was or what specific kind ---- A. I couldn't say  
28 specifically what was where. I know we had something in Slough, Chiswick, Reading, I never  
29 really negotiated with the FM centres and I never sited the equipment there, that was really  
30 down to John and his team.

31 Q Did you know whether there were customers, or a number of customers, where all their calls  
32 would be gathered up and delivered through one box? A. Absolutely.

33 Q This would be a variety of different customers? A. Yes.

34 Q You knew that? A. Yes.

35 Q The calls of various customers would be gathered up? A. Yes.

1 Q But at the meeting in February 03 you knew that there were customers that you were doing this  
2 for, but you did not tell Vodafone at the meeting? A. I believed at that time, you know, that  
3 I couldn't really differentiate between private and public licensed. All I said to Vodafone I  
4 believe was we did have CPE end customers, and we had, if you like, aggregated customers.  
5 That would have been my retort, my response. As to wholesaling, which is the word that is  
6 cropping up, I guess in fixed line telecoms, wholesaling you have a separate licence, etc., we  
7 were given a pricing structure from Vodafone and I believe to offer competitive services it was  
8 our business how we switched that and to offer the best competitive rates, which is how we go  
9 about our business.

10 Q And you did not tell Vodafone how you were doing it? A. I believe we did. I believe we  
11 gave a representation of ourselves.

12 Q When was this? A. I believe that this was February/March, whenever we were having  
13 review meetings, or these meetings to try and sort this issue out because the concentration of  
14 the SIM cards, the traffic being passed through them was clearly way and above what the  
15 normal handset business would see.

16 Q So you think you did clarify your methods to Vodafone? A. I believe so, yes.

17 Q Would that be during those meetings, subsequent to being cut off when you were trying to get  
18 back on again? A. I believe so, yes.

19 Q Let me get this clear, the meeting in February 03, what did you tell Vodafone then about the  
20 nature of your business? They were asking about the nature of your business – let us not  
21 argue about the terms in which they asked, but they were quite clearly asking about the nature  
22 of your business. What did you tell them? A. Categorically, without confusion we were a  
23 Gateway business, that was our competitive edge, and private/public that was our core  
24 business, and we had a competitive edge.

25 Q Is that what you told them or what you were? A. I believe so. I wouldn't say "dance  
26 around" words, but that is what we went into operation to do now. If you put a single line box  
27 in an estate agent, or you put a multi-line box, or a primary rate box in a library, to me you  
28 have a resell contract, you have a contract with the provider who has the licence, you are  
29 providing fair and just competition.

30 Q I follow all that, but what I am trying to get at is not why, but what specifically – what did you  
31 say to Vodafone? They were asking what you were doing and they were trying to find out  
32 what you were doing with your business. What I am trying to find out is precisely what you  
33 told them – if you can remember? A. Well I don't remember the specifics of a meeting that  
34 long ago, but I can assure you we were only five or six months into a contract with Vodafone,  
35 and we were in Gateways, out in the market gaining competitive edge, so it was Gateways and

1 I can subsequently tell you that an email between myself and our account manager, Mr.  
2 Young, because there was reference in the contract to handsets, and he said “You can’t have  
3 the handsets because you are in Gateways” – I can’t remember the exact wording. So we got  
4 denied any handsets because we were a Gateway business.

5 Q So you think that you told them at that meeting that you were a Gateway business?

6 A. Without the shadow of a doubt.

7 Q And what did you mean by that? A. Provide Gateway services to end customers.

8 THE CHAIRMAN: It is just after one, I do not know if that line of questioning means that anybody  
9 else wants to ask any questions? No? (After a pause) Thank you very much, Mr. Taylor.

10 A. Thank you very much.

11 THE CHAIRMAN: Five past two.

12 (Adjourned for a short time)

13 Mr. JOHN RICHARD STONEHOUSE, Affirmed

14 Examined by Mr. MERCER

15 Q Please give your full name? A. John Richard Stonehouse.

16 Q And your address? A. Tudor Cottage, West Street, Hambledon, Hampshire.

17 Q Could the witness be shown tab 6 volume 1, please. There are there, Mr. Stonehouse, more  
18 than one witness statements (there should be two). A. Yes.

19 Q Are they both yours? And does your signature, however belatedly, on the second signify that  
20 that is the evidence you have given? A. Yes, in both cases.

21 Cross-examined by Mr. FLINT

22 Q Could you be shown bundle 2(d), please, at tab 46? This is a note of a meeting which you  
23 attended on 15<sup>th</sup> 2005 with Ofcom and if you would look at para.28 at p.5, is that statement  
24 true? A. As Mr. Flint knows, that statement was also asked in the section 26 of me of  
25 which there was an accompanying letter. The statement in fact is true. I stated that but  
26 further to those notes at that meeting, in addition was an explanation of how we came to that  
27 decision to say yes, the SIMs were not dedicated to any customer, and that was where we had  
28 direct connections from a number of large banks directly into the Floe Telecom switch which  
29 were an extension of their PBX by a direct piece of network into our switch. The reason for  
30 connecting them in that way is so we could control the amount of traffic received from those  
31 customers. So in the first instance that piece of network, that partition on the switch, the  
32 GSM gateway connected that partition on the switch was in fact directly connected to that  
33 customer. We optimized our routing, as was discussed at the Ofcom meeting at around 70  
34 per cent optimization. We did this for two reason: not to overload cells and, secondly, to be  
35 in a position where we could offer a quality of service to our customers, being big

1 institutional banks quality was of an issue. So if we had a call coming from one of those  
2 pieces of connected networks, that meant it took it over the optimum parameters on that, i.e.  
3 over the 70 per cent, we effectively moved that on and looked for another SIM somewhere in  
4 the network, no matter where it was in the network, that carried the least amount of minutes  
5 for that day, and we sent that call there. The answer to the question, why I said yes to the fact  
6 that we were not dedicated, in fact the majority of the optimization of that piece of network  
7 into that GSM gateway connected to the switch was effectively dedicated to the customer.  
8 We protected our quality and hopefully felt Vodafone protect any congestion that may have  
9 happened to the overloading of the cell size by routing away over and above 70 per cent.

10 Q That is perhaps rather a complicated answer to a simple question. Paragraph 28, first  
11 sentence and second sentence, they are both true statements, are they? A. I think I have  
12 just made it quite clear, Mr. Flint, that those statements are true.

13 Q Thank you. So you were running a distributed network rather than having on-site customer  
14 premises equipment? A. We were running both.

15 Q Why do you say rather than having ----- A. Can I answer the first question, please?

16 Q Go on. A. Thank you. If we take the difference between a piece of customer premises  
17 equipment, a piece of customer premises equipment does not dictate where that piece of  
18 equipment stands or sits. It dictates that that piece of equipment is dedicated to a customer  
19 premise. That you connect the PBX of a customer with a piece of network, whether that  
20 piece of network is a local connection within that PBX room of may be a few metres or a  
21 couple of kilometers, is still a direct connection into that piece of equipment. By virtue of  
22 extending that piece of equipment out into a location, although it was more easier for us as a  
23 customer as a company to manage and control, it still stays as a piece of customer premise  
24 equipment. The only alternative customer premise equipment, Mr. Flint, is a network  
25 terminating equipment, and a network terminating equipment is a piece of equipment that  
26 terminates two networks, not a customer. The customer's point is the network termination  
27 point and it is up to the carrier to decide where the network termination point is. This is as  
28 true in fixed line networks as it is true in mobile networks.

29 Q So is it right or wrong that you did not have on site customer premises equipment? A. At  
30 what time are we talking?

31 Q At March 2003? A. At March 2003 I am not aware of any piece of equipment that was  
32 actually sat at the customers premises. Initially, we had equipment sat on Credit Suisse First  
33 Boston site. They asked us if we could move it out of their site, extend their network and put  
34 it on one of our sites so that we could provide them with a better disputed piece of network  
35 and because of the fact that they had 60 channels of GSM gateway connected on their site

1 down in docklands E14 where we knew there were congestion issues because we could  
2 monitor it by looking at certain measurements within our network. We moved it away so we  
3 could distribute them around the south of England to provide them with a better quality of  
4 service and also to negate again overloading cell sites because it is not in our interest to  
5 overload cell sites which would affect our quality.

6 Q If you look at paras.25 and 26, those are accurate answers as well, are they? A. Yes.

7 Q If you look at para.20 is this the Credit Suisse example you were giving, you were referring  
8 to in para.20? A. Yes, it is.

9 Q What you say there is that originally the gateways were installed on the customer's premises  
10 but it was eventually migrated on to an indirect access? A. No.

11 Q That is what this says, is it not? A. It does, but in retrospect they were connected on the  
12 end of a direct network. They had overflow which went on to indirect access, but major  
13 corporate customers do tend not to like indirect access.

14 Q Right. So they would have had a piped line on to a Floe site where there was a gateway with  
15 an ability to load share from that gateway? A. No, that is not correct. Effectively, to  
16 understand what it should be that the network is, is that you have a central switch. That  
17 switch will be in a shared location. As far as our switch was concerned, it was in Tabernacle  
18 Street in East London – sorry East City. The gateways that were dedicated to the customer  
19 could have been in any one of six areas around the country ranging from a couple we had  
20 down in the docklands all the way down through the south coast in Newbury, Basingstoke,  
21 Bristol – off the top of my head I cannot remember who the others were. There were about  
22 six sites that were regionally located as well.

23 Q But none of those were dedicated to a single customer. The customer may have used most of  
24 it, but it was not dedicated to a single customer? A. I do not know how to repeat the  
25 answer I gave to Mr. Flint in the first place in a different way.

26 THE CHAIRMAN: You repeat it in the same way. A. OK, I will repeat it in the same way. As I  
27 stated in answer to your first question, Mr. Flint, we connect a customer and dedicate into  
28 that customer from our switch into a GSM terminating equipment. As far as the customer is  
29 concerned, if he never went over the 70 per cent optimisation we set on those ports then that  
30 piece of GSM equipment would be dedicated to that customer. If he overloaded it, which is  
31 of a benefit to the mobile networks, it is a benefit to the customer, it was a benefit to Floe  
32 Telecom, if it went over the 70 per cent, then we would put that on to a universal gateway,  
33 one that was dedicated for overflow that had carried the least amount of minutes for that  
34 period. If that gateway was not available, we would then route that over our BT internet

1 connect and Floe Telecom would seek the additional cost of that call to supply the customer  
2 with a valued and high quality service.

3 MR. FLINT: Were you primarily responsible at Floe for answering the questions which Ofcom  
4 raised between March and May 2005? A. Could you direct me to what those questions  
5 are?

6 Q Yes. Would you go to tab 30. A. Is that in the same bundle.

7 Q Yes, in the same bundle. Would you look at p.3 Would you look at paras.4, 5, 6, 7 and 8.  
8 Are those all matters on which you would have given instructions to the company's  
9 solicitors? A. I am sorry, could you repeat the numbers?

10 Q 4-8. A. I believe that is a reasonable assumption, yes.

11 Q If you go to the first page of that document, I want to ask you about the matter which clearly  
12 was directly based on your statements. It is paras.1 and 5, if you would refresh your memory  
13 of that document. It is the second page of the exhibit but page 1 of the answers. I  
14 particularly wanted to draw your attention to the sentence in para.1,  
15 "The DTI representatives mentioned no substantial regulatory difficulties in the operation of  
16 the gateway service."

17 A. I wonder if you would be so kind as to refresh my memory as to what the question was  
18 for these answers.

19 Q I will do so in a moment. It is the answers that I am interested in your answer on. It is the  
20 statement here,  
21 "The DTI representatives mentioned no substantial regulatory difficulties in the operation of  
22 the gateway service."

23 I wanted to ask you whether that statement is true or not. A. I would like to answer that in  
24 the context of the question.

25 Q You really need to see the information requested, do you? A. Yes.

26 Q Would you look then – I think we will find this at tab 33. If you look at tab 33, third page,  
27 "The scope of Floe's business at the time of disconnections", you are being asked a number  
28 of questions about the business. If you would like to look through that, this is your solicitor's  
29 answer to all those questions, but I do not think the actual question matters. It is the  
30 statement I am asking you about and the answer. A. Let me consider this, please.

31 Q Take as long as you like. (Pause) I am so sorry, I have directed you to the wrong question.  
32 It is tab 2, the annexe information requested, and it is questions 1 and 5 I am asking you  
33 about (which are being answered) and you have question 1 here about whether the gateway  
34 equipment fell within the definition of user station. That is question 1, and question 5 is  
35 about private gateways. (Pause) A. I recall now.

1 Q So you are being asked quite technical-legal questions, but it is the factual answer that I am  
2 interested in. A. Sure.

3 Q I wanted to ask you whether the statement made,  
4 “The DTI representatives mentioned no substantial regulatory difficulties in the  
5 operation of the gateway service.”

6 A. Yes, that is a true statement. The meeting I had, Madam, with Mr. Davies at the time in  
7 February 2002, and I believe the information is presented in bundles of the presentation I made  
8 to him of the equipment we were thinking of using, the type of gateways we were considering  
9 using and we went through a whole remit of definitions of service, I especially was quite keen  
10 at the time that we needed to ensure that what we were doing we could find no regulation  
11 around GSM gateways. We wanted to make it clear to ourselves that there were no issues, and  
12 going to the head of mobile at the DTI along with, I suppose, our liaison, a Mr. Tarrant, we  
13 explained exactly what was going out of that meeting, post that meeting, I went away with no  
14 indication of any problems. Mr. Davies and Mr. Tarrant said that they would come back and  
15 they would look into the issues. I subsequently sent them a copy of the presentations. I made  
16 some contemporaneous notes of the meeting and sent those to Mr. Davies which I believe have  
17 been provided in the bundles over the period of this hearing, and that there was no response  
18 back from either Mr. Davies, Mr. Tarrant and the RA, the DTI to say in any way anything that  
19 we did, there was a problem with. In fact, we had no response back from the DTI or the RA.  
20 The RA was later when I met with Mr. Mason later on.

21 Q So the DTI raised no question of regulatory difficulty. That is an accurate statement, is it?

22 A. If we are talking about the output of the meeting, Mr. Flint, or are we talking about  
23 questions, debates that went on during the meeting? Debates, to the best of my memory went  
24 on during the meeting. I think I provided this in the notes as well, which were paraphrased  
25 previously in, I think it was, Vodafone’s skeleton, was that Mr. Tarrant said he would look into  
26 it if there were any issues. Mr. Davies was of the opinion there were no issues and the GSM  
27 gateway would be covered by the same licence as a normal user station, i.e. a mobile handset.  
28 So for the output of that meeting, Mr. Tarrant suggested there were some issues they were  
29 going to look at, but by virtue of the fact that neither Mr. Tarrant or Mr. Davies nor the RA  
30 came back to us for a period until we initiated a meeting with the RA some months later, where  
31 we got our legitimate expectation from, there was no issue to be raised. They did not advise us  
32 of any issues.

33 Q Where is your letter written to the RA – DTI – enclosing your notes? A. That was provided  
34 some time ago.

1 Q You have provided that to your solicitors, have you, to Floe's solicitors? A. Yes, it went  
2 into the very first bundle, I think, some time ago – 18 months ago.

3 Q We have not seen that but there is a letter, is there, which exists? A. Yes, I sent a letter to  
4 Mr. Anderson.

5 Q I see. Would you look at bundle 2(a), tab 9, please. This is based on your contemporaneous  
6 notes, is it, this document? A. Yes, these were within the letter – it possibly could have been  
7 an email but my recollection was, excuse me, that there was a letter. This is what I am  
8 referring to, yes.

9 Q These are your notes of the meeting of 1<sup>st</sup> February. On the first page you are discussing, are  
10 you not, the provision of gateways at the customer's premises. That is the service you are  
11 referring to, if you would like to look through those paragraphs. It does not say so expressly,  
12 but as you will see later, later you go on to what you refer as the wholesale proposition so the  
13 first part must have been discussing, I take it, the customer premise direct mobile access  
14 proposition? A. I think you may be making an incorrect assumption. Initially, we looked in  
15 the services and this document was put in relation to how we put the services together. The  
16 solution overviews were then spoken in the context of an overall gateway service and  
17 effectively then Mr. Davies asked me for some notes after, and I produced these, and a number  
18 of these came from our initial forward business plan.

19 Q If you look at the third page of this document, we have solution overviews. The first general  
20 area is customer premise, direct mobile access. Do you see that? A. I do, and if you recall  
21 my answer to you about 10 minutes ago, the first customer we connected was Credit Suisse  
22 First Boston . We connected them with two 60 channel GSM gateways in their premises using  
23 their infrastructure down in E14, the Docklands, a high telecoms area. So it is understandable  
24 that one of the solutions that should have been in place – because, as you may be aware – to  
25 negotiate contracts with major corporations like these large banks, you have got a lead sales,  
26 lead time, of about six months. So we were aware before we entered, before going into  
27 service, and I think Crédit Suisse First Boston went into service, if I am right, in May. We in  
28 fact had a couple of customers in the view of who we were going to connect, and we wanted to  
29 get clarification to ensure that what we were doing had no issues.

30 Q At the bottom of the page we see that Mr. Tarrant was initially concerned with the fact that it  
31 appeared that Floe was broadcasting from a base station-like equipment without an air time  
32 licence, so he raised a regulatory difficulty, did he not? A. He raised an issue which was not  
33 supported by Mr. Davies that he was going to go and look at that issue. He raised an issue  
34 during that meeting, however, one could reasonably expect on checking with the RA that if  
35 there was an issue one would expect a Government department like mobile DTI to come back

1 to us and say “Excuse me, after our meeting there are some issues here you really need to have  
2 a look at this.” That did not happen, so therefore we had every expectation that there was  
3 actually not an issue.

4 Q I just want to ask you about the facts at the moment. At the meeting no one gave you a definite  
5 answer in terms of saying there is no regulatory issue on what you are doing, did they?

6 A. They did not give us an answer either way.

7 Q Thank you. A. One would not expect them to give an answer at that stage. One would  
8 expect them to go away and duly consider the answer, and then come back.

9 Q So they did not tell you anything to the effect at the meeting “What you are proposing to do is  
10 perfectly lawful”? A. I don’t recall them using that exact language, no.

11 Q Or anything to that effect? A. I recall Mr. Davies telling me at that meeting that he was a  
12 Governor of an Inner London school and that this sort of service would be ideal if the costs’  
13 savings we were suggesting could take place. He would be very appreciative of that type of  
14 service being put into such an establishment.

15 Q At the end of the meeting, we see from your last line on the second page, the agreement was  
16 they would consider the matter? A. Absolutely.

17 Q And you say that subsequently you sent them your notes, did you? A. Yes.

18 Q And expected to get a reply and never received a reply? A. Yes, I expected to receive a  
19 reply. I emailed Mr. Davies to ask him if there were any issues raised from either Mr. Davies  
20 or Mr. Tarrant at any time.

21 Q Right. A. Hence our expectation that there was nothing wrong with what we were doing.

22 Q I see, would you look at the second page of your notes? Third paragraph: “JS then explained  
23 the GSM Gateway switch node hardware solution and the associated wholesale proposition.”  
24 This refers to your proposal to set up a network of Gateways available for use by multiple  
25 customers, does it not? A. We were at this time looking at all sorts of ways of connecting  
26 customers. We looked both at customer indirect access, CPS, direct connection equipment on  
27 customer sites. Part of this conversation was to get an idea from the DTI as to what was  
28 acceptable and was not acceptable.

29 Q Is it right in the third paragraph that you anticipated that the SIMs in these Gateways were in  
30 almost continuous use? A. I hate to repeat myself, Mr. Flint, but we optimise our Gateways  
31 at 70 per cent. We did not look at optimising it at greater than 70 per cent. because we did not  
32 wish to get poor quality, lack of connectivity. We did not want to not be able to connect a  
33 customer. It is not in the interest of someone providing a service to over dimension the  
34 network. Otherwise, they are not going to be able to terminate all the calls they get; they are

1 not going to earn the revenue from those calls, so they are not going to make the profits they  
2 expect to make. I think it is a standard fact of business ----

3 Q Yes, so you did anticipate ---- A. ... as much money as possible.

4 Q You did anticipate that the SIMs in these Gateways would be in almost continuous use?  
5 A. If you considered that 70 per cent. is continuous then that is your opinion ----

6 Q It is your words. A. 70 per cent. is not ----

7 Q Did you tell the DTI you expected the SIMs to be in almost continuous use? Did you tell them  
8 that? A. I don't recall telling them that, no.

9 Q These are your notes, are they not? A. Yes, I am just trying to look to see what you are  
10 referring to, Mr. Flint.

11 Q I am referring to your own words, your own note, "JS" that is you, is it? ".. further added that  
12 because of the almost continuous use of the SIMs in the Gateway the MNOs would likely offer  
13 2 Mb pipe"? A. Yes, what I am saying is that the SIMs will be used continuously. It does  
14 not mean to say that every SIM is optimised at every single moment in time. It does not mean  
15 to say that we are throwing 30 channels continuously as SIMs. We will be offering them  
16 continuously; it is the same as do you continuously drive along a road? You make alterations  
17 in both your direction and your speed. It depends what "continuous" means. "Continuous"  
18 means that they are there from 8 o'clock in the morning until 6 o'clock at night. They will be  
19 used but they will be optimised in their use.

20 Q Mr. Tarrant again raised a regulatory issue about this method of working, did he not? A. He  
21 suggested that there may be an issue with what we were doing, however, one can expect by  
22 virtue of no response from Mr. Tarrant that he went away and had a look at it and decided  
23 there was no issue.

24 Q I see. Is it right, as the fourth paragraph from the bottom suggests, that you were advised to  
25 keep Oftel out of the loop I suppose that is, for the present, "... as the Floe proposition could  
26 be perceived as undermining Oftel legislation on call termination." A. If I could refer you to  
27 the paragraph above that where it says I asked Oftel whether it was prudent to meet, when I  
28 asked about Oftel I asked the DTI whether it was prudent for us to meet them at that stage, that  
29 was the response that Mr. Davies gave me, because I believe going through the regulatory  
30 regime that was a paper on call termination – I am not 100 per cent. sure but I gather that was  
31 the case.

32 Q So you decided not to approach Oftel? A. I decided to take the advice that Mr. Davies, as  
33 head of mobile at the DTI, gave me.

34 Q You decided not to approach Oftel? A. I decided to take the advice that Mr. Davies, the  
35 head of the DTI, gave me.

1 Q Did you decide not to approach Oftel because you thought you might get an inconvenient  
2 answer? A. I decided not to approach Oftel because Mr. Davies advised me against it. I had  
3 no other reason for not approaching other than the advice from Mr. Davies, a senior civil  
4 servant at the DTI.

5 Q Yes. I was not aware when I asked you the questions, there is on file, but not in the bundles, a  
6 letter you wrote on 7<sup>th</sup> February 2002 to the DTI and if I could show you a copy of it, or have  
7 you shown a copy – bundle 5, tab 21. I apologise for misleading you, Mr. Stonehouse, it is not  
8 in the main bundles, it is attached to the Defence. A. Okay.

9 Q It is behind annex 4 to the Defence. Do you have that? It is a copy letter dated 7<sup>th</sup> February/  
10 A. Yes, I do.

11 Q Could I just ask you to refresh your memory of that? A. Yes, thank you. (After a pause)  
12 Yes.

13 Q It does not appear from that that you sent a copy of your notes to the DTI? A. If you recall I  
14 said to you earlier I am sure that the notes were sent and a letter or email, they were certainly  
15 sent.

16 Q I understand the email has been requested and it has not been able to be found. A. Have you  
17 requested that email from the DTI? If it cannot be found off me the logical extension is  
18 because – bearing in mind the problems we had with Floe going into administration with the  
19 servers one would have expected you would have asked the DTI for a copy of that email as  
20 well as me.

21 Q I see. Now, that was all the advice you took before launching the project. Is that right? Just  
22 your conversation with the DTI which we have seen in your notes – on the legal and regulatory  
23 side? A. Oh, on the legal and regulatory side, yes, and as you will see from that letter it  
24 confirms from my memory point of view that the DTI were advising us not to talk with Oftel  
25 because of the issues with the legislation going through. We did not deem that, bearing in  
26 mind that no response was made from the DTI, that we actually needed any more regulatory  
27 advice, or the fact that the regulatory advice would be forthcoming should Government have  
28 thought fit.

29 Q The last paragraph of your letter says: “I look forward to your response to the meeting” and  
30 you never received a response to the meeting? A. I had no responses. I repeat I had no  
31 responses from either Mr. Davies, Mr. Tarrant or anybody in the RA until we effectively  
32 contacted the RA, I believe it was later that year, I don’t have the exact dates.

33 Q Could you look at bundle 2(b) please, tab 5. Did you read this consultation paper at the time?  
34 A. Yes, I did.

35 Q Because you put in a response to it? A. Yes.

1 Q So you presumably considered it very carefully? A. Yes.

2 Q Would you look at para.5.7? You recall there the distinction being drawn between private and  
3 public connections? You recall that distinction – you recall reading it? A. I recall at the  
4 time reading that distinction, and I must admit not to understand it because the first time that  
5 distinction ever arose was in November when this document came out.

6 Q But did you have any difficulty understanding the second sentence there? A. Other than the  
7 fact of what the public connection was, no.

8 Q Well you knew that you were providing a third party telecommunications' service through at  
9 least some of your Gateways? A. Yes, and at the time this is only a consultation document,  
10 it did not constitute what we should or should not have been doing.

11 Q Yes, but it says it is not permitted under the existing law. A. We negotiated a contract with  
12 Vodafone going back all the way up to August that year as you know. If it was not permitted  
13 and bearing in mind the confidential manner of Vodafone mobile's licence, that we didn't have  
14 any access to that, one would have thought if there was an issue with that at the time of signing  
15 the contract then Vodafone would have raised it, especially as we seemingly found out recently  
16 – I think it came out of the last hearing – and Mr. Rodman was in possession of some  
17 information of the same note to say that there was an issue with different types of Gateway a  
18 matter of days after signing our contract, and a matter of weeks before providing with out first  
19 SIMs. I do not believe it was in our gift to understand exactly what was the nature of what  
20 could be considered a public or private Gateway at that time.

21 Q You knew perfectly well from November 2002 onwards, that the Regulator took the view that  
22 your use of Gateways constituted public connection and was not permitted. You knew that  
23 was the view taken by the Regulator? A. It was my understanding from this consultation  
24 document that that was the position of the Regulator and that is what he was consulting on.  
25 Discussions we had with the RA clearly stated to us that this issue was a certain grey area  
26 where a contract existed between the operator and the mobile network because as had been  
27 discussed previously before the CAT, a view was held at the time, I believe by Mr. Mason and  
28 the RA, that the mobile network operators could extend the licence for the use of gateway  
29 should there have been a contract in place for the provision of network services which, indeed,  
30 is what we had.

31 Q If you look at your response to the document at 5(c), behind tab 5(c) in the same folder, do you  
32 have the document that you prepared by way of response to the consultation? A. I am sorry,  
33 5(c)?

34 Q Yes; (c)(c), I am told. A. Sorry, I was looking at 5(c).

35 Q Can I ask you to look at the second page under proposal 2. Do you have that? A. Yes.

1 Q Do you see you say,  
2 “Yes, we agree with the proposal to amend the restriction on the type of service that may be  
3 provided by a network user. Stations shall be withdrawn. Reasons”  
4 And then you say,  
5 “The key difference resulting from the adoption of proposal 2 would be to allow companies to  
6 operate GSM gateway equipment to which their customers can connect via fixed line access  
7 public connection into a core network switch that can spread the required capacity around a  
8 distributed network architecture.”  
9 Right? So you understood what a public connection was? A. I have been in telecoms a very  
10 long time, Mr. Flint; I understand what is a public connection is.  
11 Q And that is precisely what you were doing in November 2002? A. We were reselling  
12 network services for Vodafone under a contract from Vodafone. Vodafone were well aware  
13 that we were using GSM gateways to terminate the traffic. At one time they even, when we  
14 were trying to negotiate an up-front fee which typically comes with these SIMs we were  
15 informed that “We don’t pay you, getting additional revenue because you are using GSM  
16 gateways, we do not believe that providing an up-front fee would exist.” Vodafone knew  
17 exactly what we were doing. They knew we were going to use gateways. If they supplied us  
18 with a contract for the resale of network services and they expect us then to terminate those  
19 customers, how on earth could they expect us to terminate those customers without provision  
20 of service by way of business to a third person, i.e. by public, bearing in mind that for the  
21 previous two years round about 10,000 units per year from Nokia came into the UK of premier  
22 cells or Nokia 22 single line analogue gateway devices. Those gateway devices were typically  
23 on sold by the likes of Hugh Simmons for Vodafone and a number of other people. They  
24 provided those GSM gateways to their customers. They provided a SIM to those customers. If  
25 that was not provision of a service to a third party that has been going on for two or three years  
26 since these gateways have been involved, there is no difference to what we were doing at that  
27 same time by expediting our contract for provision of service by way of business to a third  
28 person, i.e. delivering network services and earning both Floe Telecom and Vodafone revenue.  
29 Q That is a very long answer to a question I did not ask. Is it right that para.1 describes what  
30 Floe was doing at the time in November 2002? A. I was trying to explain that what Floe  
31 was doing was no different from what anybody else was doing and that at that time we were  
32 providing that. Vodafone knew what we were using. We were using gateways. At that time  
33 no distinction was made between public and private until that time and then it was only a  
34 consultation document. Until my mind, it was not until July 18<sup>th</sup> when the decisions of the

1 government came out that that in fact became the legal – was cemented within the regulatory  
2 framework.

3 Q Is it right that para.1 describes what you were doing – Floe was doing – in November 2002?

4 A. It comprised of what we were doing, as I explained to you; we were also providing  
5 services directly to some of our customers.

6 Q Paragraph 1 describes what Floe was doing in November 2002 in addition to other things  
7 which you were doing. Correct? A. That is correct.

8 Q And you knew that was not allowed under the current law? A. No.

9 Q Why do you use the phrase “would be to allow companies”? You knew perfectly well that  
10 what you were doing was not allowed? A. We were given no indication as to anything we  
11 were doing. I say to you again, how could we possibly have resold network services without  
12 providing a public form of service?

13 Q I put it to you this shows quite plainly you knew what you were doing in November 2002 was  
14 illegal? A. I would disagree with that. What it says in November in 2002, there was an  
15 indication that there was an issue with the types of services that could be provided by GSM  
16 gateways. I would refer you back again to the fact that we know that Mr. Rodman knew  
17 within days of Vodafone signing the contract with Floe that there may be an issue. If  
18 Vodafone were acting in a constructive and responsible manner, surely the first thing they  
19 should have done would have been before providing us with any SIMs – because that was  
20 before the provision of any SIMs, it did not happen until a month after the contract – they  
21 would have come to us and said, “I don’t think we can supply you with SIMs because we  
22 believe there is an issue.” I believe the issue is that there is a lack of connect between  
23 regulatory and Vodafone, and Vodafone corporate who we know were selling SIMs to a  
24 number of people for the same sort of services.

25 Q The only lack of connect I am worried about at the moment is you answering my question.  
26 Are you or are you not saying at the time in November 2002 you believe what you were doing  
27 was legal or illegal? A. I believe at that time in November 2002 that the issue has not been  
28 clarified and that we expected the consultations to take place and then to be clarified, which it  
29 was on July 18<sup>th</sup> 2003.

30 Q When Vodafone threatened to terminate your services in March 2003, why did you not say to  
31 Vodafone you had been assured by the DTI that what you were doing was legal? A. I was  
32 not party to the commercial activities, as you most likely know, at that period of time.

33 Q What does that mean, you are not “party to the commercial activities”? A. That letter was  
34 not directed to me. I would have known from the statement that our network went down at the  
35 time, we were in a position whereby we had to react to try and protect our customers. Why it

1 would have been of any interest for us to tell Vodafone, “Well, the DTI said we can do it”, do  
2 you honestly think that would have made any difference bearing in mind it was not just Floe  
3 Telecom that was being cut off at the time?

4 Q Could you look at the letter which is 2(b) tab 35. You are familiar with this letter, are you not,  
5 from Vodafone? A. I am sorry?

6 Q You are familiar with this letter from Vodafone? A. The letter to Simon Taylor?

7 Q Yes. Look at the third paragraph. It says, “... their use is illegal.” The fourth paragraph  
8 repeats the point. The use of the gateways is illegal. Did I understand your answer to the  
9 tribunal a moment ago to be that you were not concerned with commercial activities at the time  
10 and therefore it did not fall to you to answer this letter? A. The letter is not even addressed  
11 to me.

12 Q No, but you drafted the reply, didn't you? A. I possibly did draft the reply.

13 Q Look at tab 38. Do you have tab 38? Whose reference is that at the bottom? Whose reference  
14 is that at the bottom of the letter? A. My reference is at the bottom of the letter because we  
15 had a process in Floe to ensure that there was a consensus of letters going out.

16 Q So you approved this letter, did you? A. If you would let me finish what I was going to say,  
17 please. Simon Taylor would have drafted the letter out. He would ask me to look at whether  
18 there were any issues that I could see within it, and it was obviously a response to my draft was  
19 the one that went out.

20 Q This is your word processor reference, Jrs/voda/reply? A. It was my partition on a server, I  
21 suspect, yes.

22 Q So you drafted this letter, did you? A. I would have seen the draft and would have an amend  
23 of the draft if I thought it needed amending. As you can see the letter was drafted and signed  
24 by Mr. Taylor.

25 Q And why didn't you put in the draft the key point that you had been advised by the DTI that  
26 the service was legal? A. I really don't honestly know why. Why do you omit some things  
27 from letters and some not; I do not know.

28 Q Well, it was the key point in your view, was it not? A. It is not the key point in my view at  
29 all. The point in my view was that we have an expectation that not having any regulatory  
30 advice as opposed to Vodafone which on August 20<sup>th</sup> had had regulatory advice, and you are  
31 saying to me, or we should have known before then, why didn't Vodafone raise the issue –  
32 what are we talking, six months before Vodafone raised the issue? I find it strange you are  
33 asking me why I should have thought at that time of Vodafone's response to that letter when  
34 Vodafone had about six months to respond.

1 Q Could you keep that letter open but also have open bundle 2(c), tab 25. This is a letter written  
2 by you and signed by you, and I assume drafted by you, dated 2<sup>nd</sup> September 2003 to Oftel.  
3 A. That is correct, yes.

4 Q Do you see at the second page, question 3,  
5 *“Supply of any other information that Floe considers demonstrates that Floe is*  
6 *entitled to legally provide its Gateway Service.”*  
7 Then you say,  
8 *“The key point is that Floe sought advice from the DTI prior to launch to ask if what it*  
9 *planned to do was acceptable.”*

10 A. Yes.

11 Q So my question to you earlier on this letter to Vodafone, is why didn’t you make that key point  
12 to Vodafone on the question of illegality? A. And my answer stays the same. I have no idea  
13 why I didn’t. May be I thought there were more important issues to raise and we would leave  
14 those sort of issues to a later date or with the Regulator where it may have made a difference,  
15 whereas talking to Vodafone about our conversations with the DTI I do not believe would have  
16 made any difference to the outcome.

17 Q Or was it the case that it was not until after July 2003 that you came up with the story that you  
18 had received approval from the DTI for your proposed services? A. Those are your words,  
19 Mr. Flint. I don’t recall ever saying both here or anywhere else, that we had approval from the  
20 DTI. What I said to you all along was that we had no negative or adverse response from the  
21 DTI.

22 Q I see. So it is simply the failure of the DTI to object or raise an objection that you rely on?  
23 A. I would use a simile that if you are driving along a road and you are speeding and you pass  
24 a policeman and he decides not to stop you and prosecute you, you don’t go back and say,  
25 “Excuse me, will you prosecute me because I have been speeding.”

26 Q And do you think you consider you are breaking the law when you are speeding, or absolved  
27 from breaking the law because the policeman does not stop you? A. No, of course not.

28 Q Thank you. Could I ask you now about your witness statement at para.4. We can put away  
29 bundles 2(a), (b), (c) and (d), and we will just need the core bundle and your witness statement  
30 bundle. Your witness statement at para.4 deals with the issue of supply to Recall services. I  
31 want to ask you to look, if you would, at the core bundle, at tab 16? (After a pause) I have  
32 given a false reference, it is the response of 14<sup>th</sup> October 2005 from Taylor Wessing on the  
33 discrimination issue. I am sorry it is dated 18<sup>th</sup> October 2005.

34 THE CHAIRMAN: Is it 16A.

1 MR. FLINT: Thank you very much. So tab 16A I hope you have, Mr. Stonehouse, on the first  
2 substantive page of the confidential version, further evidence of a particular sort form Floe  
3 telecom. A. Yes.

4 Q And there is a reference to Recall. Can I just ask you to read that page? I just want to ask you  
5 some questions about it. (After a pause) I want to ask you about the bottom of the page, there  
6 are statements made as to the dealings with Recall which, as I understand it, are based on your  
7 evidence? A. Could I actually read it, Mr. Flint?

8 Q Certainly. A. Thank you. (After a pause) I am going down to para. (e) am I?  
9 Q Yes, down to (e). A. Okay.

10 Q Now all of that is based on your evidence, is it, including (e)? A. I believe some of that is  
11 based on Mr. Happy's evidence.

12 Q Did you provide the information that there were other examples under (e) since Floe SIMs  
13 were first switched off companies involved include GCI, Worldwide Connect UK Limited, as  
14 well as Recall? A. Those were provided by Mr. Happy.

15 Q So Mr. Happy, not you, provided that information as far as you know? A. As far as I know,  
16 yes.

17 Q But you were aware the allegation in relation to Worldwide Connect is simply nonsense?  
18 Worldwide say they never took any SIM cars from Vodafone? A. I wasn't aware of that, no.

19 Q You were not aware of that? A. No.

20 Q I see. You have provided the information from Recall, have you? The information that is set  
21 out here? A. I was provided with a brief from someone in Recall, yes.

22 Q And who was that someone in Recall? A. It is mentioned here Carl Hassan, who is  
23 mentioned in I believe it is para.1(d).

24 Q Right, so did Carl Hassan show you some documents? A. The documents that I saw – the  
25 only documents I recall seeing were relating to T-Mobile.

26 Q Not relating to Vodafone? A. To the best of my knowledge, no.

27 Q Would you look at para.4 of your witness statement, please? We can put away the core  
28 bundle. At para.4 you refer to Recall, the second sentence:  
29 "I have had the chance to look through their files. To my mind it is undoubtedly the  
30 case that both Vodafone and T-Mobile supplied Sims for use in all kinds of gateways  
31 to Recall and did so knowingly."

32 You appreciate that allegation is denied by Vodafone? You understand that, do you not?  
33 A. If you say so, yes, I didn't understand that. I was presented with a file from Recall. To my  
34 knowledge the actual paper work I saw was related to T-Mobile. I had discussions with Carl

1 Hassan and also the CO of what was Recall Group at that time, a guy called Mr. Stephen  
2 Perrom and that is where I got my information.

3 Q Did you either of them to give evidence for Floe? A. I would have thought it was the  
4 position of Taylor Wessing to ask people to give evidence.

5 Q I see, and although you had not seen any documents relating to Vodafone supplying Recall you  
6 thought it honest and truthful in your statement to say to my mind it is undoubtedly the case  
7 that Vodafone supplied SIMs for use in all kinds of gateways to Recall and did so knowingly?

8 A. My knowledge from Mr. Perron of the Recall Service and substantiated by Carl Hassan,  
9 who did not work for Recall, but from their billing entity, was that they were processing bills  
10 from Vodafone through Genesis. I am not sure at the time whether Vodafone had taken over  
11 Genesis at that time, or whether it was just directly from Genesis, but I was aware of meetings  
12 that were had between Mr. Perron and Mr. Rodman. I was aware of the billing activities of  
13 this third party who Carl Hassan works for, of billing Vodafone minutes, and that is where I  
14 based my statement.

15 Q You were aware this is an important and serious allegation in this case, made against  
16 Vodafone, of discrimination in supply are you? A. Yes.

17 Q And you thought it proper to make that serious allegation without having seen any files relating  
18 to Vodafone? A. I had no reason to disbelieve what was being said to me.

19 Q You see what I suggest to you is that that paragraph clearly suggests, contrary to the fact, that  
20 you have seen papers relating to Vodafone's dealings with Recall? A. I suggest I have seen  
21 papers relating to Vodafone and T-Mobile.

22 Q I see. Finally, could I ask you to look back at bundle 2(a) please, tab 23? This is a document  
23 drafted by you, as I understand it, is that right – The Floe Telecom business plan? A. That is  
24 correct.

25 Q You are shown as the author on p.2? A. Yes.

26 Q At p.35, this is a paragraph I asked Mr. Taylor about and I am sure you are familiar with, the  
27 paragraph that starts: "Floe is aware that as a mobile service provider it is developing  
28 applications and services that will in some areas test Oftel and the mobile telecoms regulatory  
29 regime." Do you see that? A. Yes.

30 Q Now, you did not have approval from the DTI for your services, did you? A. We had no  
31 reason to believe that they disapproved or any indication from them that anything they were  
32 doing contravened any of the current standing regulations.

33 Q You were, in the words of your own document, is this right "... currying the sponsorship of the  
34 regulatory department of the DTI?" A. Yes.

35 Q You were intending to operate a mobile service? A. It is the nature of our business, yes.

1 Q And you knew that that risked infringing the regulatory regime? A. I knew that there was no  
2 definitive regulatory regime at that time, because I had not received any advice from either the  
3 DTI or the RA to the contrary.

4 Q And you decided not to approach Oftel? A. I thought I cleared this before, Mr. Flint. I was  
5 advised, and you have seen the letters, that to involve Oftel at this moment in time, because of  
6 the regulatory legislation that was going through for fixed termination, I was advised by the  
7 DTI not to do so, there was no necessity for it.

8 Q And you knew, from November 2002, that Oftel took the view that the services that Floe was  
9 providing were not allowed? A. I knew from the consultation documents that there was a  
10 consultation on the whole area of the regulation involving GSM Gateways and that I was not  
11 aware, until any decision was made on July 18<sup>th</sup>, and also I was aware with the conversations I  
12 had with the DTI, Mr. Mason in particular, that because of Floe having a licence that no action  
13 would be taken, it would be recalled back to the mobile networks. I was also aware that the  
14 mobile networks had not gone to the RA and asked them to use their power to sequester as a  
15 bailiff and remove the conditions, if we were creating something illegal. We made it quite  
16 clear that we discussed with DTI, with the RA, who were the people we needed to discuss  
17 with, and made it quite clear what we were doing. We took no advice contrary to the fact that  
18 what we were doing was illegal.

19 Q I am sorry, I thought I had asked the last point, but arising out of that answer, could I just ask  
20 you, I hope finally now, to look at bundle 2(b) at tab 20? This is your email to the Radio  
21 Communications Agency of 7<sup>th</sup> February and their reply of 10<sup>th</sup> February. It is right, is it not,  
22 that you did not suggest to the Radio Communications Agency at this stage that what had been  
23 said in the consultation Paper was inconsistent with the advice that you had received from the  
24 DTI the previous year? A. This email was a response to one or two meetings that we had  
25 and within those meetings I made it quite clear that we discussed matters with the DTI.  
26 DTI. I assume Mr. Tarrant, being the liaison officer for the DTI with the RA would have  
27 spoken with either Mr. Young or Mr. Mason regarding any registry anomalies they thought  
28 may have been up at the time, hence our understanding, since no response came back there was  
29 no issue.

30 Q I see. So were you surprised in November 2002 at the regulatory view expressed, or had you  
31 been expecting it all along? A. I was made aware by Mr. Mason and Mr. Young that there  
32 was going to be a consultation. They politely informed us front that they were because they  
33 knew of our activities. I was therefore not surprised. I must say I was surprised at the result of  
34 the document, especially bearing in mind the majority of people were against the decision that

1 eventually came up, and I believe the Minister was still at a point a couple of days making the  
2 decision that there were still some issues.

3 MR. PICKFORD: Madam, is this an appropriate moment for me to address you on the question of  
4 whether I need to cross-examine Mr. Stonehouse? I believe in your letter last week you  
5 indicated it should be dealt with after Mr. Stonehouse's initial cross-examination.

6 THE CHAIRMAN: Yes.

7 MR. PICKFORD: Our position, madam, is that what Mr. Stonehouse says and what Mr. Happy says  
8 is entirely irrelevant to issue 4 and therefore we say we do not need to cross-examine on it, and  
9 I shall elaborate in a moment why I say it is irrelevant. The second point we make is that even  
10 if it is irrelevant, Mr. Wiener's evidence is unchallenged before the Tribunal. Floe have not  
11 sought to cross-examine Mr. Wiener and therefore there is no basis for disputing that evidence.  
12 We say, in the light of that again, we do not need to put anything further to Floe's witnesses.  
13 My only reason for raising it is to ensure that it is not said to me later on that if we rely on  
14 something that Mr. Wiener has said that either the tribunal or Mr. Mercer turn round to me and  
15 say why did you not put that to Floe's witnesses.

16 Can I expand upon the point of relevancy. The first reason why we say it is not  
17 relevant is because, consistent with our primary case, we say that we should not even be  
18 getting into the question of the compatibility between Exemption Regulations and Community  
19 Law. Putting that to one side – because I understand that the Tribunal is not going to deal with  
20 it on that basis alone – if one accepts that there is going to be some sort of investigation of that  
21 issue of compatibility, we say there are four issues which one has to consider in relation to the  
22 correct approach of the tribunal to that assessment. The first is that there is plainly a margin of  
23 discretion that is afforded to a member state in its implementation of relevant legislation, and  
24 the Tribunal is not entitled in this case to substitute its view of the facts to those of the member  
25 state. The second point is that in so far as any factual enquiry at all is appropriate, the correct  
26 evidence to assess when considering whether there is any factual basis for the Exemption  
27 Regulations is the evidence which was before the relevant decision maker at the time he took  
28 his decision. In that case we say that is the evidence that was before Mr. Timms, the Minister  
29 for Ecommerce when he brought the legislation into force in 2003. For that proposition we  
30 rely firstly on the fact that as a matter of Community law there is no requirement to address  
31 later evidence and that is supported by *Upjohn* at para.42. I do not intend at this juncture to  
32 take the Tribunal to that point. I propose to elaborate on that in our closing submissions unless  
33 the tribunal wants me to do otherwise now.

34 We also say that it is plain from para.27 of Schedule 8 to the Communications Act  
35 that parliament intended that Ofcom's decisions in relation to the Exemption Regulations

1 should be subject only to judicial review, and therefore to the extent that the Tribunal is going  
2 to embark upon an exercise in scrutinising those regulations, it should confine itself to the  
3 same principles. The norm in judicial review is to focus on the evidence that was available to  
4 the decision maker, not fresh evidence subsequent to that decision.

5 The third point we would make in relation to the Tribunal's assessment of evidence, is  
6 that it does not have the Secretary of State before it. It does not have the full evidence that was  
7 taken into account by the Secretary of State because some of that evidence has been redacted,  
8 and it is not in a position to engage in the same wide-ranging consultative exercise that Ofcom  
9 was engaged in, indeed the Secretary of State engaged in, when it originally took its decision.  
10 For those reasons, it is not in a position to enter into a full factual enquiry in this case.

11 The fourth point we would make is that even if we are wrong that the focus of the  
12 attention should be on the decision of the Secretary of State and the Tribunal instead takes the  
13 view that it should be focusing on what Ofcom thought, again there the question is what  
14 evidence did Ofcom have before it, not what subsequent evidence Mr. Happy and Mr.  
15 Stonehouse can adduce. So we say for all of those reasons, the evidence of Mr. Happy and Mr.  
16 Stonehouse is not relevant, is not going to assist the Tribunal in relation to its determination on  
17 the issue of compatibility, and if the Tribunal is with me on that, then clearly there is no need  
18 for cross-examination of them. As I said, our second position is that even if we are to consider  
19 those issues on the facts Mr. Wiener's evidence is unchallenged and therefore strictly we  
20 would say we do not need to put anything further to Floe's witnesses in relation to it, but I am  
21 simply guarding against the eventuality that someone tells me that I should have done.

22 MR. ANDERSON: Could I just add, since it also covers the same ground, there was an outstanding  
23 application for Ofcom to cross-examination Mr. Stonehouse, I suspect in precisely the same  
24 area in which Mr. Pickford is minded to cross-examine so there would not ultimately be a need  
25 for both of us to. As you will see from our skeleton argument, we would agree entirely with  
26 the position that Mr. Pickford has put forward, but we would make it quite clear that we do not  
27 accept the evidence of Mr. Stonehouse in relation to how easy it would be to overcome the  
28 problems.

29 THE CHAIRMAN: Mr. Wiener's evidence falls into the same category though, does it not, because  
30 he is not evidence that was before anybody or would be before anybody.

31 MR. PICKFORD: It does save in so far as the Tribunal could have regard – if the Tribunal's  
32 approach was it wanted to look at what information Ofcom had before it when Ofcom took its  
33 decision, it could look at the exhibits to Mr. Wiener's statement which was, in fact, part of the  
34 information which Ofcom had before it when it took its decision at AW2.

35 THE CHAIRMAN: But that is just the documents?

1 MR. PICKFORD: That is just the documents, yes. That would not be advanced as Mr. Wiener  
2 putting forward those facts in evidence before the tribunal now as evidence of their truth. That  
3 is what he said.

4 THE CHAIRMAN: It would only be the document?

5 MR. PICKFORD: Indeed.

6 THE CHAIRMAN: Just so that we all understand, you say you would be relying on Mr. Wiener's  
7 evidence because it is not challenged, but if your submissions are right, then neither Mr.  
8 Wiener's evidence nor Mr. Stonehouse's evidence, nor Mr. Happy's evidence on this, would  
9 be before us?

10 MR. PICKFORD: That is right. My primary submission is you do not need to bother with any of it.

11 THE CHAIRMAN: Except possibly the exhibit to Mr. Wiener's evidence.

12 MR. PICKFORD: Yes, although I believe that is actually included in the bundle elsewhere simply as  
13 one of the documents.

14 THE CHAIRMAN: Yes.

15 MR. PICKFORD: Simply to clarify that particular point, we say you do not need to go into it at all,  
16 but it is in case you are not with me on that obviously I have to have a fall back position.

17 THE CHAIRMAN: Can we just adjourn for five minutes to discuss this.

18 MR. ANDERSON: Before you adjourn, madam, could I just make one point and this is, in a sense, a  
19 point against us. We should point out that part of Mr. Stonehouse's evidence quotes from a  
20 document which was a consultation, created in the context of the RA's consultation, in 2003.  
21 To that that extent, it would have been material before the RA. That is just quoting from a  
22 document, so again it may be just a question of looking at the document.

23 THE CHAIRMAN: It is a document, is it not, rather than looking at his evidence?

24 MR. ANDERSON: Exactly.

25 (Adjourned for a short time)

26 THE CHAIRMAN: Mr. Mercer, I did not give you an opportunity?

27 MR. MERCER: My thought, I suppose, ma'am, is that Mr. Wiener's evidence is superseded really  
28 by Mr. Burns' evidence as far as the actual technical position goes, and I hear what Mr.  
29 Pickford says – I am not sure that this is the time in the proceedings to have that argument  
30 about those points. I am not cross-examining Mr. Wiener. I do not see – it is up to Mr.  
31 Pickford to decide whether he wants to cross-examine Mr. Happy. We are quite happy for Mr.  
32 Happy to be cross-examined, but there I let it rest.

33 THE CHAIRMAN: We do not consider that either Mr. Happy or Mr. Stonehouse, or Mr. Wiener's  
34 evidence is relevant to issue 4 because it was not before the decision makers at the relevant

1 times. For the avoidance of doubt any documents which are exhibited to their witness  
2 statements which were before the decision makers may be relevant.

3 MR. MERCER: Does that bring us back to the re-examination of Mr. Stonehouse, ma'am?

4 THE CHAIRMAN: There is no further cross-examination?

5 Re-examined by Mr. MERCER

6 Q Mr. Stonehouse, what was the purpose of you going to see Mr. Davies and Mr. Tarrant? Was  
7 it the good of your health, a general interest in the subject, or what? A. It was for  
8 clarification of what we planned to do, that there was no obstacles in our way to provide the  
9 services as laid out in the business plan and in the presentation I gave to Mr. Davies.

10 Q Just to check, you had no correspondence back from Mr. Davies? A. None whatsoever.

11 Q I understand he may be presently in Iraq. Rather than get all the documents out again, there is  
12 a couple of sections of documents you refer to that I would like to read to you. The first one is  
13 from the November 2002 consultation and indeed, ma'am, it also deals with a point we  
14 touched upon this morning.

15 THE CHAIRMAN: Is this a document in the bundle?

16 MR. MERCER: It is. It is 2(b) tab 5, November 2002. If you look at para.1.4, please, the third  
17 sentence, and would you read that out to the end? A. "This is the one starting "This is a grey  
18 area at present ?

19 Q Yes. A. Yes. "This is a grey area at present, as these service providers cannot be licensed  
20 under the Wireless Telegraphy Act 1949 – the cellular radio frequencies are already licensed to  
21 UK cellular network operators on a nationally exclusive basis, so cannot be licensed to other  
22 commercial users."

23 Q Leaving the second half of that sentence alone for a moment, "This is a grey area at present  
24 ..." to what does that refer? What is the grey area? A. My understanding of the grey area is  
25 whether the provision of the services to a third party can be allowed through the use of a GSM  
26 Gateway.

27 Q Could you turn to para.6 of that same document – Proposal 2. Could you read out the RA's  
28 proposal, please? A. Proposal 2 states: "It is proposed that the restriction on the type of  
29 service that may be provided via network user stations shall be withdrawn".

30 Q And that basically means abolishing regulation 4.2? A. That was my understanding, yes.

31 Q Please look at 2(b) 38. That is the letter of 13<sup>th</sup> March. Would you look at the second page,  
32 third paragraph, and what you say about legality? You refuted the charge of illegality/  
33 A. Yes.

34 Q Because of the contract? A. Because of the contract.

35 Q So you did not feel it necessary to mention any other legality argument? A. No.

1 Q Did you have a contract in the same way with T-Mobile? A. Not in the same way, no.  
2 Q Not in the formal written long form? A. No.  
3 Q Does that mean that the way in which you dealt with T-Mobile was different? A. Very  
4 much so.  
5 MR. MERCER: That is all, thank you, Mr. Stonehouse.  
6 MR. DAVEY: Mr. Stonehouse, when you went to discuss your plans with the DTI, you were  
7 looking to get some indication as to whether there were any problems, did you say that you  
8 made a presentation to them? This presentation, the notes are there of what happened? A. I  
9 made a verbal presentation supported by those notes, yes. It was not a formal presentation  
10 with the use of slides, etc.  
11 Q You did not give them your business plan or anything like that, this was just an exploratory  
12 talk? A. Very much so. It was the first conversation we had with the DTI.  
13 Q Then you sent the notes? A. Yes. It is a habit of mine to send notes after meetings.  
14 Q In the papers that we have been given, with the notes there are two double-sided pages of  
15 material. Did that go as well? A. Yes, it did. During the conversations with Mr. Davies I  
16 wanted to go through every single iteration of the service that was possible just to get from  
17 them the right reaction as to what was allowable and maybe what was not allowable.  
18 Q We have not seen the letter sending these, describing that, I think is right? A. No, in my  
19 answer to Mr. Flint I said I believe the supporting information in the bundle was sent by email  
20 and the letter was sent separately.  
21 Q I am speaking from memory now, but I do not think the letter refers to anything – the letter is  
22 just a letter, it does not actually refer to any enclosures? A. No, basically it was a thank you  
23 letter and just re-stating my understanding of their position on a couple of issues.  
24 Q So do we know what happened to the email? A. I assume it was delivered. I had no  
25 response back to say it was not delivered.  
26 Q Well you would not, would you? A. I always tag to ask for a reply, unless the other party  
27 has tagged not to respond when receiving then no. Normally people do not take that  
28 precaution.  
29 Q Then there is not a copy of it anywhere? A. There is possibly a copy on the Floe server  
30 which I believe we have access to now, I know for some time we did not.  
31 Q And was it ever asked for by anybody, do you know? A. No, not to my knowledge.  
32 Q So then, having been at the DTI, you went to discuss with Vodafone? A. Yes, some time  
33 later.  
34 Q Some time later? A. Yes, some time later. I was sort of peripheral to those discussions at  
35 the time because we were very busy based on the information he had back, so Mr. Taylor -----

1 Q So Mr. Taylor did the ----- A. Did most of the negotiation, yes; I was involved in a couple  
2 of meetings, and you are aware from the bundle in drafting a lot of the business plan, but in all  
3 honesty that was done prior to even meeting with the DTI, the initial drafting.

4 Q So you drafted the business plan as well, or you were involved in it? A. Yes, I was deeply  
5 involved. I think it was considered one of my fortes at the time. The business plan was quite  
6 technical in a number of aspects.

7 Q There were two, in fact? A. There were actually a number of business plans. We would  
8 have taken our base business plan which was developed over the period really from September  
9 2001 through to 2002 when the company – late 2001 – when the company was incorporated,  
10 through to the meetings. We would have had that basic business plan that would have been  
11 used for investors etc. From then we would have tailored business plans depending on who we  
12 were seeing and what the output of those discussions was.

13 Q And can you sort of explain why, you know, the business plan which went to Vodafone was  
14 rather different and perhaps less ambitious than a business plan which had already been drafted  
15 and so on. Do you know why it was done like that for Vodafone? A. I can only guess at the  
16 fact that the information that was included in the business plan provided by Vodafone was  
17 information that the other directors deemed was necessary for negotiation of that contract.  
18 Other than that, I am afraid I do not know.

19 Q Yes, the ambitious business plan was dated even earlier. It was way back? A. Yes.

20 Q The one for Vodafone was dated May 02 – the other way round. The one for Vodafone was  
21 dated in January 01. That is right? A. I am not sure, to tell the truth. January 01. I would  
22 be very surprised if it was January 01.

23 Q Yes, but there were a number of plans? A. Yes, I think it is like any business plan; they  
24 evolve during the process of a business.

25 Q And the one that went to Vodafone was because you think your speculating was appropriate in  
26 the circumstances? A. Yes, very much so, because our key driver at that time was to  
27 connect as many city banks as we possibly could based on the channel we had signed up.  
28 Those were the type of customers.

29 Q You had asked the DTI at that stage – you had already been to the DTI to ask them if there  
30 were any sort of regulatory issues? A. Yes.

31 Q Did you consider asking Vodafone whether they saw any regulatory issues? A. No, I did not  
32 consider that. I suspect we would have thought that Vodafone being pretty dominant within  
33 the mobile determination market place would have brought those issues up before should they  
34 even have realised, and I believe the process to get an agreement such as ours through  
35 Vodafone goes through a number of different departments including sales marketing,

1 regulatory, finance etc. We would have expected that to have come up at the time of signing a  
2 contract, and to the best of my knowledge no such comments were had back from Vodafone.

3 Q Once the contract was signed did you then just sort of get on with it? A. Yes. I believe it  
4 was between three and four weeks before the first SIMs were delivered, and then from that  
5 point in fact it was just then to get those initial SIMs deployed as soon as possible.

6 Q Did you have meetings with Vodafone or did you just get on with your thing and they got on  
7 with theirs? A. I recall having at least one, it may have been two, meetings at the account  
8 review meetings between Simon Taylor and Jonathan Young, and I believe I may have even  
9 met Jason Ripley once as well; it is a name that I recall.

10 Q So there were a couple of meetings? A. There were a number of account review meetings, I  
11 think, from August signing the contract going through in a number of conversations between  
12 Mr. Taylor and Mr. Young who were the interfaces for both companies. I personally, as I said,  
13 attended one or may be two of these meetings when I was brought in for some technical  
14 reason.

15 Q And what sort of thing was discussed? A. The things discussed was the type of traffic we  
16 were taking. We discussed ARPU's, whether it was relevant that Floe got an up-front  
17 commission on the SIMs, these sort of things, negotiate the fixed rate that Vodafone offers,  
18 trying to get that reduced obviously to such margins as we possibly could. Those normal sort  
19 of things where there were post contract signings, management and the working of the  
20 agreement and the relationship.

21 Q And then you prepared a paper after all the debacle, and there was discussion going on about  
22 what should be done legislatively. You prepared a paper for that? A. Yes, post the meeting  
23 that was held with Mr. Timms, he asked that I should liaise with Martin Fensom of the RA to  
24 produce a concept paper of how I believed an interconnect agreement would work.

25 Q And what was the object of that? A. The object was to see as to whether there was a registry  
26 regime wrap that could be put around controlled GSM gateway services should they become  
27 one of the *de facto* standards of terminating fixed and mobile traffic in the UK.

28 Q That there should be a regulatory regime, should they provide it instead of? A. Instead of a  
29 totally uncontrolled environment that existed then and I would suggest still exists now. Is it  
30 worthwhile mentioning I also had conversations, quite detailed conversations, with Orange at  
31 the time which led to a similar sort of concept and subject to testing, Orange could see no  
32 problem with what we were suggesting and that was based on that paper.

33 Q But this was in the context, was it, that the position appeared to be that they were totally illegal  
34 at that time? A. At that time, I think, it was still very much the case that the likes of Floe  
35 who had a contract with the service provider, and this is made clear by one of Mr. Mason's

1 emails, where it would, be a contractual matter between the parties where the area was still  
2 very grey in everybody's mind. I think right up until the July 18<sup>th</sup> decision there is evidence in  
3 the bundles that shows that the Minister was still unsure as to what action should be taken. I  
4 think it was to help the RA form a decision around the consultation document which we  
5 believed at the time was going to go the way of regulations. Hence the time we spent involved  
6 within that document and with the RA.

7 Q And was it in that document that you referred to things being allowed. I took a note of what  
8 you said. You said that something should be allowed. That was the one in which you said the  
9 adoption of proposal 2 would be to allow companies to operate GSM gateway equipment. So  
10 what was to be allowed which was not allowed, if you see what I mean? A. The  
11 consultation as to whether provision by way of service to a third person was to be allowed over  
12 GSM gateways. Our viewpoint – I think there is a viewpoint of the vast majority of the  
13 respondees (I think it was about 78 per cent of those who responded actually responded in  
14 favour of proposal 2) which was a bit against what Mr. Young said in the advice to the  
15 Minister in which he suggested that the likes of BT and a couple of large telcos were small  
16 businesses, which I thought was not really the thing to say. However, we believe that bearing  
17 in mind that we believe a regulatory wrap could be put around it, that legislation could be  
18 created that allowed certain sectors on both stations to have a point of interface exactly the  
19 same as the way BT designates now on the fixed networks, we believed there was a way that  
20 could happen, and under proposal 2 that that should happen.

21 Q So you thought that you should be allowed to do this, whereas the existing situation was that  
22 you were not allowed to do it? A. Under the existing WT Act, yes, the traditional way of  
23 servicing a third person was not allowable and therefore on July 18<sup>th</sup> it became without the  
24 regulation.

25 Q So under the existing WT Act it was not allowable? A. I think the area of confusion was  
26 around whether the mobile networks could extend their licence and this was the subject of  
27 many conversations and emails I had with the RA at the time, whether the extending of the use  
28 of the licence could be done and whether having a contract with a mobile network meant that  
29 you were operating.

30 Q So it was to decide whether ----- A. I think from what I alluded to earlier under Mr. Flint's  
31 questioning regarding the single analogue line GSM gateways that had been coming into the  
32 country for three years previously at the rate of about – Nokia, I believe were putting about  
33 10,000 a year in. These were being sold by service providers of all the mobile – I believe the  
34 majority of the mobile networks anyhow, to end users, which was exactly the same situation  
35 we had albeit that was one single line and we had multiple lines.

1 Q So you are saying it was to decide whether the MNOs could allow you to do this? A. I am  
2 not sure even at this stage now the result of that consultation document still makes it clear as to  
3 if you have a service contract for resale of network services whether you are still within or  
4 without the regulation.

5 Q As you say, it was to decide whether the MNOs were able to permit you. Is that because they  
6 could not permit you up till then? A. If we believe what we have heard – if we understand  
7 what we have heard in front of this Tribunal – all gateways are illegal and for private use at  
8 one stage or not, I have to admit it is still a grey area to me when one has a contract with the  
9 mobile network.

10 MR. ANDERSON: Can I just ask one very short question of clarification arising out of that?

11 THE CHAIRMAN: Yes.

12 Cross-examined by Mr. ANDERSON

13 Q In your witness statement you quote from a document, is that document what you have been  
14 describing as the “regulatory wrap” in your answers to Mr. Davey’s questions? A. Yes, that  
15 was the document that was provided to Martin Fenton of the RA, an excerpt from that  
16 document.

17 Q If I could ask you to be shown bundle 2(e), tab 37, is that the document that we are talking  
18 about? A. Yes, it is, yes.

19 Q You say in your witness statement that it was provided in March 2003? A. I believe that is  
20 the case, yes.

21 Q Do you know when in March? A. Without referring to correspondence and referring to any  
22 logs no, not off the top of my head, I am afraid, no.

23 MR. ANDERSON: Thank you.

24 THE CHAIRMAN: We might as well go down the line – Mr. Flint?

25 MR. FLINT: No, thank you.

26 THE CHAIRMAN: Mr. Mercer, anything arising from that?

27 MR. MERCER: Only one area of clarification.

28 THE CHAIRMAN: Arising out of?

29 MR. MERCER: Arising out of the last questions.

30 Re-examined Mr. MERCER

31 Q Then the SIM cards were switched off by Vodafone, did you believe that what you were doing  
32 was not unlawful because of the contract you had with Vodafone? A. Yes.

33 Q And that you did not need any more authority than that? A. No.

1 Q So a few moments ago when you were answering questions from the Tribunal, about wanting  
2 to see a change in the law, that presumably was only in relation to Regulation 4.2 so the matter  
3 would be made easier for you generally? A. Absolutely, yes.

4 MR. MERCER: Thank you. I could see some confusion getting in there and I just wanted to deal  
5 with that, ma'am.

6 THE CHAIRMAN: Thank you very much, Mr. Stonehouse. A. Thank you.

7 (The witness withdrew)

8 MR. FLINT: It is Vodafone's witnesses now. I have a witness problem; Mr. Greenstreet is only  
9 available this afternoon and may not be available tomorrow, so I would like to call him first, if  
10 I may. I do not know how long he is likely to be in cross-examination, but he will be very  
11 short. I call Mr. Greenstreet.

12 Mr. IAN ALAN GREENSTREET, Affirmed

13 Examined by Mr. FLINT

14 Q Your full names, please, Mr. Greenstreet? A. Ian Alan Greenstreet.

15 Q And your address? A. Devandy, Longlane, Newbury RG14.2TH.

16 Q Could you be shown bundle 1, please, the bundle of witness statements. You have made two  
17 witness statements, one at tab 9. Is that statement your statement and is it true? A. Yes, it  
18 is.

19 Q Would you go over to tab 10, a document incorrectly headed "Third witness statement", I think  
20 it is a mistake, it is your second witness statement, signed by you. Is that statement your  
21 witness statement and is it true? A. Yes, it is.

22 Q Thank you.

23 Cross-examined by Mr. MERCER

24 Q Good afternoon. You will be pleased to know it is just your third witness statement we shall  
25 be dealing with. You will have got the formula by now. I too will ask you some boring  
26 questions but I will be mercifully brief. You say Mr. Taylor contacted you? A. That is  
27 correct, yes.

28 Q Out of the blue? A. I believe he got my name from one of my other colleagues in Vodafone,  
29 he had had various contacts with Vodafone, a large organisation and he got my name as being  
30 responsible for this product area.

31 Q Mr. Taylor says he was contacted by Vodafone and then made contact with it about these kinds  
32 of devices, so what you are saying is you did not ask him but there may have been somebody  
33 else in Vodafone who asked him? A. He may have had another conversation with the other  
34 people in Vodafone but personally no, I did not contact him with this product.

1 Q Just help me for a moment, did Vodafone purchase in the end equipment from Telecom FM?  
2 A. I believe they did purchase a few units and I think the ongoing arrangements after that were  
3 some type of lease agreement with customers that they did not take units directly and then sell  
4 them on.

5 Q Did at any time Vodafone provide Multi-use Gateway services? A. When you say "Multi-  
6 Use" you mean ----

7 Q End user feeding through the same Gateway? A. When you say "supply" those, you mean  
8 as a complete system?

9 Q As a system with a build-service to people who were going to use them for those purposes?  
10 A. No, some SIMs may have ended up in those devices but they were not provided as a  
11 solution.

12 Q Is that just this country, or does your answer cover abroad as well? A. I can only answer for  
13 the UK.

14 Q To coin a phrase, you would have us believe, Mr. Greenstreet, that Vodafone were COMUG  
15 virgins for the first half of 2002, you knew nothing about them? A. That's correct, yes.

16 Q Let us just think about that for a moment. You note in your own evidence – I think it is around  
17 paras. 8 and 9 – the Premicell devices sometimes did not work very well if they were placed,  
18 for example, in the basement next to a switch they might not have had the appropriate radio  
19 coverage? A. There were issues with them as a solution, yes, that is right.

20 Q What is the solution to that? A. In terms of an installation ----

21 Q Is it a solution to move the device to the roof? A. That overcomes some of the issues  
22 potentially, putting antennae obviously where there is good coverage, but that does not  
23 necessarily give the issue of capacity, that can still be an issue.

24 Q That is fine, so we have at least established that at this time you could see that the Premicell  
25 device could be some distance from the PABX to which it was attached? A. Yes, within a  
26 building.

27 Q Why just a building? A. As I say, because the actual equipment location, for example, if it  
28 was in a basement, obviously the signal coverage would have been poor at that point.

29 Q But you could have moved it, say moving it to the roof, you could have moved it to the roof of  
30 the next building? A. Well that would mean obviously some means of connecting the two.

31 Q Like a wire? A. Yes, potentially.

32 Q So at least you knew that, deduced that fairly early on when you were looking at these devices;  
33 and the device to which it could be attached could be a router, could it not? It could be a  
34 PABX router? A. Yes, the PABX would be performing that function because the call would

1 obviously have to be pulled out from a general course to determine that was actually a call to a  
2 mobile, so some type of routing would take place at some point.

3 Q So now we are in possession of all the evidence we need to know we could have a remote  
4 device attached to a router, and is that not what COMUG is, Mr. Greenstreet? A. The  
5 devices we are talking about, all the experience was using a device on a customer site. The  
6 antennae might have to be repositioned to ensure a good signal, but that is as far as it went up  
7 to that point.

8 Q But you would agree that the elements of a COMUG are the you have a device which is  
9 possibly remote from the end user, not in the same building, a piece of wire that takes the call  
10 out, and that piece of wire can be attached to a router?

11 MR. FLINT: With respect, that is a matter of comment not for the witness what a COMUG is. The  
12 witness can be asked questions of fact as to what he understood at the time, but not in my  
13 submission beyond that.

14 THE CHAIRMAN: You can ask this question.

15 MR. MERCER: As a matter of fact did you know that a PABX and router could be attached to a  
16 Premicell device? A. Obviously that is technically possible.

17 Q And another system, a third system could have been attached or routed into the PABX?  
18 A. When you say a “third system”, what do you mean?

19 Q Three houses, there is a Premicell in A, and a router in B and another system in C. C could  
20 connect to the PABX in B, and B could connect to the Premicell – correct? A. Yes,  
21 obviously that is theoretically possible.

22 Q You were in possession of all the information that you needed to be able to work out that  
23 COMUGS were potentially possible? A. No, because the difference there from obviously  
24 what I know now is the fact that you are effectively taking traffic and actually using multiple  
25 sources of traffic on to a single network.

26 Q So it is the multiple access that you could not have guessed? A. No, that is right, using them  
27 in that fashion. Obviously it is easy with hindsight, but at the time that was not something we  
28 were aware of.

29 Q A small point, in para.12 you refer to the “middle of 2002”, could you be more precise?  
30 A. Not from recollection, not an exact date.

31 Q And, secondly, is it usual for Vodafone – companies like Vodafone – to get its trade  
32 information from interviews with other people, with potential candidates? A. I mean, that  
33 was extremely unusual, and obviously the information was volunteered, and that really for me  
34 was obviously the first time I really understood the potential for how this could be used via  
35 network essentially obviously for terminating mobile traffic on this sort of scale.

1 Q Despite the fact that you had previously known what it could do? A. Not in that way, no;  
2 there was a big leap from using single individual devices albeit some of them on a larger scale  
3 to address a large organization, but moving to the point obviously of taking traffic from  
4 potentially third parties and usually a large scale arbitration service.

5 Q Why is that a quantum leap? A. Because it is a completely different proposition.

6 Q Why? A. Because commercially you are not just providing a single termination on a site  
7 which is a product which has been approved. You are actually effectively running a telecoms  
8 network.

9 Q So it is a commercial difference; not a technical difference? A. The technical solution is  
10 different, yes, but obviously commercially it is very different.

11 Q Technical solution is the same, is it not? A. No, it is not actually. It is a matter of scale and  
12 implementation but it is different.

13 Q Scale and implementation but technically the same? A. The actual device, yes.

14 MR. FLINT; No re-examination, madam.

15 (The witness withdrew)

16 MR. FLINT: I was going to call Mr. Rodman next but he is clearly going to be a lot longer than five  
17 minutes, and I suspect we will not lose any substantial time if the Tribunal preferred that I call  
18 him at 10.30 tomorrow morning.

19 THE CHAIRMAN: We have two suggestions from the Tribunal. One is if you have somebody  
20 short that would finish until five, we could slot them in. Secondly, should we start at 10?

21 MR. FLINT: I think if you are prepared to sit on until five, I would propose to call Mr. Rodman.  
22 We are certainly prepared to get on. He is my next witness, but if you would prefer to sit at 10  
23 tomorrow morning, I think Mr. Rodman accepts that he is unlikely to finish tonight, but he  
24 may do. May be Mr. Mercer can tell me how long Mr. Rodman will be, but if he is going to  
25 be less than 20 minutes or so -----

26 THE CHAIRMAN: He may be more. I do not think that should tie us.

27 MR. FLINT: Or Mr. Overton could give evidence now. He may be shorter. I will call Mr. Overton  
28 then.

29 JOHN PHILIP OVERTON, Sworn

30 Examined by Mr. FLINT

31 Q Your full names, please, Mr. Overton? A. John Philip Overton.

32 Q And your address? A. Chaucer Lodge, Crawleywood Close, Camberley in Surrey.

33 Q Could you see your witness statement, please, in bundle 1, the witness bundle, at tab 17. Is  
34 that your signed witness statement and is it true? A. Yes, it is.

35 Q Thank you.

Cross-examined by Mr. MERCER

- 1
- 2 Q How many types of standard contract does Vodafone UK have? A. It is difficult to answer
- 3 because I am only really coming from one specific area because there are ----
- 4 Q In your area how many does it have? A. A small number.
- 5 Q Basically probably a variation of just one? A. It probably starts from one type of contract
- 6 and then, as you say, variations.
- 7 Q So you would not have had a specific form of contract for dealing with gateway devices?
- 8 A. Well, at the time of the contract we were not aware of gateway devices. In fact, the term
- 9 gateway was never apparent to us
- 10 Q I am sorry: at the time you signed the contract? A. At the time of the contract ----
- 11 Q August? A. That is true, yes, in our particular area.
- 12 Q So did Mr. Taylor not have any discussions with your colleague? Did your colleague have
- 13 negotiations with Mr. Taylor and not tell you about gateways at all? A. They were not
- 14 described as gateways. They were described in a similar vein to what we knew about which
- 15 was a premicell which was a product which was sold and it is a single SIM device that had
- 16 been sold by our corporate sales force, and the business plan led us to believe it was the same
- 17 type of device. I am sorry, I am going a bit longer, but the term gateway still was not apparent
- 18 to us at that time.
- 19 Q OK. So in respect of using Premicell type devices you had just one standard form of contract
- 20 which you took off the shelf, I presume? A. It was the first time that we had come into this
- 21 environment of being asked to provide a contract of this type. We had not got into discussions
- 22 before.
- 23 Q And is that why the contract, the one of 12<sup>th</sup> August, makes all these reputed references to
- 24 handsets and stuff? A. I think our understanding of negotiations and of the business plan
- 25 was that handsets were fundamentally part of the proposal. I mean, I think this is probably – I
- 26 mean, I was not party to the discussions so I am giving some degree of hindsight sort of
- 27 evidence.
- 28 Q So you were aware the contract involve premicell devices to some degree? A. Yes.
- 29 Q And you had been told that, had you, by your colleagues? A. What this particular contract,
- 30 because I signed the contract after discussion with Jonathan Young, and those discussions were
- 31 around Premicell devices.
- 32 Q And least cost routing? A. Least cost routing from the term of a fixed originating call into
- 33 making it an on net call. While that may not necessarily be lease cost routing *per se*, in this
- 34 particular environment that is what I understood it to be.

1 Q So you went into this contract, and what did you believe the effect of the contract was?  
2 A. I am sorry?

3 Q Let me try to help you a bit. You were going to supply SIM cards? A. Correct, yes.

4 Q And you did supply SIM cards? A. Correct.

5 Q And what did you believe those were going to be put in? A. Either handsets which  
6 presumably could be purchased free and openly in the market as, you know, happens, and into  
7 single use premicell devices. Or premicell type devices.

8 Q Premicell type devices? A. Yes.

9 Q And any other devices? A. I cannot envisage any at this moment in time, or did not at that  
10 time.

11 Q But would you have objected to it being put in any kind of device as long as the device did not  
12 ----- A. Yes, I think we would. I mean, subsequently now, given what we know they have  
13 been used for, yes, I am sure we would have objected. We would certainly have taken further  
14 advice from within Vodafone.

15 Q So do you not normally. We have heard – my client – there was a process in Vodafone  
16 whereby their contract went round all the departments for clearance before they got it?  
17 A. No, that is not strictly true.

18 Q Why do you think they were told that then? A. I was not party to those discussions, so that  
19 is not a question for me.

20 Q This contract was entered into on the basis of – did you see the business plan? A. In terms  
21 of actually recalling seeing it, I cannot be certain, so in my statement I certainly said I don't  
22 recall seeing it. It is perfectly possible that I saw it, but I certainly do not recall so under oath I  
23 am not going to say yes, I definitely saw the business plan. As was common with discussions  
24 with other different types of organisations, we would always ask them for a business plan  
25 before we really entered into any form of contract.

26 Q You did not routinely read them? A. I could not say routinely. I would leave that, and the  
27 discussions that I had with the people in my team, I would trust their judgment knowing the  
28 sort of contracts we were getting into, I would expect them to go through that sort of process  
29 and I would trust their judgment.

30 Q Was the contract validly entered into as far as Vodafone was concerned, do you consider?  
31 A. Validly entered into – I think it was valid in terms of what we believed the usage to be  
32 given the business plan that we were given.

33 Q So you entered into a contract and at that time you did not put any restrictions into the contract  
34 about any form of use for any kind of gateway? A. I suspect not, but then again we were not  
35 aware of gateways at that time. It was not a term that I was aware of.

1 Q But you were aware before you entered into the contract of the gateway type device because  
2 the business plan described it, didn't it? A. The device which I knew as a premicell device, I  
3 knew the basic principle of it, and it had been sold by the corporate sales force as a single user  
4 device, and the business plan was pointing towards 5-80 employees. So my natural  
5 assumption was what it was going to be was a small to medium business type product in the  
6 same way that the premicell was.

7 Q Because that is what you say you envisaged, you did not put any restriction in the contract  
8 whatsoever? A. Not to my knowledge. I cannot say for certain. I would suspect not.

9 Q When were you first aware of the phrase "gateways"? A. Towards the back end of 2002.

10 Q And who made you aware of that? A. Mr. Rodman.

11 Q That is the head of regulatory policy? A. Yes.

12 Q Tell me, Vodafone is a very large organization? A. Yes.

13 Q And I presume a lot of information circulates? A. I suppose yes is the answer.

14 Q And that is the first time you ever heard of it? A. Absolutely and categorically.

15 Q Do you not find that surprising? A. Not really.

16 Q One of your colleagues already said in his witness statement that there was a chance interview  
17 back in the summer at the latest and he knew of gateways and the uses to which they were to  
18 be put to were, and that information was never shared? A. You are saying "a colleague".  
19 Ian Greenstreet was a colleague by virtue of the fact that he worked for Vodafone. I did not  
20 have day to day interactivity or interaction with him at all, so for me it is not surprising.

21 Q And what about Mr. Rodman? Do you have any interaction with Mr. Rodman? A. Up till  
22 that point, I really did not – I suppose I could say I did not know of his existence because I had  
23 not actually dealt with him. I have perhaps stumbled across him in the internal telephone  
24 directory, but I cannot honestly say that I did. I have not spoken to him before at all, in 15  
25 years of Vodafone.

26 (The witness withdrew)

27 THE CHAIRMAN: Mr. Mercer, do you think if we called Mr. Young we would finish by five?

28 MR. MERCER: I doubt it, madam.

29 THE CHAIRMAN: I always think it is unfortunate if a witness is overnight, especially if he is only  
30 going to be five minutes tomorrow morning.

31 MR. MERCER: I would prefer to start tomorrow morning either at 10 or 10.30, whichever the  
32 tribunal wants, and I actually will then go back to calling Mr. Rodman first and then  
33 Mr. Young.

34 THE CHAIRMAN: 10 o'clock.

35 (Adjourned until Tuesday, 31<sup>st</sup> January 2006 at 10.00 am)