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IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

31st October, 2007

Before:
VIVIEN ROSE
(Chairman)

PETER CLAYTON
ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED (“ORANGE”)	1080/3/3/07
and	
OFFICE OF COMMUNICATIONS (“OFCOM”)	
AND	
T-MOBILE UK LIMITED (“T-MOBILE”)	1089/3/3/07
and	
OFFICE OF COMMUNICATIONS	
AND	
BRITISH TELECOMMUNICATIONS PLC (“BT”)	1090/3/3/07
and	
OFFICE OF COMMUNICATIONS	
AND	
HUTCHISON 3G UK LIMITED (“H3G”)	1091/3/3/07
and	
OFFICE OF COMMUNICATIONS	
AND	
CABLE & WIRELESS UK & OTHERS (“CABLE & WIRELESS”)	1092/3/3/07
and	
OFFICE OF COMMUNICATIONS	

CASE MANAGEMENT CONFERENCE

APPEARANCES

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared for Orange.

Mr. Mark Brealey QC and Mr. Meredith Pickford (instructed by Regulatory Counsel, T-Mobile) appeared for T-Mobile.

Mr. Graham Read QC, Miss Anneli Howard and Mrs. Sarah Lee (instructed by BT Legal) appeared for BT.

Miss Dinah Rose QC (instructed by Baker & McKenzie) appeared for H3G

Mr. Matthew Cook (instructed by Olswang) appeared for Cable & Wireless

Mr. Peter Roth QC, Mr. Josh Holmes and Mr. Ben Lask (Instructed by the Office of Communications) appeared for OFCOM.

Mr. Stephen Wisking (Partner, Herbert Smith) appeared for Vodafone Limited.

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1 THE CHAIRMAN: Good morning everybody. Thank you very much for your written submissions
2 and the letters which you have sent in, which have certainly helped us to clarify the issues that
3 we need to cover today. For shorthand purposes the Tribunal likes to refer to the cases we are
4 hearing today as the “termination rate dispute cases”, and we tend to refer to the two appeals
5 by H3G and BT against the Ofcom general market review and the imposition of SMP
6 conditions as the “mobile call termination cases. If the parties could try and use that
7 terminology it would help to avoid confusion.

8 Looking at the letter that we sent out on 25th October, as regards interveners it has been
9 clarified to any of the applications to intervene that have been notified to the parties and the
10 Tribunal will make those orders.

11 The substantive issues to be covered today are three fold in our view. First, whether there are
12 issues in the Orange appeal that should be tried as preliminary issues. Those have been
13 referred to in the correspondence as “ground 1” and possibly “ground 2” of the April notice of
14 appeal. By ground 1 we mean Orange’s argument that there was no dispute within the
15 meaning of s.185 of the 2003 Act between Orange and BT over the level of charges and that
16 the time limit set by the agreement between them for referring matters to Ofcom had expired
17 by the date that BT referred the matter and therefore they argue that Ofcom has no jurisdiction
18 under s.185.

19 Ground 2 is the point that even if Ofcom had jurisdiction it ought to have decided that there
20 was a better alternative route for resolving the dispute; and there has also been referred to the
21 limitation point which is the question of whether it was necessary for Orange to have brought
22 an appeal against the February decision of Ofcom to accept jurisdiction or whether they could
23 have raised that point in a challenge to the final determination.

24 In the Tribunal’s letter of 25th October, we highlighted some of the points that the Panel
25 believes need to be explored in relation to the question whether one or more of those aspects of
26 Orange’s appeal should be tried first.

27 The second substantive issue to cover today is that of H3G’s application for a stay of its appeal
28 in the termination rate dispute cases until after the determination of the non-price control
29 matters in H3G’s mobile call termination appeal. You will have seen the Tribunal’s comments
30 on the areas that we wish to explore.

31 The third substantive area is in relation to documents. Can I just ask whether Vodafone and
32 Orange have now had sight of the redacted versions of the notice of appeal.

33 MR. WISKING: For Vodafone’s part we have the notice of appeal from all the appellants. What we
34 do not have are the non-confidential annexes, and in some instances it is not clear either what
35 the annexes are or whether the annexes are confidential, so I would like to request if the other

1 parties could serve us with what they consider to be the non-confidential annexes to their
2 notice of appeal.

3 THE CHAIRMAN: We will deal with that later on. I wanted to check whether there was still a live
4 issue in relation to that. So we will then come to that issue as to whether or not there are
5 documents that need to be provided to the Tribunal and between the parties.

6 May I just ask whether there is anyone who thinks that there is another issue, which I have not
7 mentioned, which ought to be on our agenda for today?

8 MR. READ: Can I raise the point which is flagged up in our observations and I do not know the
9 extent to which it is still live, which is how exactly the Tribunal – and of course one
10 appreciates that this is a different Tribunal to that in the market call termination appeal – how
11 the two appeals are likely to be dealt with and how, if BT is right in its intentions that there are
12 core issues that do to a degree overlap (we can come back to how far they overlap later on)
13 whether those matters should be dealt with at the same time, or at least in parallel.

14 THE CHAIRMAN: Yes, I was bundling that up with the question of the H3G stay in fact?

15 MR. COOK: Matthew Cook, I act for the 1092 appellants, as we call ourselves in our submissions.
16 It may well come within the context of documents, but it is a proposal made by the Tribunal in
17 the context of the determinations and much more limited redactions being made in the context
18 of those, if that is wrapped up under documents then we will come back to it in due course.

19 THE CHAIRMAN: Yes, it is Mr. Cook. Can I then ask whether counsel have had any discussions
20 amongst themselves as to the order in which they wish to present issues today? We could
21 certainly go through them in the order that I have outlined them in my opening remarks unless
22 you have come to the conclusion that there would be a better way of dealing with it? No?
23 Excellent. I think therefore I will call on Miss Demetriou to make her submissions in relation
24 to the question of the preliminary issue or issues in the Orange appeal?

25 MISS DEMETRIOU: Madam, thank you. You will have seen from our letter that we suggest that
26 ground 1 in Orange's appeal be heard as a preliminary issue. Now Ofcom has raised the
27 possibility that ground 2 be heard at the same time because they are both jurisdictional issues,
28 and if the Tribunal felt that that was a better way to go then we would be content with that
29 suggestion. So we are ambivalent really as to whether ground 2 is heard at the same time as
30 ground 1. We do think that ground 1 should certainly be heard as a preliminary issue for
31 essentially two reasons.

32 The first reason is that the jurisdictional points raised by Orange are clearly suitable for
33 determination as a preliminary issue because they essentially raise a short point of statutory
34 construction namely the meaning of the word "dispute" in sections 185 to 191 of the
35 Communications Act 2003. We say that that is capable of resolution quickly following a

1 relatively short hearing before this Tribunal. As far as we can discern there is no dispute of
2 fact between the parties and there is no need for any economic evidence – it is a short point of
3 statutory construction that can be determined quickly. That is the first reason why we say that
4 this is suitable for resolution as a preliminary issue.

5 The second reason relates to the consequences of a finding by the Tribunal in Orange’s favour
6 and we say that if Orange is right on its jurisdictional point that this will have quite significant
7 consequences in terms of the remainder of the termination rate dispute appeals before the
8 Tribunal.

9 What ground 1 comes down to essentially in our submission is this: are sections 185 to 191 of
10 the Act are designed to permit Ofcom to intervene in commercial bargains struck by the
11 telecommunications’ operators in circumstances where one party wishes to resile from that
12 bargain, that agreement? Or is the purpose of the dispute resolution procedure to resolve
13 deadlock when no agreement can be reached in the first place, and we say the latter is the
14 correct purpose of these provisions. You will have seen that in that context we raise essentially
15 two arguments.

16 The first argument is that there was no dispute within the proper meaning of that word in the
17 circumstances of this case because Orange and BT agreed to the termination rate, there was
18 agreement and having agreed to the rate it was impermissible, we say, for BT in effect to
19 generate a dispute reference by issuing its own charge notice objecting to the charge which had
20 previously been agreed. Secondly, we say that there was no dispute because BT failed to make
21 a reference within the contractually agreed time limits.

22 We say that if those arguments, or indeed either one of them, is resolved in Orange’s favour
23 such that it is found that Ofcom has no jurisdiction to consider the reference because it did not
24 amount to a dispute, then that will, we submit, dispose in significant part of the remaining
25 appeals. To take Orange’s position first, we say that it would dispose entirely of BT’s appeal
26 against the determination in so far as it concerns Orange. That is clear and self-evident, in our
27 submission.

28 We say, secondly, that it is very likely, to put it at its lowest, to affect Orange’s continued
29 intervention in the other termination rate dispute appeals. At the very least, it will significantly
30 affect the scope of those interventions.

31 Thirdly, and perhaps most fundamentally, we agree, on reflection, with Ofcom’s position in its
32 submissions to the effect that a finding in Orange’s favour is likely, we say, to be
33 determinative, or significantly determinative, of the determination in so far as it affects the
34 other mobile phone operators if they are factually in a similar position to Orange. Vodafone in
35 its written submissions to the Tribunal, tab 23 of the bundle, para.9 of its letter, says it factually

1 is in a similar position to Orange, and says that any finding of the Tribunal would apply
2 equally to it.

3 Ofcom in its submissions I think says that, with one exception, this point would be
4 determinative of the other appeals. We can see a lot of force in that because even though the
5 other mobile phone operators have not, themselves, taken this point on appeal we say that it is
6 a question of jurisdiction. The fact that it has not been taken as a point in appeals does not
7 make any difference, Ofcom either has jurisdiction in these cases or it has not.

8 I say in parenthesis that the impact, because the Tribunal has raised this in its letter of 25th
9 October, of this question on the Hutchison/Orange appeal is not self-evident because the
10 contractual arrangements between Hutchison and Orange are different to the standard inter-
11 connect agreement that applies as between BT and Orange. We say there is consequently no
12 inevitable read-across, but equally, depending on the terms of any Tribunal's judgment in
13 Orange's favour, there may on the facts be an impact on that appeal too. It is just very difficult
14 at the outset to pin down whether that is inevitably the case. Potentially, a judgment could
15 have an impact also on that appeal.

16 We say in conclusion, therefore, that determining the jurisdictional arguments raised by
17 Orange would, if Orange is correct, save significant time and expense. When one reflects on
18 some of the substantive arguments raised in the other appeals we say that the merits of this
19 proposal become all the clearer because, in our submission, many of the arguments raised by
20 the other parties in their appeals are inviting the Tribunal to look quite closely at Ofcom's
21 economic analysis. Quite complex arguments are raised. We say that if Orange is correct on
22 its jurisdictional points then much of this may be rendered unnecessary, and so we say it makes
23 perfect practical sense to have these points heard as a preliminary issue.

24 **THE CHAIRMAN:** It is your submission then that if Orange was successful on the first ground that
25 would result in effect in knocking out almost all these cases?

26 **MISS DEMETRIOU:** It may well do, depending on the facts, because we do not think that it is fatal
27 that the other parties have not taken a jurisdictional point themselves in their appeal. So,
28 depending on the precise terms of the Tribunal's judgment, if, on the facts, the other parties
29 were in the same position or were within the scope of the judgment then, yes, that is our
30 submission. Ofcom is clearly better placed than us to determine whether factually that is true,
31 but we see the force of Ofcom's submissions and we say that potentially this could have the
32 effect, if we are right, of knocking out most of the other appeals.

33 **THE CHAIRMAN:** What would happen, looking to the future, if the Tribunal heard this as a
34 preliminary issue and Orange was successful and then Ofcom sought to appeal that finding to a
35 higher court? Where would that then leave the rest of the appeals?

1 MISS DEMETRIOU: There would then be the usual question which arises in these cases as to
2 whether or not to stay the rest of the appeals pending the outcome of any appeal brought by
3 Ofcom to the higher courts. I can see at the outset powerful reasons for adopting such an
4 approach, but no doubt there would be debate at that stage as to what the correct procedural
5 course would be. Given the complexity of the substantive arguments, one can see, at least at
6 the outset, good reasons for staying those appeals pending determination by the Court of
7 Appeal.

8 So those, in brief, are our submissions in favour of the Tribunal ordering the jurisdictional
9 points to be heard as the preliminary issue. There may be points that are raised against me that
10 I am happy to deal with in reply, but unless I can help any further at this stage those are my
11 submissions on those points.

12 THE CHAIRMAN: Mr. Roth?

13 MR. ROTH: Thank you, madam. With respect, we, on behalf of Ofcom, agree with virtually
14 everything that Miss Demetriou has said, save for one relatively minor point. These are
15 confined issues that are raised and they could be dealt with at a relatively short hearing
16 certainly compared to the much more complex and elaborate issues raised in the substantive
17 appeals.

18 Ground 1 has been helpfully characterised by you, madam, and then by Miss Demetriou, as
19 comprising two distinct arguments, one being whether there is a dispute within s.185 when one
20 party is seeking to change an agreed commercial bargain; and secondly, whether Ofcom could
21 take and determine a dispute when it has been referred outside a contractual time period in the
22 contract between the parties to the dispute. It is perhaps helpful to keep that distinction in
23 mind.

24 Before going further with that, could I also deal with ground 2, which is expressed very briefly
25 and helpfully in Orange's notice of appeal. I do not if you have the notice of appeal to hand. It
26 might be helpful to look at it. This is the Orange notice of appeal. Within the document it is
27 p.15, paras.53 and 54. Ground 2:

28 "... not appropriate for Ofcom to handle the alleged disputes. By s.186(3) of 2003
29 Ofcom must, where a dispute is referred to them under an in accordance with s.185,
30 decide that it is appropriate for them to handle the dispute unless they consider that
31 certain circumstances set out in paras.(a) to (c) of that sub-section apply."

32 If it is a matter which has been referred then it spells out the circumstances of which (a) is that
33 there are alternative means available for resolving the dispute, and resolution of the dispute by
34 those means would be consistent with the community requirements; (c) that a prompt and
35 satisfactory resolution of the dispute is likely, those alternative means are used for resolving it

1 “As set out above, Ofcom has applied price controls to Orange’s 2(g) and 3(g) voice
2 call termination charges with effect from 1st April. The alleged dispute is therefore
3 plainly resolved. It is therefore the submission of Orange, without prejudice to
4 ground 1 that there were at the relevant time alternative means available for resolving
5 the dispute, namely the powers exercisable by Ofcom pursuant to s.78 to 86, namely
6 to set price controls as an SMP condition. Doing so would equally plainly meet the
7 requirements of paras.(b) and (c) above.”

8 So that is the very short point that is being taken as ground 2, and that is why we say that also
9 clearly applies to all the other termination rate dispute appeals if it is right.

10 Ground 1, however, is a ground that, as has been said, goes to jurisdiction. On the no dispute
11 point, the construction of s.185 – in other words, what I call ground 1(a), the first argument
12 under ground 1 – that is something that applies irrespective of any time period in the contract.
13 Therefore, and this is the only issue where we part company with Miss Demetriou, it seems to
14 us that if that is right – and you will appreciate that Ofcom says it is not right – then it would
15 apply equally to the other termination rate dispute appeal involving only the MNOs – that is to
16 say the Orange/Hutchison, the disputes not involving BT, because there also one has the
17 dispute point.

18 Ground 1(b), namely the referral of the dispute out of time, as it is said, that does not apply to
19 the mobile disputes because they do not have the same contract as the standard BT contract
20 which applies in all the BT disputes.

21 THE CHAIRMAN: I am sorry, I am not following this, Mr. Roth. You are saying that point (a),
22 whether there is a dispute, namely the point that Orange make that BT had agreed to the rates
23 and then issued their own notice using their terminology “generate dispute”, you say that if that
24 is right and that in those circumstances there is no dispute within the meaning of s.185, that
25 then would knock out all the appeals regardless of the parties?

26 MR. ROTH: Correct, because as we understand it in all cases there was already an agreed rate which
27 one party was seeking to change, and as the argument is expressed by Miss Demetriou in their
28 notice of appeal the ground is that where there is already an agreement between the parties of
29 the rate being charged and then one of the parties to the agreement serves a change notice
30 seeking to vary it that does not give rise to a dispute. That is the ground as we understand it. I
31 hope we have not misunderstood it, but that is our understanding of the ground being
32 advanced, and Miss Demetriou is helpfully nodding. If that is the argument then it will apply
33 to the others as well.

34 Ground 1(b) – the date point – does not apply to the disputes concerning Hutchison and
35 Orange and Hutchison and 02 (that was the name I was trying to remember). It does appear to

1 apply to almost all the cases involving BT. We have prepared a schedule, which we hope is
2 helpful, setting out the dates so one can see this. If I might hand that up to the Tribunal, and
3 pass that along for my friends. (*Documents distributed to the Tribunal and counsel*)
4 That is just setting out in tabular form the date each of the disputes in the left hand column, the
5 agreed position, the dispute notice “OCCN” is the changed notice. The date of rejection – on
6 the BT contract the date by which a referral should be made, that is to say applying the period
7 from the contract, and then the date of the actual referral. As you can see, just casting your eye
8 down that, looking at the right hand column, and the column just before it, in all but one case
9 the actual date of referral was after the contractual date. The one exception is the second of the
10 two T-Mobile BT referrals, which is the bottom one on the first page. So that point, if it were
11 right, would also apply to the others, and we respectfully endorse what Miss Demetriou said, it
12 is true that only Orange has taken this point in its notice of appeal, the other appellants have
13 not. But it is a point clearly that goes to jurisdiction in Ofcom to do what it did, then its
14 determinations are invalid, and you cannot confer jurisdiction where it is a statutory
15 jurisdiction by consent.

16 We have brought along, if it is necessary, I cannot imagine this is a proposition that is in
17 dispute, but the *locus standi*, which is the House of Lords in the *Essex County Council* case – I
18 will not develop it – it is a fairly striking case because there a case was heard and argued
19 before the Lands Tribunal, appealed heard and argued before the Court of Appeal, appealed to
20 the House of Lords and in the House of Lords somebody realised something had gone badly
21 wrong because the Lands Tribunal had no jurisdiction. It was said that everyone has
22 proceeded on the basis we have, so surely there is jurisdiction by consent? “No” said Lord
23 Reid, “you cannot, where it is a statutory jurisdiction, give it by consent.” So it would affect
24 all these appeals and, not only that, but we think it would also very much impact on the
25 argument in the call termination appeal (MCT appeal) because, madam Chairman, you will
26 recall that core to that appeal is the question of the extent to which BT could refer a matter for
27 dispute resolution by Ofcom. If Orange is right, then the scope for BT to refer matters to
28 Ofcom under s.185 is much more limited, and therefore that impacts on the analysis of BT’s
29 countervailing buyer power in that case, and so it does not affect the jurisdiction of that case,
30 but if the argument is right it very much impacts on the argument in the mobile call
31 termination appeal.

32 For that reason also we would very much urge that it be heard as a preliminary issue and given
33 that this can be heard, we would have hoped, without the extensive time required for the
34 parties to plead to the much more complex issues in the other case, it should not disrupt the
35 timetable that might be set for the other appeals, if the Tribunal agreed to do that. I should add

1 that adding ground 2 to ground 1 – you see the scope of ground 2 – it is not going to cause
2 much extension of time for argument

3 THE CHAIRMAN: Would you say that ground 2 is also a jurisdiction point of the *Essex County*
4 *Council* type?

5 MR. ROTH: No, I think it is not a jurisdictional point, but it would be, we think, convenient to
6 dispose of it together, because it would certainly impact in the same way on the MCT appeal
7 and, as Miss Demetriou says, it might affect Orange’s intervention in the termination rate
8 dispute appeals, but that does not appear to us to be a jurisdictional point.

9 THE CHAIRMAN: Does the ground 2 point not partly depend on the answer to the main question,
10 which is: what is the connection (to put it neutrally) between the test under s.185, and the
11 exercise of the powers after a finding of significant market power?

12 MR. ROTH: We think with respect not, because we think really it depends on looking at what the
13 s.185 and s.186 mechanism is designed to do, and really whether SMP powers are relevant to
14 that or not. It is clear, there is no question, that there is power under the SMP provisions to
15 impose price controls – that is not an issue, there is an issue whether they should have been
16 imposed. The question here I think raised is, is it relevant that there is that SMP power when
17 you are dealing with dispute resolution? We say Ofcom’s position is that it is not, and indeed
18 the way the appropriateness test is expressed it is a discretion in any event and it is not a
19 mandatory duty, so we do not think that that feeds in in that way.

20 The third issue is the limitation point, as you have expressed it, which you will recall I think
21 was canvassed at the CMC, at which I was not present. It is a very short point, and a point that
22 Ofcom is very anxious to have guidance upon, and Orange put it forward really out of an
23 abundance of caution that they served their notice of appeal at that time, but if notices of
24 appeal do have to be put in as soon as Ofcom takes a dispute and not after a determination the
25 result is a plethora of appeals and resulting burden on Ofcom and, indeed, the Tribunal. So
26 that we think is a very short matter of construction of the rules, and we would ask, please, that
27 it be clarified. It has arisen in a couple of cases, it has never been answered, and if there is
28 going to be a preliminary issue it could conveniently be dealt with at the same time.

29 Madam, the only other point that I would say is this, if it is helpful, we are all very conscious
30 that the Tribunal today is not, as counsel for BT pointed out, the Tribunal hearing the MCT
31 appeals, and no doubt in due course that will be addressed and conceded. It may well be
32 because of, first of all, Hutchisons’ applications to amend the MCT appeal by broadening its
33 scope, secondly by possible interventions in that appeal; or thirdly, indeed, by as I think BT
34 suggest these appeals being heard together by a reconstituted Tribunal, that the date in
35 December that is being reserved becomes vacated and that appeal is put off, if that were to be

1 the case the Tribunal might then consider whether this preliminary issue could be heard on that
2 date given that all the parties have those dates reserved – it certainly would not need four days,
3 I would have thought it would not need more than two, or one if it were just Orange and
4 Ofcom, but two given the number of parties, and then one could usefully deal with that at that
5 time. I just throw that out as a suggestion – I am not sure if it can be taken forward because of
6 course you are not in a position to vacate that date today because you are not the Tribunal
7 hearing that case.

8 THE CHAIRMAN: What do you say, Mr. Roth, about this point of further appeals from any
9 decision of this Tribunal on such a preliminary issue?

10 MR. ROTH: I am sorry, the additional point you make. If there were an appeal it would clearly be
11 pointed out to the Court of Appeal that there are pending cases stayed, awaiting the outcome
12 because this is a preliminary issue for a number of disputes and one would seek an expedited
13 hearing in the Court of Appeal – they tend to try and assist in those circumstances, obviously
14 no one here could bind the Court of Appeal but one would hope they would accommodate an
15 expedited hearing – again it would not be a long appeal. I would have thought given that they
16 then have a judgment from this Tribunal, if there were an appeal it would be a one day appeal,
17 which one would hope could be fitted in.

18 The only other point I have been asked to add is that Ofcom is receiving a steady stream of
19 appeals from dispute resolutions and therefore determining this preliminary issue is important
20 not only for these cases in the way I have outlined, but really in determining what Ofcom has
21 or does not have to do so that that is a very live issue in other cases which makes it somewhat
22 urgent from our point of view.

23 THE CHAIRMAN: You mean you have appeals which have come in as a response to changes in
24 existing agreements?

25 MR. ROTH: No, they are disputes before Ofcom, I got it wrong. They are disputes pending before
26 Ofcom, that is right, yes – changes in existing agreements. Unless there is anything else I can
27 assist you with?

28 THE CHAIRMAN: Now are there other parties who wish to be heard on this question of whether
29 we should hear a preliminary issue in the Orange appeal?

30 MR. READ: Madam, BT obviously has major reservations that there is a preliminary issue on these
31 points. Perhaps I can start by saying that of course we accept that it is capable of being a
32 preliminary issue vis-à-vis Orange, but we do not accept that it is capable of being a
33 preliminary issue vis-à-vis the other parties.

34 Perhaps if I can develop that a little, because it has been presented to you as a short point of
35 statutory construction. We say that is an error because what you are faced with in the Orange

1 appeal is the interface between contract law and statutory construction, because the primary
2 argument is that BT is out of time because it did not comply with the time limits laid down
3 within the standard interconnector agreement as to referring the dispute to Ofcom, that is a
4 contractual point, an issue about the contractual construction of the contract.

5 When one is dealing with contract law it is perfectly open to the parties to waive or allow
6 themselves to become estopped from arguing that there has been a non-compliance with the
7 strict time period laid down. Madam, can I make clear that it is certainly one of the issues that
8 BT will develop very strongly when dealing with Orange's submissions on these points. So
9 that is the first point.

10 THE CHAIRMAN: Sorry, what would be ----

11 MR. READ: In effect will say that the parties, by their conduct, have either waived or are now
12 estopped from saying that BT failed to submit the dispute to Ofcom within the correct time
13 frame. Now, that necessarily is a very fact sensitive issue, and because it is a fact sensitive
14 issue it is likely to vary from dispute to dispute.

15 The second point that arises from the fact that we are looking here at contract law is that of
16 course if the parties choose not to take a point over a strict time limit within the contract then
17 they will be held to have waived or become estopped from so doing, and that is precisely what
18 we say has happened in the other disputes, that this is not a question of jurisdiction, this is a
19 question of contract law as to whether there has been a waiver or an estoppel relating to the
20 time period within the various other provisions. It is as plain as a pikestaff that nobody else,
21 apart from Orange, has actually taken this point before the matters were referred to Ofcom, and
22 everyone has proceeded on the basis that absent Orange this point is not going to be challenged
23 by the parties. We say that is very simple, that as a matter of contract law there has been a
24 waiver and an estoppel of this and this is not something going to the jurisdiction of the
25 Tribunal and the powers of s.185, it is something that is resolved simply and straightforwardly
26 by the contract that the parties have agreed in a contractual situation between them.

27 So as far as the Tribunal is concerned, if the parties have accepted that there is a dispute there
28 then, under the contract, there is a dispute and as far as BT is concerned that is an end to the
29 matter as to Ofcom's jurisdiction in the matter.

30 There is a further point, however, that arises out of this which is, of course, the whole of
31 Orange's argument presupposes the dispute defined within s.185 of the Communications Act
32 in fact means identically the same thing as "dispute" defined between the individual parties in
33 their individual contracts and of course that is an issue which we say does not follow,
34 particularly when you look at the way a dispute within s.185 is obviously referable back to
35 Article 20 of the framework directive which is dealing with access conditions and not

1 necessarily contractual disputes. We say that this is a red herring because at the end of the
2 day this is not a point going to the jurisdiction within s.185, it is a separate and distinct point
3 relating to contract and whether or not the parties have strictly complied with the terms of their
4 contract or waived or become estopped from taking the point subsequently. That is why we
5 say that whatever the outcome of a preliminary point on the Orange appeal it will not actually
6 affect the other appeals in the BT determination. Of course, I think it is accepted that as far as
7 the H3G and the 02 and Orange everybody accepts that it not a point there. That is the first
8 point, madam, that we say in terms really this is a non-point. It is not a question of
9 jurisdiction.

10 THE CHAIRMAN: Do you say that that applies to ground 1(a) as well as ground 1(b), or is that a
11 point that is only in relation to the time limits?

12 MR. READ: We say it applies to ground 1(a) as well. As we apprehend what ground 1(a) is
13 referring, as we understand it, to BT having effectively accepted a change control notice, and
14 agreed it and then, within a matter of a few days, raised an objection in a further change control
15 notice; that is what we apprehend this point is about. So as we apprehend it, it is peculiar to
16 the situation in Orange, and not the situation vis-à-vis the other parties in any event.

17 THE CHAIRMAN: My understanding of what Mr. Roth said, to which he said that Miss Demetriou
18 nodded was that actually that is not the point, the point is much broader than that, that once the
19 parties have entered into an agreement then “disputes” – to use the term in a non-technical
20 sense, or further bargaining between them in relation to potential changes to that agreement are
21 not disputes within the meaning of s.185, and s.185 is limited to the initial negotiations to enter
22 into the access arrangements.

23 MR. READ: Madam, perhaps I can deal with that point? First, that is not quite the way we perceive
24 Orange’s notice of appeal to be putting the point. We understand it and, if need be I can take
25 you to paras. 39 and 42 of the notice of appeal, we perceive the complaint to be that the parties
26 freely entered into an agreement over the price on I think it was 1st August, or around about
27 then, and then within a matter of days BT had actually issued a further change control notice.
28 Madam, it is extraordinary, in our respectful submission, to suggest that the issue of price
29 cannot be an access related condition, because in our respectful submission it goes to the heart
30 of the dealings between the parties, that if you have an agreement effectively to sell
31 interconnection at a particular price, if the parties then – through the mechanism within the
32 contract itself, choose to seek to vary that contract, but cannot reach agreement on it, then
33 madam we say it must be an access related condition, because otherwise there is on other
34 proper mechanism for resolving how exactly one party is going to interconnect on terms that
35 may stay the same for most other eventualities within the terms of the agreement, but on the

1 fundamental price they are not agreed and they cannot reach agreement on it. So madam, that
2 is why we say at the end of the day it must be an access related condition.

3 THE CHAIRMAN: We cannot get into the merits of the point at this stage, what I am exploring is
4 whether or not you accept that given the wider point that is now being put forward by Orange
5 as having been the point that they made in their notice of appeal, namely that disputes which
6 arise in the context of an existing agreement binding the parties are not potentially referable to
7 Ofcom under s.185, if that is the point that they are making, whether you accept that that is a
8 jurisdiction point which would affect the outcome of the appeals between the other parties,
9 even when the other parties have not sought to rely on that point themselves.

10 MR. READ: I think the short answer to that is that we say this is something that the H3G judgment,
11 when considering the dispute resolution powers (by which I am talking about the 2005
12 Tribunal judgment) that has already effectively decided the point by looking at and considering
13 the question of price, and whether or not that is an access-related condition.

14 Can I deal with one further point, which is its bearing upon the mobile call termination appeal,
15 and the cases that are being dealt with on that on the SMP issues? We think that the point
16 Ofcom have made about this having some form of bearing on it and their dispute resolution
17 powers is, in reality, unlikely to be something that is of major importance because if, at the end
18 of the day, the parties are told in due course that the time limits are strict within the terms of
19 the interconnect agreement, then all that is going to happen is that the parties at the end of the
20 day are going to comply with those time limits before any dispute is referred to Ofcom, so it is
21 very unlikely in the future to have any effect on Ofcom's dispute resolution powers, because it
22 is obviously going to be focusing primarily on the time limit and the way that the parties
23 actually deal with it in the context of the contract. So we do not think that this issue is, at the
24 end of the day, going to have a significant bearing at all upon the mobile call termination
25 appeal.

26 Unless there is anything further, that is all I need to say on that.

27 THE CHAIRMAN: Just to be clear then, you would say that the best way to approach this is for
28 these points to be taken at the main hearing of the overall appeal, like any other points?

29 MR. READ: Madam, it depends upon the word the "structure" and one is back to the problem that I
30 mentioned earlier about the interrelationship with the mobile call termination appeal, because
31 obviously if there is a need for expedition, and BT does say that there is a need for expedition,
32 then the jurisdiction issues probably can be dealt with relatively discretely, and so they can
33 either be dealt with at the same time, with what BT calls the "core issues" or, alternatively,
34 they can be put to one side so that the core issues can be dealt with first and dealt with in that
35 way.

1 But to agree, madam, it is ultimately dependent upon, if one likes, the overall format for how
2 the two appeals are going to be dealt with going forward, for example, there may be some
3 merit that if, for any reason, a date in December were to be lost, that perhaps this point could
4 be taken at that stage and, if you like, filled in. I do not think that is something that we would
5 necessarily be adverse to provided it has no major impact on the expeditious dealing with the
6 core issues in, we would say, both appeals, or certainly the overlapping issues.

7 Unless there is anything further, madam?

8 THE CHAIRMAN: Anybody else want to be heard? Miss Rose?

9 MISS ROSE: (no microphone)

10 THE CHAIRMAN: Thanks very much, Miss Rose. Mr. Cook?

11 MR. COOK: Madam, I would echo certainly the comments made on behalf of BT and perhaps to a
12 lesser extent H3G, and particularly not at all to the final comments about the December
13 hearing which we will come on to and my clients will be saying that taking those dates might
14 well be a useful time for hearing these preliminary issues, if they do come on.

15 Nonetheless, the 1092 appellants' position on this is that ground 1, in particular, we can see as
16 being in large measure distinct points.

17 Ground 2, I would say straight away I do not see as being distinct. Ground 2 is a point that
18 says that you should not have gone down the dispute resolution route, you should have gone
19 down the regulation route. We say that, as we understand it, is actually the reverse of the point
20 made by H3G, which is that you should not have gone down the regulation route, you should
21 have gone down the dispute resolution route. We do see ground 2, although it is not a point
22 that we are directly concerned with, as being very highly linked to the other issues.

23 Ground 1 is perhaps more clearly distinct in that context, echo BT's comments that if it is a
24 bad point it will have no impact on anything. We think it is a bad point which is the reason
25 why we have not taken it. If, on the other hand, 1(a), which is about whether there was an
26 agreement previously, there is a narrow version of that which only applies to Orange, on the
27 basis that there was an agreement a week earlier and then BT challenges it. It is now being
28 suggested that there is a wider point that any agreement previously prevents anything. That,
29 we accept, would obviously apply more widely. So there is a possibility either that they could
30 lose entirely or they could win, but only on Orange specific facts or the potential for a general
31 impact.

32 So there is a very good chance, we would say, that this is not going to be a silver bullet that
33 knocks all the appeals out. So, from our perspective, we have no objection, particularly from
34 ground 1, to going ahead beforehand as long as it does not cause delay at all in dealing with
35 what we see as the substantive issues and these appeals being. So if it was the case that the

1 Tribunal took the view that the substantive issues and the appeal would take place in January,
2 as BT suggested, then we would have no objection to this being held in December on the basis
3 that everyone carries on preparing for January as much as can be. What we are very keen
4 about is that this should not result in a true preliminary issue where this is heard first and
5 everybody else waits until this has been determined.

6 Split issues is something that we would be happy with. Split hearings is something that we
7 would be happy with, but not if the result of that is to lead to uncertainty continuing for an
8 extended and lengthy period. The appeal points you have made, madam, are very forceful in
9 that regard, it could be a very extended period. All of the cases should carry on in accordance
10 with a timetable that best suits the issues there. If these points are quicker, we can see no
11 particular objection to them going ahead first, but they should not slow down the substantive
12 points.

13 THE CHAIRMAN: Mr. Brealey on behalf of the T-Mobile.

14 MR. BREALEY: Madam, we endorse the comments made by the last speaker. Could I just refer the
15 Tribunal to tab 6 of the bundle. We are broadly neutral on a preliminary issue, but we do say
16 that we are against it if it impacts on T-Mobile's appeal. I think it is just important to bottom
17 out what actually Orange are submitting. Can we go to tab 6, p.11, paras.38 and 39. This, as I
18 understand it, is the core of their ground 1, 38, 39 and 40. Can I just pause at 38. One sees
19 there in the penultimate line, "particular existing bargain". Miss Demetriou referred in her oral
20 submissions to resiling from the contract. So there is a flavour here of resiling from a contract.
21 In other words, if one looks at 39:

22 "… BT accepted the Appellant's OCCN changing its termination [rate] …"

23 and then shortly after it wanted to reduce it. This is an OCCN which, as I understand it, under
24 Orange's grounds of appeal is valid. The actual contract we see is dated 2001, which is at p.5.
25 So there is an existing contract.

26 We endorse what BT say, that this looks to be a contractual dispute. When one compares the
27 factual scenario at 38, 39 and 40 with, for example, the factual scenario in T-Mobile's appeal –
28 if we can very quickly go to tab 4, para.36, there is no resiling or changing the position very
29 soon after. Here at 36 is what the Tribunal will know is our section A ground of appeal. This
30 is where BT proposed new call termination charges, they were rejected. H3G proposed new
31 termination charges and they were rejected. That is a far cry from what is being submitted by
32 Orange at paras.38 and 39. Then obviously we go on and in subsequent paragraphs we show
33 why there is a retroactive rate.

34 I highlight these passages to the Tribunal because we are broadly neutral on the preliminary
35 issue. If Orange want a preliminary issue and the Tribunal orders, so be it, but there can be

1 treacherous shortcuts, and if it is going to impact on T-Mobile's appeal we would resist it,
2 because there are differences in the facts. One cannot safely say that the question of law is
3 going to be determined such that it will knock out every knock-out blow on our appeal.

4 That is really what I would like to submit on Orange's preliminary issue. We are broadly
5 neutral, and if it is going to impact on T-Mobile's appeal we would be against it.

6 THE CHAIRMAN: Yes. Mr. Wisking?

7 MR. WISKING: Could I just briefly set out Vodafone's position on this application. Vodafone is
8 obviously only an intervener in these proceedings and therefore we are perhaps in a similar
9 position to T-Mobile, in that we do not have strong views on this point. However, one
10 observation as an intervener is that these proceedings are clearly complicated. Not wanting to
11 be a siren, if there is a practical scope for narrowing these proceedings through a preliminary
12 issue we would support that, and therefore would broadly support Orange's application.
13 The second point to make is that Vodafone considers that it falls within ground 1(a) of
14 Orange's appeal, ground 1(b), and also the wider, however it is characterised, ground 1. So we
15 would benefit clearly if Orange were successful, and for that reason we can see the merit in the
16 preliminary issue.

17 The third point is simply that we, again, do not have strong views as to whether that
18 preliminary issue would encompass ground 2, or the limitation point. We would be happy to
19 deal with those in the preliminary issue if the Tribunal considered that appropriate.

20 Unless there is anything else.

21 THE CHAIRMAN: Thank you. Miss Demetriou?

22 MISS DEMETRIOU: Can I just raise three points very briefly by way of reply. The first is the
23 waiver point raised by Mr. Read and endorsed by Miss Rose.

24 THE CHAIRMAN: I think, before you get on to those points, unless this is going to be one of your
25 points, all parties would benefit from a repetition by you of what you see ground 1 as being. It
26 has been described as "potentially narrow", "potentially wide". Perhaps there are two different
27 points that you are taking, but if you are able to explain once again what those points are I
28 think that would be useful.

29 MISS DEMETRIOU: Madam, yes, of course. There are two elements, as we see it, to Orange's
30 ground 1, and they were fairly summarised by Mr. Roth, and they are in particular what he
31 termed as ground 1(a), being that in circumstances where the parties have contractually agreed
32 upon a termination rate, then attempts following that agreement to renegotiate do not constitute
33 disputes within the meaning of ss.185-191 of the Act. So "disputes" means an initial dispute,
34 an initial failure to agree a rate, but once a rate has been contractually agreed any attempts

1 afterwards to alter that agreement do not fall within the scope and meaning of “dispute” in the
2 Act.

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

6 MISS DEMETRIOU: That is exactly right. So we say that the purpose of the dispute resolution
7 procedure is to break initial deadlock, because initial deadlock might preclude access to
8 networks. We say that Ofcom then has other regulatory powers under the SMP provisions to
9 cure commercial agreements where those agreements have anti-competitive effects.
10 Otherwise, this is all down to the commercial bargain struck by the parties.

11 THE CHAIRMAN: So your point is not the narrow point, or is not at least only the narrow point,
12 that as regards this particular OCCN that Orange served BT appeared to accept it and then a
13 few weeks later sought to challenge it?

14 MISS DEMETRIOU: No.

15 THE CHAIRMAN: That is not your only point, but is there also an Orange specific point that you
16 are taking on this?

17 MISS DEMETRIOU: Well, ground 1(b) is, I suppose, Orange specific in the sense that we are also
18 saying that even if ground 1(a) is wrong BT did not refer this dispute within the contractually
19 agreed timeframe. That is another reason why it does not constitute a dispute for the purposes
20 of the Act.

21 In so far as ground 1(a) is concerned, no, it is a much more fundamental general point and it
22 does not depend on the precise facts as between Orange and BT, and in particular it does not
23 depend on the fact that BT issued its OCCN a matter of days after the agreement took place,
24 because we can see the difficulty then of drawing the line. We do not rest our submissions on
25 the short period between the initial agreement and then BT issuing the second OCCN. It is a
26 much more general fundamental point. It goes to the very nature of the dispute resolution
27 mechanism, which we say is to prevent initial deadlock and not assist parties reach
28 commercially more beneficial agreement later on.

29 I hope that is clear. We thought it emerged quite clearly from para.41 of our notice of appeal,
30 but if not I hope it is clear now.

31 That is the scope of our ground 1. We say that, for that reason, it is of general application in
32 these appeals, and there has been some discussion, particularly on the part of Cable & Wireless
33 and T-Mobile, or some concern as to the impact on timetable, and some concern expressed that
34 it must not delay progress towards the hearing of the substantive issue. But if we are right
35 there will be an inevitable impact, we say, in the sense that it will then obviate the need for the

1 hearing of the substantive issue. So there is an inevitable consequence, if we are correct, and
2 that should be borne in mind by the Tribunal, in our respectful submission, when deciding on
3 the appropriateness of this being heard as a preliminary issue.

4 Just in relation to the point made by Mr. Read and endorsed by Miss Rose, the question of
5 waiver, we say that is fundamentally wrong, with respect. What that is tantamount to saying is
6 that by agreement, whether by waiving their rights or by agreement, the parties can affect the
7 jurisdiction of Ofcom. That is incorrect.

8 We say that Ofcom's jurisdiction is a statutory jurisdiction, but the Tribunal has to construe the
9 statute and in particular the meaning of "dispute", and the fact that the parties may have
10 waived contractual rights is neither here nor there. So that is our substantive answer to
11 Mr. Read's point. We also note that BT does not seem to raise that point in relation to Orange,
12 as I think Mr. Read accepts. So even if one were to accept his point, then putting it at its
13 lowest, resolution of the jurisdictional issue in Orange's favour would, at the very least, be
14 determinative of BT's appeal in so far as it relates to Orange, which we say is of significant
15 value to us because that affects our continued interventions in these appeals and all the expense
16 and time that that would entail.

17 THE CHAIRMAN: You would still be involved in H3G appeal against the H3G/O2/Orange
18 determination, the August determination. Does that raise similar issues? Would you, in any
19 event, be making submissions on the main issues in that context?

20 MISS DEMETRIOU: Once can see that the resolution of the preliminary issue in Orange's favour
21 might well be dispositive of that appeal too. It depends on the precise terms of any Tribunal
22 judgment. If the Tribunal were to accept the broad submission made by Orange under ground
23 1(a) then on the facts that might well be determinative of the H3G/Orange appeal. If it were
24 not, then Orange would of course continue to make submissions in the context of that appeal.
25 Finally, I think Mr. Read made various other points as to the meaning of the word "dispute",
26 and submitted that it has already been determined in the H3G judgment. We do not agree with
27 that, but we say that, in any case, those are points going to the merits which can be argued in
28 the context of a preliminary hearing.

29 Finally, madam, on the question of the December dates, we recognise of course that the CMC
30 today is not deciding what happens to the December dates, but in the event that they were to be
31 vacated then it may be helpful to point out that Orange would be prepared to, and in fact keen
32 to have the preliminary issue determined as early as possible. If the December dates were
33 vacated then that would seem like a convenient time to hear the preliminary issue.

34 Those are my submissions, madam.

35 THE CHAIRMAN: Mr. Brealey?

1 MR. BREALEY: I am sorry to labour the point. I appreciate that we are adopting a stance of
2 neutrality but we are against it if it impacts on T-Mobile, but can I go back to tab 6, because I
3 think it is important for the Tribunal to understand whether there is indeed this wide ground
4 1(a) point being made at all. Could I go back to tab 6, which is Orange's notice of appeal, we
5 begin at para.15. This could well be a treacherous shortcut if a preliminary issue is ordered
6 and the rest of the appeals are somehow stayed. At para.15, on p.5, we see at the bottom of the
7 page:

8 "Orange's current interconnection agreement with BT was entered into 23 March
9 2001 ..."

10 That is the standard form. This is, as I understand it, the main agreement. Then they set out,
11 para.16, various clauses under which you can propose changes. Then the sentence of para.16,
12 if you cannot reach agreement 14 days after the rejection of the OCCN by the recipient:

13 "... either party may, within one month ... refer the matters in dispute to Ofcom for
14 resolution."

15 So there is the main agreement setting out provisions for changing the rates, and if you cannot
16 agree the rates then it goes off to Ofcom for resolution because of the dispute.

17 I pause there because I took the Tribunal to the relevant paragraph, para.36, of our grounds of
18 appeal, and we say that that is indeed what happens in the T-Mobile appeal. There was a
19 dispute between H3G and BT, the parties could not agree and it went off to Ofcom for dispute
20 resolution essentially.

21 Then what Orange essentially complain about is that BT agreed the proposed rate under the
22 OCCN and Orange insist that the 10th July OCCN is the right one – they want it to be
23 contractually valid and enforceable – but then BT somehow reneged on it. Then you get into
24 how counsel for BT has said there are waiver and estoppel points.

25 To say that you only look at the main agreement, the interconnection agreement, dated 23rd
26 March 2001 and somehow that is it, and any other dispute arising from that is nothing
27 whatsoever to do with the regulator, seems to be contrary to what Orange itself is submitting in
28 its grounds of appeal.

29 THE CHAIRMAN: Mr. Brealey, if we are going to decide a preliminary issue in this case then it
30 seems to me that it is up to the person who is arguing for that to formulate the preliminary
31 issue in the way that they see fit so that, if there are jurisdictional questions, then in the context
32 of that hearing of a preliminary issue we resolve whatever jurisdictional points there are.
33 It seems to me that you are complaining that the point that Miss Demetriou has explained to us
34 today did not emerge clearly from the notice of appeal. There may be something in that or

1 there may not, but it does not seem to me that that can determine what the scope of any
2 preliminary issue, should we decide to order one, should be.

3 MR. BREALEY: I fully endorse that, Madam Chairman. Mr. Roth was talking about that it may
4 impact on the other appeals. If this preliminary issue is going to somehow impact on other
5 appeals, and the Tribunal has also raised the question about what if it goes to the Court of
6 Appeal, is that going to delay all these appeals, I am simply making the point, well, let us make
7 sure that it is a proper preliminary issue and it is not going to prejudice the other appeals,
8 because there are other factual scenes and there are other arguments of law which have to be
9 canvassed.

10 MISS ROSE: Madam, I am sorry to prolong this, just very briefly, endorsing what Mr. Brealey has
11 just said, in fact it is not simply that the point does not emerge clearly from Orange's notice of
12 appeal, the point that is now being put by Miss Demetriou is actually inconsistent with the
13 submissions made by Orange in their notice of appeal. Madam, if you go to para.43, this is the
14 case as pleaded by Orange:

15 "In the Appellant's submission, the term 'dispute' in s.185 must, where the parties
16 have already entered into contractual relations with respect to the matter in question,
17 there were no relevant obligations which can be construed as referring to either
18 disagreement as to their rights and obligations arising out of the contract; or
19 (b) other differences between them where the parties have mutually agreed, whether
20 through an express contractual mechanism or otherwise for those differences to be
21 referred to Ofcom."

22 So there is, in fact, a positive case being mounted by Orange that the process in their
23 agreement with BT allowing for variation notices, if they cannot be agreed, to be referred to
24 Ofcom as disputes does constitute a dispute within s.185.

25 So, madam, I am concerned at the very broad way that it is now sought to be put in
26 circumstances where obviously there has been no application for permission to amend this
27 notice of appeal and in circumstances in which, if a new ground were to be taken, there would
28 only be very limited circumstances, which we would say did not apply here, which would
29 permit it to be. So we do submit that what is now being argued is not actually a proper
30 preliminary issue.

31 THE CHAIRMAN: I think, ladies and gentlemen, that we will rise for five minutes before we hear
32 anybody else on this point.

33 (Short break)

34 THE CHAIRMAN: The Panel believes it has heard enough submissions on that point to enable it to
35 come to a view on the question, and unless anyone has got something that they wish to raise

1 which has not already been said by one of the parties, then we would propose to move on to
2 deal with the second substantive issue.

3 MR. READ: Madam, all I wanted to say was that I referred to the H3G judgment in 2005. It was
4 para.131 in particular that I had in mind in that judgment.

5 THE CHAIRMAN: Thank you very much, Mr. Read.

6 MR. ROTH: May I just, madam, make this point clear: it was suggested that we were putting
7 forward a preliminary issue in some way to derail or delay the progress of the other appeals.
8 That was not Ofcom's intention. I do want to make that very clear. It may be that you will
9 recall, madam, that at the CMC in the other case we were one of the very few parties that
10 supported Hutchison in wanting to get an early hearing. It was suggested that we have some
11 sort of devious motive. We do not.

12 THE CHAIRMAN: Thank you, Mr. Roth.

13 On the question of the handling of the termination rate dispute appeals and the non-price
14 control matters in the H3G mobile call termination appeal, the Tribunal has in front of it
15 Hutchison 3G's application for a stay which has been supported by some, and others have put
16 forward slightly different ways in which to tackle this point, I will begin by asking Miss Rose
17 for Hutchison to give us her submissions.

18 MISS ROSE: ... is to have a speedy resolution of the core issues in the MCT appeal, and
19 particularly the issue of SMP. We are not that concerned about how that is achieved, whether
20 it is achieved by staying the whole of the dispute resolution appeals or whether it involves a
21 hearing of core overlapping issues that are common to both sets of appeal, we are content for
22 whatever you consider to be the most efficient and helpful way for the issues to be resolved.
23 We read with great interest the submissions particularly of BT. We can see the attraction of
24 the points that they put forward in relation to options 2 and 3, which were essentially two
25 slightly different alternative routes for hearing what they have described as the overlapping
26 core issues in the termination disputes together with the SMP issue.

27 Madam, the crucial question for us here is the timetable. That immediately brings me to the
28 problem of having one hand tied behind my back, because we have got two different Tribunals
29 dealing with two sets of appeals, and this is only one of those two Tribunals. What we have
30 been suggesting, and what I have slightly tentatively put forward as a possible course – one
31 course, of course, remains simply staying these dispute resolution appeals and proceeding in
32 December with our SMP appeal. That is the position that we put forward in our notice of
33 appeal and that we elaborated on in our submissions. That is one way forward.

34 Of course, I recognise that all the interveners would have to have the opportunity to make
35 submissions anyway. That being so, one can see the attraction of the suggestion made by BT

1 that the issues should all be resolved rather than having two hearings dealing with the same
2 issues. If that is going to be done, then what we would propose is that the December dates are
3 used for our SMP appeal and the overlapping core issues – in other words, that is BT’s option
4 2.

5 The practicality of that, we submit, is enhanced by the proposal that we made in the MCT
6 appeal to hive off the proportionality issue. That disposes of all of T-Mobile’s concerns about
7 the evidence and the amendments and proportionality part of the appeal, because what would
8 then be left is the question of whether H3G has significant market power. There are some
9 differences, but essentially it raises the same questions of Ofcom has misconstrued its statutory
10 obligations and has misconstrued the end to end obligation on BT, as are raised in these dispute
11 resolution appeals. Those are pure issues of law. There is not any need to call evidence on
12 them, and we submit that they could be dealt within the four days that are currently allocated.
13 We suggest that that is probably the best way forward.

14 The alternative is the stay alternative on which you have our written submissions. The trouble
15 is that this Tribunal cannot achieve that today.

16 THE CHAIRMAN: The difficulty is this, the H3G appeal against the finding of SMP raises the
17 question, what in some future hypothetical dispute between BT and H3G would Ofcom do if
18 BT referred that dispute to Ofcom. Looking at what Ofcom would do what does that say about
19 how far that process exercises a constraint on H3G’s exercise of market power. That is
20 looking, in a hypothetical way at what the test would be in those circumstances. In these
21 termination rate dispute appeals, it is not a hypothetical situation, it is an actual situation
22 involving the whole industry in which the test has been applied and in a way which is central
23 to those appeals. It seems rather the wrong way round to stay the cases in which the point
24 actually arises as a central point in order to consider the similar point, or the same point, in a
25 hypothetical way in an appeal which is actually about something different, namely whether
26 H3G has significant market power.

27 I do not say that that observation necessarily leads us anywhere, but it may be helpful for you
28 to know that that is what the Tribunal is wrestling with here.

29 MISS ROSE: Madam, if I may respectfully say so, we do appreciate the force of that, and that is
30 why the position that I am adopting now, as you will have discerned, is somewhat different
31 from the position that was adopted in our notice of appeal and in our written submissions. We
32 do, as I said, appreciate the attraction of the suggestion that BT are making, which is that the
33 core overlapping issues should be heard together. Of course, we accept that in any event, even
34 if they were not heard together, for the Tribunal hearing the MCT appeal it would necessarily
35 be important for them to look at the actual approach that had been applied by Ofcom when

1 resolving a dispute. We will submit, of course, that our concern that Ofcom's decision on
2 SMP was based upon a fundamental misunderstanding by Ofcom of its dispute resolution
3 powers has now been proved to be correct, because when Ofcom has purported to resolve a
4 dispute we submit that it has fundamentally misapplied the legislation. So we accept that the
5 two issues overlap and that therefore the most efficient way of case managing them may be for
6 them to be heard together.

7 The question then becomes when can they be heard, bearing in mind the enormous problems
8 that are being caused for Hutchison as a result of the delay? You will recall, madam, that our
9 notice of appeal was lodged in May of this year. We were looking in any event at a hearing
10 seven months after that notice of appeal was lodged. BT have suggested as their preferred
11 option a hearing in January of next year. We have no idea at the moment whether that is
12 something which the Tribunal will be able to accommodate and that is a major factor for us in
13 determining the stance that we take on this application, because if the matter could be dealt
14 with in January then we could live with that, but what concerns us is that if we lose the
15 December dates - you see here before you a magnificent display of the talent of many different
16 chambers and firms of solicitors, we are also at the moment, of course, talking about two
17 Tribunals, and our concern is that it might not be January but a considerably later date, and the
18 losses to us at that stage become very severe. Of course, it is not just a question of H3G
19 paying out very substantial excess sums, those sums are being paid directly to our competitors,
20 who you see here today, to their benefit, and enabling them to compete against us and employ
21 attractive strategies to gain more customers with the funds that we are having to pay them in
22 the interim, so we suffer a direct and continuing disadvantage the longer that this drags on.
23 That, with great respect, may perhaps inform the approach that is taken to these proceedings by
24 some of the other mobile network operators.

25 I should say that I have never said, or even implied that Ofcom has any devious agenda. What
26 I was expressing was our surprise and dismay that Ofcom was not supporting us on the need
27 for the prompt determination of our appeal because we would have hoped that Ofcom, as the
28 regulator in this field, would have appreciated the serious competitive advantage to us as the
29 newest and smallest entrant in the market, and that as the regulator that they might have taken
30 the approach that they would have wanted to facilitate the hearing of our appeal - but we are
31 certainly not making any implication about Ofcom's motives. It is obvious though that our
32 competitors have very strong reasons for wanting this appeal to be delayed.

33 I do not know, madam, if you are in a position to shed any light on the question of when the
34 Tribunal would be able to accommodate a joint hearing, whether it could in fact implement
35 BT's suggested option 3?

1 THE CHAIRMAN: I am not at present, no, Miss Rose.

2 MISS ROSE: That makes it very difficult for us to take any position other than our primary position
3 which is that we submit that the hearing should go ahead in December, and that we would not
4 object to the overlapping issues identified by BT being joined with the SMP issues in that
5 hearing and that we do submit that the time estimate would be sufficient, given our proposal to
6 hive off the entirely distinct proportionality question.

7 Madam, I do just want to say that we are anxious to be as co-operative as possible and will do
8 anything we reasonably can to have these matters heard as soon as possible.

9 THE CHAIRMAN: Mr. Roth, do you wish to go next?

10 MR. ROTH: Yes, madam. I will come back to the timing point, but I think everyone accepts that
11 there is substantial overlap on key parts of the case however precisely one circumscribes them,
12 between these appeals and the termination appeal – the other appeal. Both of them concern
13 what is the correct approach that Ofcom should take to a dispute resolution under the Act. In
14 the other appeal it is on a hypothetical basis and on these appeals it is on an actual basis as you
15 pointed out, but the core issue is, is Ofcom approaching it the right way or is it, as people are
16 suggesting for various different reasons, approaching it the wrong way, and the impact of
17 that?

18 We initially suggested in our written submissions that perhaps the way to deal with it is to
19 adjourn really the Hutchison proposal and allow the parties to these appeals to intervene in the
20 other appeal. Like Hutchison, having read the submissions of the various parties, what one is
21 really looking for is a sensible way forward, so that one can avoid what clearly would be the
22 worst situation, namely, that this same central issue, split into various core arguments, or
23 grounds is heard by two different Tribunals pretty much around the same time, with it having
24 to be argued twice at huge expense, and indeed potentially, I suppose, producing inconsistent
25 results. That cannot be in anyone's interests, let alone the Tribunal's interest. But we do, on
26 reflection, think that it might be more sensible for them to be heard and, like Miss Dinah Rose,
27 we are somewhat flexible whether it is better to have a stay and allow all the parties to
28 intervene in the other appeal, or to have these heard together if it is possible to reconstitute the
29 Tribunal so that it is of course the same panel hearing both lots of appeals.

30 The reason that I said earlier with regard to preliminary issue on Orange that one could use the
31 December dates is this: whichever of those two alternatives one takes, namely, whether it is
32 staying these appeals and allowing everyone to intervene in the CTM appeal and putting these
33 arguments there or, as now seems to command the greatest support, if it is possible for the core
34 issues to be heard together, is it does enlarge the scope of the argument because although on
35 the CTM appeal there is virtually no witness evidence – I think in fact Hutchison do have a

1 witness statement with the original notice of appeal from Mr. Russell – but on these appeals
2 there is, particularly from BT, substantial witness evidence, including expert evidence. So the
3 scope of what is then before the Tribunal, whichever of the two routes is taken is enlarged, and
4 it seems clear given the number of parties involved that four days now that all of this has been
5 opened is not going to be sufficient, and that is why I ventilated the suggestion earlier that if
6 the consequence is going to be that the other appeal has to be put back we could take
7 advantage of those days in December for the preliminary issue – it was not to try and cause any
8 delay to matters but simply trying to think – as I think we all are – of a sensible way to
9 proceed.

10 The only other point I would make at this stage is this: Miss Dinah Rose mentioned the letter
11 that her client sent, I think, yesterday regarding the other appeal (CTM appeal) offering as it
12 were that the amendments concerning proportionality and appropriateness could be adjourned
13 to a later hearing. That question, indeed, the whole issue of the application to amend is not
14 before the Tribunal today, but I should simply flag that Ofcom does have some concerns about
15 segregating proportionality and appropriateness from the other issues in that appeal and those
16 concerns stemmed largely from the fact that, as you will recall, there is the CC investigation
17 that is going to proceed in parallel, indeed, we supported Hutchison in its submissions that they
18 should proceed in parallel to avoid delay, and the CC investigation engages some of the same
19 issues that are raised in the proportionality and appropriateness amendments. As the whole
20 idea was that this Tribunal would produce a judgment in that case in sufficient time for the CC
21 to take into account in its inquiry delaying proportionality and appropriateness to some later
22 date could interfere with that. But, as I say, that is not for today but I felt I should flag that
23 concern.

24 THE CHAIRMAN: What would you say, if we were to have this hearing of the overlapping core
25 issues, how would you delineate those core issues? Which parts of the non-price control
26 matters in the MCT appeal and which parts of these termination rate dispute appeals would all
27 be heard together?

28 MR. ROTH: Well, we are concerned about segregating from the other appeal. There are a couple of
29 tables which have been produced with the skeleton arguments, and perhaps the most
30 comprehensive is one produced I think by T-Mobile at the end of their written submissions for
31 today. I do not know if you have that, madam, it is at the end of Mr. Brealey and Mr.
32 Pickford's skeleton argument, it is a one page table? You see it breaks it down into 16
33 issues, and shows who has taken what point, and we respectfully agree with T-Mobile's
34 position that issues 1 to 9 are the overlapping issues. We respectfully agree with that. There is

1 perhaps a question mark around issue 7 depending quite how it is interpreted, but we would not
2 want to argue about that.

3 THE CHAIRMAN: That whole issue of whether BT can pass on the higher charges to its transit
4 customers is a point that arises in these appeals, but is not a point that is made in the MCT
5 appeal at present. It seems to us difficult to decide these core issues without investigating that
6 point.

7 MR. ROTH: On point 7 we did have some difficulty seeing how that was a core issue, depending
8 how it is put – I think you are referring to point 7. But the others, 1 to 6, and 8 and 9 do seem
9 to go to how Ofcom would resolve the dispute and how it should resolve the dispute and
10 therefore feed into the hypothetical question of how Ofcom would resolve the dispute which is
11 at issue in the other appeal. I am sorry, 1 and 2 are the preliminary issues of Orange so they
12 are segregated out. It is 3 to 9 with perhaps a question mark over 7. We think that possibly T-
13 Mobile have misunderstood how 7 is raised. If they say it does we do not want to argue with
14 them about that, if they see it as overlapping. The only point I would make is that the
15 remaining issues, 10 to 16, which are not overlapping issues do not seem a very great compass
16 and I just throw it out as an observation whether they should be adjourned to a separate hearing
17 or whether they should conveniently be heard at the same time to get them out of the way, we
18 are fairly neutral about that, we do not think that they would significantly enlarge the time
19 required even with all these parties – clearly they would have some effect, maybe an extra day,
20 day and a half, but we would have thought not much more. Certainly issues 3 to 9, query 7,
21 are the overlapping issues. I think that largely follows what BT have put, who have also
22 produced a table where they have done it in a slightly different way, they have called it “A”,
23 “B”, “C”, I think.

24 THE CHAIRMAN: Which parts of the H3G MCT appeal would you then add to these to make the
25 overall bundle?

26 MR. ROTH: The MCT appeal has a number of grounds for saying “No SMP”. We think that is
27 rather difficult to segregate and that is why our preferred alternatives are either to proceed
28 with the CTM appeal and allow the parties to intervene and address these arguments there so
29 the whole appeal is heard with the parties intervening, or for these core issues as just identified
30 to be heard with the CTM appeal.

31 THE CHAIRMAN: I do not see the distinction between those two ----

32 MR. ROTH: These issues would actually be decided, the issues in these appeals.

33 THE CHAIRMAN: I see, so you are saying ---

34 MR. ROTH: Then you decide it on the concrete facts, which is I think the point that some parties
35 have made in their written submissions, and it is always more attractive in a way when you

1 have the concrete facts before you and you are actually deciding it and making a binding
2 determination which binds these appeals as well.

3 THE CHAIRMAN: But in either of those examples we would be determining the whole of the MCT
4 appeal?

5 MR. ROTH: The whole of the MCT appeal, yes, subject to Miss Rose's suggestion on
6 proportionality and appropriateness, but certainly the rest of it, yes.

7 THE CHAIRMAN: Then the issues 10 to 16 would then be decided at a later date and that would
8 then wrap up these appeals?

9 MR. ROTH: Yes, and we just raise the question mark, if one is going down that route should one
10 decide them at a later date, or bundle them in, as to which we are fairly neutral, and it may be
11 a question of timetabling and so on. But as I said before, and I would repeat, we were one of
12 the few parties to support Hutchison seeking an early hearing but we cannot see with the best
13 will in the world any kind of combination now including also an extra party in the defendants
14 represented by Mr. Cook intervening, and the evidence that BT is putting forward can now be
15 squeezed into four days, we just think that is, with respect, completely unrealistic, we are now
16 looking at a very substantial hearing.

17 MR. READ: BT's starting point is we have very major concerns about staying the present appeals in
18 order for the matters to be dealt with in the mobile call termination appeals and I can develop
19 those at some length if you wish, but obviously I think the point has been well made in the
20 context of the discussion so far that in fact one is going to be looking at a good example of the
21 dispute resolution powers in process, whereas at best in the mobile call termination appeal one
22 is going to be looking at it in the abstract, in the hypothetical future situation. I think it is also
23 fair to say that BT does, and this is to deal with the point that the Tribunal raised in para. 12(a)
24 of the letter it recently sent, I think on 25th October. We can see circumstances in which the
25 Tribunal ultimately hearing the call termination appeals may actually say: "The dispute
26 resolution powers, which ever way they are interpreted do not really affect anything". Indeed,
27 there may well be an argument because, of course, one has the situation where dispute
28 resolution powers are just one part of the countervailing buyer power which in turn is one part
29 of the SMP. We also can possibly see situations where it might be argued that at the end of the
30 day the issue has already, in effect, been dealt with by the previous H3G CAT decision. So
31 there is a real danger, we see, in putting forward, or allowing a stay to take place of the present
32 disputes, of effectively just delaying those and delaying getting to the real issue because in the
33 mobile call termination appeals in fact it just does not feature in the way that H3G would like it
34 to feature. That is the starting point which is why we say a stay in these circumstances ought
35 to be, in our respectful submission, a complete non-runner.

1 That leads on to the next question: what do you do then in order to ensure that the issues are
2 properly dealt with. There does seem to be a measure of agreement coming forward now that
3 in fact they have to be the best method, certainly in terms of the difficulties that one has in the
4 mobile call termination appeals having, in fact, tried to be expedited but the risk that if you
5 were to stay those and then go forward that that would actually cause a massive delay in that
6 appeal, and it is not something that BT would want. That leaves one with the obvious solution
7 that the two should be heard in tandem on the core issues, as we see them, in the termination
8 rates' dispute appeal, along with the other issues in the mobile call termination which we see as
9 being effectively the two issues of SMP and proportionality.

10 Can I make clear that, as far as BT is concerned, it would want and urge that proportionality
11 be dealt with at the same time as the SMP issues in the mobile call termination, because
12 otherwise the danger is that that will hold up the reference to the Competition Commission –
13 the hearing, sorry. Miss Lee, who is much more intimately connected with that part of BT's
14 appeal, makes the point that it is the hearing that could well be delayed.

15 So the solution that BT sees is the one that is really put forward in its option 3 that in fact there
16 is no reason why the core issues cannot be dealt with at the same time, along with all the issues
17 currently within the mobile call termination appeal, and that that will then allow the Tribunal
18 hearing those two appeals not only to reach a conclusion on the core issues in the termination
19 rate dispute, but also to be in a position to formulate what it considers to be relevant for the
20 purposes of gauging SMP for the purposes of a mobile call termination appeal. So that is the
21 starting point where BT comes from.

22 THE CHAIRMAN: So, just to be clear, you say we should hear at least the SMP issue in the mobile
23 call termination dispute and the "core issues" as they have been called in the termination rate
24 dispute case, and that we should also at the same time hear the proportionality point in the
25 H3G mobile call termination rate dispute, because that should not be postponed because that
26 has an effect on the part of H3G's appeal, and BT's appeal which is being sent to the
27 Competition Commission?

28 MR. READ: Yes, that is right, that is BT's stance as it stands at the moment. There was some
29 indication, madam, that judgment was going to be handed down at 1 o'clock. I do not know if
30 that would be a convenient moment for me to break off, or whether you want me to go on for
31 another two or three minutes.

32 THE CHAIRMAN: How much longer have you got altogether?

33 MR. READ: Perhaps I can just make the point that BT is also concerned that there should not be a
34 delay in the context of the termination rates dispute appeal because for the reasons that we
35 have outlined in para.14 of our notice of appeal this is having a very damaging and unsettling

1 effect for a whole series of reasons that are listed in that paragraph going forward, and for that
2 reason we are concerned that the core issues should be dealt with as soon as possible.

3 Can I just then turn to the core issues, because it is, I think, useful to go to the T-Mobile table?

4 We have one or two issues over how it has been formulated in respect of the jurisdiction
5 disputes i.e. items 1 and 2 on that table. We say, for example, that we do not think that we are
6 actually in fact raising a point in respect of 2, because we think that 2 has probably been mis-
7 defined in the table here, and that in fact the point that we are raising ----

8 THE CHAIRMAN: What is point 2?

9 MR. READ: It is put as Ofcom should have used the SMP powers. As we understand it, that is
10 ground 2 of Orange's notice of appeal ----

11 THE CHAIRMAN: Yes, that is what I understood..

12 MR. READ: -- which is put as whether Ofcom should have accepted the dispute in the first point,
13 the discretion point. The point that we were making, which is I think what has been picked up
14 and put into the BT column as point "A", and I think it is also linked to the point that the
15 altnets are also making, which follows in 3, which is in effect Ofcom fettered its discretion by
16 artificially tying its dispute resolution powers in the light of the decisions it had already taken
17 in 2004 in the market review appeal. That is the point that certainly BT is making. I should
18 add that it is not a criticism at this table *per se* because I think one of the problems is that
19 although the individual parties are intimately concerned with their own notice of appeal they
20 perhaps sometimes subconsciously use that as a method for interpreting what the other parties'
21 notices of appeal actually mean – perhaps we have seen that already with the Orange notice of
22 appeal earlier on today.

23 We say that the core issues are 3 to 9. We think there are some nuances, perhaps it might even
24 be said "semantic nuances" over whether 7 is necessarily one of the core issues, we did not
25 include this in our original our original table as one of the core issues. We think on reflection
26 that T-Mobile is probably right about this in that it does have an impact on the gains for trade
27 test, i.e. whether BT can actually claw the money back and there certainly are parts in BT's
28 notices of appeal where we address the issue of how Ofcom have considered this provision,
29 certainly between the draft determination and the final determination. So we think that
30 probably T-Mobile are correct to say that that ought to be included within the core issue.

31 As regards the other points, 10 to 16, we say they are obviously not core and BT is certainly
32 quite prepared and happy for those issues to be hived off to another day.

33 THE CHAIRMAN: Thank you very much, Mr. Read.

34 MR. READ: There is one further point that I ought to make, which is the question of evidence. We
35 are obviously concerned that the Tribunal that actually hears these points they should have the

1 opportunity of hearing the evidence in the termination rate dispute, the actual evidence,
2 because obviously there is a whole issue about the effect it has on the market and the way, for
3 example, the gains from trade test has been formulated. So we do not see that it is possible to
4 deal with the termination rate disputes being heard at the same time as the mobile call
5 termination dispute without having the evidence that is being put forward. I think that is
6 probably everything that I need to say.

7 THE CHAIRMAN: Thank you very much, we will rise now and come back at 10 past 2, please.

8 (Adjourned for a short time)

9 THE CHAIRMAN: I understand from those putting together the transcript of the proceedings that it
10 would be better for them if I leave my microphone on all the time, but you should still, when
11 you are addressing the Tribunal, put your microphones on as well, but my microphone will
12 stay on and that is how it should be.

13 Mr. Read, had you finished what you wanted to say before the short adjournment?

14 MR. READ: I think the only point that I was concluding with before the short adjournment was the
15 point about evidence and the fact that BT does firmly believe that the Tribunal that actually
16 hears these two appeals must do it on the facts from the termination rate dispute appeal and not
17 try and do it, if you like, up in the air by having something whereby the parties just attend at
18 the mobile termination call appeal on, effectively, assumed facts without actually addressing
19 the facts in respect of the termination rate dispute appeal. I think that was the only point.

20 THE CHAIRMAN: Thank you. Who else wants to address the Tribunal on the question of a stay or
21 not to stay. Mr. Cook?

22 MR. COOK: I am not going to repeat the points that have already been made, other than, firstly, to
23 echo the fact that from the 1092 appellants' perspective we would very much echo the point
24 you made initially, madam, that it makes enormous sense to deal with these issues on the basis
25 of real facts rather than hypothetical facts; and secondly, to echo what seems very much to be
26 the emerging consensus today that where there is a general issue which is argued in different
27 ways by multiple parties, it inevitably makes far more sense for all of those varieties of
28 arguments in favour of a point to be heard together, rather than part heard at one time and part
29 heard at another time.

30 So we very much support ground 3 of BT's argument that all of the core issues – and we would
31 very much say that number 7 identified by T-Mobile in their list, which are the SIA points, are
32 ones that fall within those core issues – should be dealt with at the same time in a single big
33 hearing along with the ones on the other appeal.

34 From my client's perspective there are two particular points that we want to make very clear at
35 this point to the Tribunal. Firstly, in terms of the duration – this seems to be again general

1 agreement – we cannot see that it is in any way possible to hear that kind of size of block of
2 issues in four days. It is going to take significantly longer than that, we would say.

3 The second point to make from my client’s perspective, in particular, and it is really where in
4 some ways we differ from the other parties because we were not involved in the other appeal,
5 but it is one that I think applies in any event, which is to actually go ahead on 11th December,
6 which is roughly 40 days time, is going to be incredibly problematic, we would say impossible,
7 from our client’s perspective. Once you take into account, and we understand that Ofcom has
8 not served a defence in the other proceedings yet at all, once you take account of the need for
9 Ofcom to serve detailed defences to this wide range of issues that have been put forward, and
10 then to put in skeleton arguments, and I am assuming that there would not be a provision for a
11 reply but we would put in staggered skeleton arguments, with our skeleton being a skeleton
12 incorporating our reply type submissions – for Ofcom to put defences in, for us to have a
13 proper opportunity to consider those, put together a skeleton argument which incorporates our
14 reply, get it to Ofcom, for them to put a skeleton argument in again, my clients would find that
15 impossible, we would say, for the purposes of a hearing in early December. We very much
16 support BT’s suggestion that this is something that, yes, it is very important that this is dealt
17 with and we agree with H3G on that purpose and that point, but from our perspective January
18 2008 is a realistic and credible timetable and the beginning of December 2007 is not.
19 So with those comments we suggest that they should be heard together, but it should be as
20 early as is practicable in the course of next year.

21 THE CHAIRMAN: Thank you. Mr. Brealey?

22 MR. BREALEY: Madam Chairman, we endorse what Mr. Cook says. Can I make four short points
23 regarding the stay. The first is that a stay of the termination rate appeals would be a fairly
24 draconian measure because obviously a stay raises access to court issues. That is the first point
25 as a draconian measure.

26 The second point is that it seems to be accepted now that the common core issues be heard
27 together – so be heard together.

28 The third point is that if they are to be heard together it makes sense that the core issues be
29 determined together. It would be good case management.

30 That leads me to the fourth point, that if they are to be determined together we would endorse
31 what Mr. Cook says, which is that four days really is not enough and a January slot would be
32 preferable if it is available.

33 MR. COOK: Madam, I apologise, there was one additional point I omitted to mention, and that was
34 – as I said, we fully support the notion that the core issues should be heard together – that
35 having looked at 10 to 16, we did query to what extent that is going to a considerable amount

1 to the duration of any hearing. Certainly from our perspective, we only have one issue which
2 is a failure to consult, which is a very small rump point to be dealt with. Others have more
3 substantive issues, T-Mobile in particular. There was simply a question mark in our minds
4 about how much additional time would be needed to incorporate some of those points,
5 particularly our failure to consult point, which is a very short point, and whether it would be a
6 more efficient use of the Tribunal's time to add in small additional points like that, which
7 would really add very little to the hearing, rather than bringing everybody or a lot of people
8 back at a subsequent stage potentially to re-hear what are really quite small rump issues in
9 many cases. That was more a point to throw into the mix. If that was in any way at all going
10 to cause problems in terms of timescale or anything else, we are content to go ahead on the
11 core issues. It seemed quite a narrow rump that was being left over.

12 THE CHAIRMAN: If what you are suggesting is that we should hear effectively the whole of both
13 the sets of appeals at a single hearing and that is going to take more than the four days which
14 are set aside in December. Nonetheless, we have those four days set aside in December, and it
15 might be thought a shame to let those go. Is there some logical – obviously I have everyone's
16 submissions in relation to the preliminary issues, but I think we are dealing with a splitting of
17 the hearing rather than treating one as a preliminary issue and putting the rest on hold –
18 division that would enable us to have part of the hearing in December and part of the hearing
19 later? It is particularly relevant to you of course because you have not been involved so far in
20 the MCT appeal?

21 MR. COOK: I would say that is very difficult. It is difficult to see, when you look at issues 3 to 9
22 on the list, any clear split, particularly, given the way in which they have been argued by a
23 variety of parties. They have not been argued for the most part in a clear block divided way
24 and a lot of the points have been worked in together when they have been argued. It would be
25 somewhat artificial to try and sub-divide them. The only one perhaps which springs out as
26 being slightly separate is the SIA issue, but it is not an enormous point on its own in terms of
27 timescale to be argued. The bulk of the core issues are connected and linked together. I am
28 not suggesting that it is possible to sub-divide, I was more querying to what extent we are
29 already arguing that we should hear in practice all of the issues bar a rump that, once it gets
30 very small, it almost becomes meaningless to separate something that is going to be dealt with
31 in a day or a day and a half later. It is better to hear it all at the same time if that is the case.
32 As I said, our key perspective here is that we are very keen to have this heard with a sensible
33 timescale in early January or soon thereafter, with as many issues as can be practically dealt
34 with at that time. We were suggesting that the rump might end up being almost too small to
35 make sense.

1 THE CHAIRMAN: Mr. Brealey, you had finished what you wanted to say?

2 MR. BREALEY: Yes. I do see the force of Mr. Cook's approach when looking at this table. I think
3 everyone has said that issues 3 to 9 are the core issues. I can well see that 15 is also a core
4 issue and could logically be dealt with as part of the core issues.

5 THE CHAIRMAN: Yes, thank you. Mr. Wisking?

6 MR. WISKING: Our position is much, I think, as everyone else's, though we would like to be
7 sensible and practical about this. Therefore, we would also support dealing with core issues
8 alongside the CTM case, if that is considered to be the most practical course.

9 There are some practical issues which have been touched on already. I think we would
10 endorse what has just been said about the non-core issues. If there are many of them, they are
11 not going to take much time and it seems sensible to deal with everything together.

12 The second point that has been made is that the core issues involve quite a lot of factual
13 matters, and therefore, before any hearing, there needs to be proper time allowed for exchange
14 of pleadings.

15 As regards the CTM case, it has also been noted that there is this application by H3G to
16 amend. Part of that is opposed by Ofcom. As regards the rest, I understand Ofcom is seeking
17 more time. So the pleadings and evidence have not closed in the CTM case yet. So there are
18 issues of timing which no doubt the Tribunal will come to.

19 The last point is the suggestion by H3G that SMP could be dealt with separately from
20 proportionality. We would be concerned about that if that entailed a split of the pleadings in
21 the CTM case. I think that would lead to over complication and would not be efficient. I think
22 we would also be concerned about that if it involved a separation of a decision of the Tribunal
23 on the SMP case and the proportionality issues such that its decision on the proportionality
24 issues was not available to the CC on reference to the CC. There is a danger that
25 proportionality gets pushed out so far that that decision is not available to the CC. As has been
26 the subject of previous argument in the CTM case there are overlapping issues which need to
27 somehow be dealt with.

28 Those were the only points unless there was anything else.

29 THE CHAIRMAN: Thank you. Miss Demetriou?

30 MISS DEMETRIOU: I would just like to briefly register our agreement with the points that
31 Mr. Wisking just made, and to say that we see force in the suggestion that it might be simplest
32 to hear both appeals in their entirety at the same time if that can be accommodated relatively
33 quickly within the Tribunal's timetable, rather than attempting to split off issues.

1 We see force in what Mr. Cook says about the rump of the issues being relatively small in
2 nature, or confined in nature. So it may just be more practical to hear both sets of appeals
3 together in their entirety.

4 THE CHAIRMAN: Yes, I do have a concern that once one tries to drill down into greater detail
5 what the core issues are beyond the very helpful table provided by T-Mobile, one knows from
6 experience that these things tend to become cloudier than they may at first appear.

7 Thank you. I think that is everybody on that. Miss Rose, do you have anything that you would
8 like to come back to us on?

9 MR. ROSE: There are a few short points. The first problem is the question of the two Tribunals,
10 because we do have a difficulty that this is the Tribunal dealing with these appeals, and we are
11 inevitably now discussing case management issues that impact on the separate appeals. If the
12 two sets of cases are to be heard – either all the issues or some of the issues – together, then
13 clearly it would make sense for one Tribunal to deal with both of the appeals.

14 We have attempted during the short adjournment to try and work out how that could be
15 achieved. We understand that cases are normally allocated to Tribunals by the Registrar, but
16 what I do not know, and I am sure that you can inform me, is what is the procedure for re-
17 allocating a case from one Tribunal to another so that one Tribunal could deal with all the
18 issues.

19 THE CHAIRMAN: I think our view, Miss Rose, is that we will decide, first of all, what the best
20 way of dealing with the conduct of these two cases is, and then whatever arrangements are
21 necessary to bring that about will then need to be made.

22 MISS ROSE: The difficulty with that is that the submission that is being made to you today involves
23 people saying that the other set of appeals should be adjourned out of the December dates, and
24 that of course is not a decision for this Tribunal to make, which gives us some difficulty.

25 Can I just address the question of hiving the proportionality issue. As I understand it, the
26 objections that are being made are that this would cause a delay in the resolution of
27 proportionality which might impact on the reference to the Competition Commission.

28 With respect, we do not understand that objection, because the alternatives are either that the
29 whole appeal is adjourned or that the SMP goes ahead in December and the proportionality
30 issue is adjourned. On either of those alternatives, the proportionality issue is not heard in
31 December, but is heard as early as possible in the New Year. In fact, the argument that Ofcom
32 does not have any force, because on Ofcom's own proposal, and indeed the proposal that most
33 of the parties are making to you today, there would be a delay in the resolution of the
34 proportionality issue.

1 THE CHAIRMAN: Yes, I think the point being made is that if one is going to include the
2 proportionality issue in this hearing that we are contemplating of the core issues then that
3 makes it a hearing of X days, and one knows that the more days that one estimates the hearing
4 is going to take, the more problematic it is to find a space of that size in everybody's diaries,
5 whereas if the proportionality point is put off further then the time estimate is X minus Y, and
6 that may be easier to find. As I understood it, that was the only point that was being made.

7 MISS ROSE: Madam, I would suggest then that separating the proportionality issue is likely to
8 result in an overall more rapid determination of the issues because it means that the Tribunal is
9 finding two shorter blocks of time rather than trying to find one longer block of time.

10 THE CHAIRMAN: Yes, I think the point that was being made by Mr. Cook is that even if one gets
11 to a shorter block of time by hiving off the proportionality point, his clients cannot be ready to
12 decide to participate in the hearing of the other points in December. It would have to be put
13 off until January, and if we are putting it off until January or whenever can be found then do
14 we want to put off the proportionality point further than that, or do we want to hear it all
15 together?

16 MISS ROSE: Madam, our submission of course is that we are suggesting that the December dates
17 can be held for the SMP issue.

18 THE CHAIRMAN: And you maintain that even having heard what Mr. Cook says?

19 MISS ROSE: Madam, of course I hear what he says, but the hearing is not at the beginning of
20 December, it is 11th December. We are now at the end of October. The High Court fixes
21 speedy trials over much shorter timescales than that. Indeed, the High Court is fixing speedy
22 trials sometimes in as little as two weeks and requiring parties in that space of time to
23 exchange witness statements, undergo a full disclosure process, exchange skeleton arguments
24 and argue the case. People do it, they manage. I have been involved in a speedy trial that was
25 prepared from scratch within a two week period. Everybody who is here, including
26 Mr. Cook's clients, is represented by large firms of City solicitors who have a lot of resources.
27 They have got large legal teams and, with respect to them, they can pull their fingers out and
28 be ready.

29 To take another example, an expedited judicial review, including detailed pleadings, lengthy
30 witness statements, skeleton arguments and argument are frequently dealt with within periods
31 of a month or less. Sometimes one sees cases go to the Court of Appeal from scratch within a
32 month.

33 So, with great respect, when somebody says they cannot be ready, that is a flexible concept.
34 Quite how far people are prepared to exert themselves in order to be ready is likely to depend
35 on how much is at stake for them personally. One is likely to take a slightly different approach

1 if what is at stake is truly critical. I do suggest that really, given the resources that are
2 available to the parties, it is possible for it to be dealt with in December.

3 That, of course, also disposes of the pleading point made by Mr. Wiskin which relates to the
4 proportionality issue and does not relate to the SMP issue.

5 I do not understand there to be any reason why Ofcom cannot plead its defence on the SMP
6 issue by this Friday as they have had our pleading on that since May of this year.

7 My learned junior makes the very good point to me that of course the notice of appeal which
8 Cable & Wireless have already submitted is a full pleading of their case including the
9 arguments in support of it. So, on that basis, they have already done the lion's share that they
10 need to do in terms of preparing for the hearing. Of course they need to see the defence and
11 draft a skeleton argument. I would suggest that that can be done within the timescale.

12 The next question is what is actually the time estimate for this hearing. This Tribunal has
13 heard many parties say, "Oh, well, it is going to take longer than four days". Then they say it
14 can be dealt with early in January, so it is not a very long delay, but they do not say how long
15 they think the hearing is going to be. We are very concerned at the open ended putting off of
16 the hearing without a clear indication from the parties of what they say the time estimate is and
17 without any clear understanding of how long the delay is going to be and when the matter
18 could actually be heard.

19 Finally, you raised the suggestion of whether we could start the hearing in December and
20 continue. This does seem to us to be a potential practical way forward. Madam, if you accept
21 that the core issues could be prepared by these parties by the December date, then I would
22 suggest that the course that is most likely to deal with these matters expeditiously would be to
23 keep the December dates and then to list additional dates, depending on what estimate the
24 parties give, for January, so that the matter would go part heard over the Christmas vacation
25 and could then be resumed as early as possible in January. I would suggest that, given the
26 constraints on availability of Tribunal members, that is most likely to be the way that will
27 result in a most efficient disposal of the process.

28 Of course the Orange appeal stands somewhat separate from these issues and can be separately
29 timetabled. It does not need to fall within the same timetable, it does not need to be heard
30 together with the other issues. Those issues are distinct.

31 Madam, those are our submissions in reply.

32 MR. COOK: Madam, may I come back?

33 THE CHAIRMAN: Yes, Mr. Cook.

34 MR. COOK: There is certainly some criticism being made of perceived failure of a desire to do
35 work on the part of my clients and myself. I start off by saying initially that, yes, obviously we

1 have put in a fully pleaded notice of appeal. The key step that we are now waiting for is
2 Ofcom to put in a defence. It is apparently close to being ready, depending on what the
3 amendments are in the other appeals, putting a defence in on that. I am not clear where they
4 are in terms of putting in a defence in relation to our case and obviously the other cases that are
5 in front of you today. We are obviously waiting for that defence. It is only when Ofcom
6 produces that that we can re-start work again. It is not something where we are currently in
7 position to be beavering way and we are not beavering fast enough. It is Ofcom, and I am not
8 criticising Ofcom – I do not suggest Ofcom should be in a position to produce it by this Friday,
9 but it is down to Ofcom to produce the defence.

10 I would suggest, given these issues, given the multitude of issues that are before them and
11 being realistic the mere fact that there are as many appeals as they are, as many variations of
12 the arguments, it makes producing a defence of that substantive and it will take time to do it
13 properly. So this is a case where we would say that ---- Madam?

14 THE CHAIRMAN: I think that we must decide what is the best way to approach this before we get
15 too bogged down in timetabling. The timetabling should follow from how we determine it is
16 best to conduct these two appeals and not vice versa.

17 MR. COOK: In which case, madam, I will leave that point. You have my submissions.

18 I would deal with one other point raised by Miss Rose, which is the question of this being part
19 heard as a case. You raised with me the possibility of trying to sub-divide the core issues so
20 they could be distinct, and I suggested, and I still stick to that, that trying to sub-divide them is,
21 in practice, very difficult. Part heard, I would suggest, is actually going to be immensely
22 problematic. You are talking about part hearing which is going to be almost a month to the
23 start of January, with Christmas in between. These are not issues that anyone sensible wants to
24 have part heard. They are complicated, and the difficulty you are going to have, given you
25 cannot in this context subdivide them as we have already talked about, is going to be that you
26 hear a set of submissions from a few parties on all of the issues, and then you will have those
27 in your mind for a month before you hear some counter arguments. Now, that is problematic in
28 itself to part hear something of this complexity, deeply unfair, because you will not have heard
29 counter arguments in the same way. So we would very strongly oppose the notion of part
30 hearing issues of this kind and nature.

31 THE CHAIRMAN: Mr. Read, in relation to the points going back to the start of this hearing to do
32 with the jurisdictional points or grounds 1 and 2 of the Orange appeal, would the objections
33 that you made to those being heard as preliminary issues in the sense of hearing those and then
34 awaiting the determination of those before the rest of the case is progressed with, would those
35 objections still stand if the Tribunal was considering hearing those in the December slot in

1 order to get them out of the way, yet not making a determination on those but treating them as
2 points in the main hearing to be decided after the main hearing in the New Year.

3 MR. READ: I thought at the end of my submissions earlier I had made the point.

4 THE CHAIRMAN: I think you did, but I have forgotten what you said!

5 MR. READ: I know sometimes they can be not very memorable, so I will make them again. We say
6 is that obviously we want the core issues with the market review appeal and the termination
7 rate dispute appeal to be heard in tandem and as quickly as possible because that has always
8 been BT's stance. If those matters can be heard as quickly as possible, then we do not see that
9 there is an insurmountable hurdle to using any other space available to deal with the
10 jurisdiction points and get those out of the way. But our principal concern is, and remains, that
11 we do not want those jurisdictional points to interfere with the quick, rapid progression of the
12 core issues and the overlap with the other appeal. So that is where we stand. If one could have
13 a hearing towards the end of January on the core issues and then one had a slot in December
14 that was effectively free, then yes, that would be advantageous to fit those in and deal with
15 those jurisdictional points there. But, as I say we do not want that impacting and delaying what
16 we think are the core issues.

17 THE CHAIRMAN: That is very clear, thank you.

18 (The Tribunal confer)

19 THE CHAIRMAN: Thank you for that. The third issue to deal with today is in relation to the
20 documents. The Tribunal believes it would be assisted by seeing unredacted versions of the
21 final determination and the draft determination and you will have seen the suggestion in our
22 letter of 25th October as to how to deal with the continued confidentiality claims in relation to
23 the redacted version – the published version if I can call it that – because we are not quite clear
24 at the moment how far the parties present would wish to maintain the confidentiality that they
25 obviously asserted in order to have the material redacted from the published decision.
26 Clearly bulk of the work in dealing with this falls on Ofcom so perhaps, Mr. Roth, if you
27 would like to make what submissions you wish in relation to the disclosure of documents.

28 MR. ROTH: Yes, thank you, madam. Regarding paras 17 and 18 of your letter of 25th October,
29 particularly para.18, where you have suggested a basis where:

30 “(a) Each party considers whether it wishes to maintain confidentiality in any of the
31 redacted material in the Determination which relates to its own business.

32 (b) Each party writes to OFCOM identifying which of their own confidential material
33 which has been redacted in the published version of the Determination they are now
34 content to be disclosed to the other parties.

1 (c) OFCOM then produces the new version with any remaining redactions and
2 circulates that:

3 Ofcom is entirely content to proceed on that basis, notwithstanding the fact that though Miss
4 Rose said each party is represented by a large firm of City solicitors, Ofcom takes the
5 compliment, but sadly do not have the resources of a large firm of City solicitors, but we are
6 quite content to proceed in that way.

7 Just to make clear, we would simply be then producing that version, as we understand it,
8 following what each party had agreed to waive, Ofcom would not be exercising any
9 independent judgment as to whether the decisions of parties is correct or not because we have
10 already been through that process pursuant to our statutory duty under to s.393.

11 THE CHAIRMAN: Yes, that was the thinking, unless you think otherwise there is nothing particular
12 that has happened since the decision was published which would cause you to change your
13 view, unless the parties tell you that it has changed.

14 MR. ROTH: Exactly. So think that is, if we may say so, a very constructive, sensible way forward.

15 THE CHAIRMAN: And as far as any disclosure of further documents are concerned, do you have
16 anything ----

17 MR. ROTH: No, having regard to the view you expressed at para.22 of the letter we do not think
18 there are any relevant further documents.

19 THE CHAIRMAN: Thank you. Any other parties wish to make submissions in relation to either the
20 process set out in para.18 of the letter of 25th October, or in relation to documents other than
21 the determinations. Perhaps I should have asked, Mr. Roth, whether the determinations
22 include confidential material relating to persons other than those before the Tribunal?

23 MR. ROTH: Yes, possibly the one party who is not present, and has not appealed is O2.

24 THE CHAIRMAN: It may be then that you would need to write to O2 to ask them whether they
25 maintain confidentiality. Thank you. Any other parties want to address us in relation to
26 documents. Mr. Cook?

27 MR. COOK: Madam, we very much agree with the proposal you have put forward to try and
28 produce redacted versions that are slightly less redacted than the current position and there are
29 documents, witness statements that are exhibited to our notice of appeal which have not been
30 disclosed to the other parties. BT has disclosed our witness evidence to us at least anyway, so
31 there are documents like that. Notices of appeal have been exchanged between the parties but
32 some of the annexes and appendices have not, so that would be an approach we suggest should
33 apply more generally, that you produce what parties consider to be appropriately redacted
34 documents at this stage. We would like to reserve our position perhaps at a later stage to
35 suggest the confidentiality ring that we suggested in our written submissions. We are happy at

1 the moment, but if it comes back and the redactions are smaller, there may be no need to push
2 forward a confidentiality ring with to some extent the issues that that involves.

3 The parties have, after all, to date said those are the redactions they consider desirable, and
4 they may well stick to that, so it may be necessary to introduce a confidentiality ring at a later
5 stage if the redactions remain substantially as they are, but I am not going to press that today. I
6 simply wanted to flag it as being something that we may need to press in a fortnight's time,
7 and we suggest that if that is the case that it is done on and determined on paper by the
8 Tribunal.

9 THE CHAIRMAN: Yes, thank you. Mr. Brealey?

10 MR. BREARLEY: Simply out of courtesy, we agree with the Tribunal's proposal at para.18.

11 THE CHAIRMAN: Thank you. Miss Rose and Mr. Read?

12 MR. READ: We agree, but can I also make clear that obviously para.20 is no longer an issue – in
13 fact it was never an issue, we say, in any event, it was just a misunderstanding of what our
14 letter was actually suggesting because we say at the end of the day it is a matter for the
15 Tribunal whether they want that material. We are not quite clear where we stand on 19, I do
16 not think that is being pursued at the moment. This is the request for certain material. We will
17 look at that and think again about it, but obviously we do have concerns about confidentiality
18 in respect of some of the material that was submitted back, but I do not think that is for today's
19 purposes.

20 THE CHAIRMAN: Well that would be useful, Mr. Cook, though, if you could clarify what was
21 actually intended by the 1092 appellants in relation to that material.

22 MR. COOK: Our intention, as set out in our skeleton, having seen the preliminary review of the
23 Tribunal it is not a point that I plan to press with you.

24 THE CHAIRMAN: Thank you. Miss Demetriou?

25 MISS DEMETRIOU: We also agree with the proposal at para.18.

26 THE CHAIRMAN: Thank you.

27 MR. WISKING: And we do as well! (Laughter)

28 THE CHAIRMAN: Good – a chorus of approval.

29 MR. WISKING: Just to come back to the point I made at the very start, we would like to be served
30 with the non-confidential annexes from the notices of appeal.

31 THE CHAIRMAN: Yes.

32 (The Tribunal confer)

33 THE CHAIRMAN: Miss Demetriou, in Orange's letter of 19th October it was said that Orange has
34 not seen copies of all the notices of appeal in the termination rate dispute proceedings, have
35 you now seen those, or are you in the same position as Vodafone?

1 MISS DEMETRIOU: We are in the same position as Vodafone in that we have seen the notices of
2 appeal but not the annexes, so we would also like non-confidential copies of the annexes.

3 THE CHAIRMAN: Right.

4 (The Tribunal confer)

5 THE CHAIRMAN: I understand that actually none of the parties may have exchanged non-
6 confidential versions of the annexes. Perhaps it is unnecessary for us to make an order in
7 relation to this, the parties should exchange non-confidential versions of their pleadings and
8 that should include Vodafone and Orange as interveners.

9 Is there anything else which we need to deal with today?

10 MR. COOK: Madam, the only matter is one of directions and timetable, which we left earlier. If
11 there are any points that we wanted to deal with on that now might be an appropriate time, but
12 I was not planning to make submissions, more flag it up as an issue.

13 THE CHAIRMAN: I think we need to decide what we are going to do and then there will need to be
14 a round of correspondence in which we put forward suggestions as to times and timetabling
15 and seek the parties' views on that. I do not think we can take it forward any further this
16 afternoon until we have clarified the way ahead a little more.

17 Thank you very much everybody.

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