Neutral citation [2007] CAT 7

IN THE COMPETITION APPEAL TRIBUNAL

Case no. 1066/3/3/06

Victoria House
Bloomsbury Place
London WC1A 2EB

23 January 2007

Before:

Sir Christopher Bellamy (President)

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

Mr. Keith Jones and Mr. Thomas Cassels of Baker & McKenzie LLP represented the Appellant.

Mr. David Anderson QC and Mr. Allen Bates (instructed by the Director of Telecommunications and Competition Law, Office of Communications) represented the Respondent.

ORDER (Withdrawal and Costs)

Background

1. On 22 December 2006, Hutchison 3G (UK) Limited ("H3G") made an application to the Tribunal, pursuant to Rule 12 of the Tribunal Rules[1], for permission to withdraw this appeal, lodged on 30 May 2006 under section 192 of the Communications Act 2003 ("the 2003 Act"), against a decision ("the decision") made by the Office of Communications ("OFCOM") in respect of/contained in a statement entitled "Number Portability and technology neutrality - Modification to the Number Portability General Condition and the National Telephone Numbering Plan" dated 30 March 2006 ("the statement of 30 March 2006"), and/or in respect of OFCOM's failure to act on the concerns raised by the H3G regarding the inefficiencies and inadequacies of the implementation of the number portability system in the United Kingdom insofar as it relates to mobile number portability or "MNP" ("the failure to act").

2. According to H3G, the statement of 30 March 2006 and the failure to act constituted an appealable decision/appealable decisions under the 2003 Act in that:

   (a) the statement, in that it expressly or impliedly rejected H3G's substantive concerns, not least by making only limited amendments to General Condition 18 of the General Conditions of Entitlement and relevant related documents, is a decision taken under Part II of the 2003 Act, in particular sections 3, 45, 58 and 60, and thus appealable under section 192(1) of that Act; and/or

   (b) The failure to act on the concerns raised by H3G amounted to a failure by OFCOM to comply with a request to take a decision and/or to exercise a power and/or to perform a duty, which constitutes an appealable decision pursuant to section 192(7)(b) of the 2003 Act.

3. In its notice of appeal of 30 May 2006, H3G submitted that the decision and/or the failure to act: constitutes an error of assessment in that OFCOM has failed to adequately consider H3G's concerns and/or to properly take those into account; and/or constitutes an error of assessment and/or law in that OFCOM failed to act despite substantive material before it; and/or is inconsistent with Article 30 of the Universal Service Directive no. 2002/22/EC of 7 March 2002; and/or constitutes an error of law and/or assessment in that it is inconsistent with OFCOM's duties under the 2003 Act; and/or fails to give any or adequate reasons.

[1] SI 2003/1372.

4. H3G makes two key substantive complaints. First, H3G argues that the time taken for porting mobile numbers, currently 5 working days in the United Kingdom as compared with 2 hours in Ireland, is excessive and is unacceptable to consumers and discourages switching. H3G also argues that the technical solution for MNP in the United Kingdom is out of date and inefficient, affecting both the quality and nature of the service provided to consumers, and reducing the possibilities for effective competition from companies such as H3G. The way that costs are allocated under the current system also means that the costs of the system fall disproportionately on H3G as compared with the 2G network operators, namely Vodafone, Orange, T-Mobile and O[2].

5. H3G contends that it is the only mobile phone operator who is incentivised to reduce the inefficiency of the present system, as it is the "maverick" player seeking to grow its market share and disturb the equilibrium between the existing 2G mobile network operators.

6. H3G further states that it has raised its concerns about port lead times and the desirability of direct routing on numerous occasions, both directly with OFCOM and with the "operator steering group" at which each of the mobile network operators has a vote. According to H3G, its proposals to amend the system of number portability in the UK have been voted down by the other network operators.

7. In respect of the relief sought by H3G in this case, the notice of appeal states as follows:

> "H3G requests that the Tribunal, as a minimum:
>
> (a) quash the Comms Act Decision or the relevant parts thereof in so far as it considers Ofcom's "co-regulator" approach to be appropriate with respect to UK MNP; and/or
>
> (b) Pursuant to section 195(3) of the 2003 Act, direct Ofcom to consider the substantive issues raised by H3G regarding UK MNP and consider/consult on proposals for improved UK MNP within 3 months of the relevant judgment of the Tribunal."

8. The first case management conference in this appeal took place 30 June 2006. In its submissions for that case management conference, filed on 23 June 2006, OFCOM acknowledged H3G's concerns in respect of the time it takes for a number to be ported

from one network to another, and that calls to ported numbers are routed indirectly. In that regard OFCOM stated:

> "Ofcom is alert both to those concerns and to the context to which the appellant refers (in particular, the possible divergent interests of incumbents and newcomers). Indeed Ofcom has publicly committed to addressing those concerns in the context of its review of the General Conditions in the latter part of 2006. It is not, however accepted that an appeal to the CAT would be the right way of progressing those concerns, even if there were a jurisdictional basis for such an appeal. Nor does Ofcom accept that it would be appropriate for the Tribunal to grant the relief which the Appellant is seeking."

9. OFCOM accepted that, at least in principle, the statement of 30 March 2006 was an appealable decision for the purposes of the Act, but stated that "the appellant's concerns were outside the scope of that decision and the consultation process which preceded it" and that those concerns were "being addressed separately by Ofcom under a different process from that which the Statement concluded". OFCOM also submitted that it had not failed to act. On the contrary, it recognised the force of the appellant's concerns and was keen to consider and address those concerns.

10. On 27 June 2006 OFCOM wrote to Baker & McKenzie LLP, solicitors acting for H3G, stating that it had already committed itself to considering H3G's concerns in the latter part of the year. OFCOM stated that it had already begun work on the review of General Condition 18 and

> "[a]lthough Ofcom has yet to produce a detailed timetable for its review of the General Conditions, it is anticipated that a consultation document will be issued in the autumn in which a range of options for industry will be identified for number portability, both with respect to appropriate lead times and the possible need for a central database and direct routing. Ofcom currently anticipates that this consultation process will lead to the issue of a formal statement amending the General Conditions in early [2007]".

11. OFCOM further stated that:

> "Your client is therefore mistaken in its view that Ofcom has failed to act to address those concerns, and it follows that your client's appeal is misconceived. Accordingly, I invite your

> client to consider withdrawing its appeal, and to instead contributing its input to the General Conditions review which Ofcom is undertaking. Ofcom wishes to give careful and detailed consideration to your client' s concerns as part of that review, not least because we recognise that your client's status as a relatively new mobile network provider may enable it to offer a valuable perspective on the relationship between the number portability process and the vibrancy of competition between the mobile networks."

12. In a letter dated 29 June 2006, H3G responded to OFCOM letter stating:

> "H3G welcomes the information provided in the letter dated 27 June 2006, where Ofcom mentions that it has undertaken preliminary work in relation to the review of the General Conditions and has both identified General Condition 18 as a main area of the review and begun relevant work by commissioning an international benchmarking study on both port lead times and direct routing solutions."

Whilst, at that stage, H3G remained of the view that the statement of 30 March 2006 should be set aside for the reasons set out in its notice of appeal, H3G indicated that:

> "H3G was previously unaware of such factors and is unaware of any public comment by Ofcom on this. As far as H3G is aware, Ofcom has not mentioned such a study/report to the MNP OSG or any of the mobile network operators individually."

and

> "It may be that, if Ofcom can give more concrete indications and firm commitment as to, for example, its intentions, instructions to consultants, timetable and work project (including as to when it would likely publish a consultation document), there may be little point in H3G actively pursuing the appeal (notwithstanding the merits of H3G's case) as H3G's concerns will have been met. The matter has clearly not reached that stage but H3G looks forward to receiving your comments on the above."

13. In a letter dated 30 June 2006, OFCOM again invited H3G to consider withdrawing its appeal, stating:

> "Given that the remedy sought by your client is for Ofcom to consider its concerns and you have received assurances that Ofcom is doing so through a full consultation, both publicly and in correspondence, it is hard to see what possible purpose could be served by your client's appeal proceeding . Accordingly, I would again invite your client to give prompt consideration to the withdrawal of its appeal.

14. At the case management conference on 30 June 2006, H3G indicated that it would like further time to consider its position. The Tribunal by order required H3G to state its intentions in respect of the appeal by 7 July 2006, and extended OFCOM's time for the filing of the defence to 19 July 2006.

15. By letter of 4 July 2006 H3G indicated, among other things, that it would be prepared to withdraw the appeal, if OFCOM accepted a large number of contentions that H3G put forward as to the unsatisfactory state of affairs regarding MNP in the United Kingdom, and if OFCOM agreed to issue a consultation document on those issues by 29 September 2006, with a decision by 14 February 2007.

16. By letter of 6 July 2006 OFCOM replied to the effect that it considered that its existing commitments to proceed to consultation fully met H3G's concerns. OFCOM made it clear that

> "We are therefore not prepared, nor able, to enter into a bargaining process in relation to the withdrawal of your client's appeal involving commitments as to that consultation process going beyond the commitment that Ofcom has properly made in previous statements and correspondence and most recently in the case management conference before the Competition Appeal Tribunal."

17. A meeting took place between the parties on 7 July 2006, following which, by letter of the same date, H3G stated that, although it would keep the matter under review, it preferred not to withdraw the appeal until it had seen the proposed consultation document and/or the defence. In response to the letter from OFCOM of 11 July 2006, H3G, in a letter of 13 July 2006, reiterated its view that there were a number of issues raised by the notice of appeal that had not been addressed, and that the better course was for OFCOM to file its defence. Pursuant to the Order made on 30 June 2006, OFCOM filed its defence on 19 July 2006.

18. In the defence, OFCOM set out its detailed view as to the background to the matter. It emphasised its commitment to engage in further consultation on MNP portability in the autumn of 2006, and contended that the statement of 30 March 2006 had envisaged this. According to OFCOM, the appellants' attack was really against the way in which OFCOM set its priorities. However, the defence set out a number of considerations that

OFCOM considered likely to be relevant in its forthcoming consultation on porting lead times and call routing. OFCOM argued that, since the statement of 30 March 2006 had not rejected the appellant's concerns, but had indeed envisaged further action, the appeal against that statement was inadmissible. As to the merits, OFCOM considered that the appeal was essentially an attempt to force OFCOM to re-order its priorities, not withstanding that OFCOM recognised the importance of H3G's concerns. OFCOM, however, clarified its view on certain points, and reiterated its intention to proceed to further consultation on the MNP issues raised by H3G.

19. According to OFCOM in the defence, there was no breach of Article 30 of the Universal Services Directive, or any other error of law and/or assessment. As to the "failure to act", OFCOM contended that it had not been requested to act, within the meaning of section 192(7)(b) of the 2003 Act, the consequence of which was that the appeal was inadmissible. As to the merits, OFCOM contended that there had been no unreasonable delay in dealing with the applicants' concerns, and that it was in any event actively proceeding to a consultation about those concerns, with a view to deciding whether a modification to the General Conclusions was appropriate.

20. H3G filed its reply on 16 August 2006. In its reply, H3G contended that OFCOM substantially modified its position during the course of the appeal and now effectively recognises H3G's concerns, albeit that OFCOM had previously failed to do so within a reasonable period. H3G maintained its position both as to the admissibility and the merits of the appeal. However, at paragraph 10.2 of the reply, H3G stated:

> "… in light of Ofcom's change of position such that it has recognised the "likely" disincentives on the 2G MNOs, the fact that indirect routing is suboptimal and that the concerns raised by H3G are significant and urgent, and will (not, may or possibly) be addressed in the forthcoming consultation, H3G agrees that the relief sought by H3G has been granted by Ofcom."

21. On 2 October 2006 the Tribunal wrote to the parties inviting written submissions on the future conduct of this matter, including the issue of costs, in view of paragraph 10.2 of the reply.

22. On 5 October the Tribunal informed the parties that the case management conference then fixed for 11 October 2006 had been adjourned. On 9 October 2006 OFCOM made written submissions on costs, and expressed the view that any further hearings would be unnecessary.

23. On 16 November 2006 OFCOM published its consultation document entitled "Review of General Condition 18 – Number Portability" ("the consultation document"). The consultation document set out OFCOM's conclusions as follows:

> "**Summary of conclusions**
>
> **Routing of calls to ported numbers**
>
> 5.1 Ofcom is proposing that fixed networks migrate to an ACQ/CDB solution by no later than 2012 and mobile networks migrate by September 2009.
>
> 5.2 In addition, Ofcom is proposing that mobile networks implement direct routing at the earliest opportunity. Ofcom considers that mobile operators should be required to provide direct routing using NICC Service Description 8 or other suitable standard within one year of Ofcom's final notification, unless evidence is presented to Ofcom that indicates that the additional costs the mobile industry would need to incur in implementing direct routing in this manner ahead of implementing ACQ/CDB is not proportionate to the benefit.
>
> **Port lead times**
>
> 5.3 Ofcom is proposing to require that mobile port lead times be reduced to less than one working day. If Ofcom receives evidence that shows that the costs involved in moving to a lead time shorter than one working day outweigh the benefits then Ofcom will need to consider whether a three working day period is more appropriate in light of the evidence received. It would currently appear that the current mobile porting process can be reduced to three working days without the mobile operators incurring significant costs."

24. On 22 December 2006 H3G lodged an application for permission to withdraw its appeal, together with written submissions on costs. In its application, H3G stated notably that:

> "1 .1 After careful review of Ofcom's consultation published on 16 November 2006, *'Review of General Condition 18 - Number Portability' (*the "2006 Consultation"), Hutchison 3G UK Limited ("H3G") hereby applies to the Tribunal for permission to withdraw its appeal pursuant to Rule 12(1) of the Tribunal's Rules.
>
> 1.2 H3G applies to withdraw on the basis that the relief it sought has, to a sufficient extent, been granted such that it would not be an efficient use of the Tribunal's, Ofcom's or H3G's resources to pursue the remaining issues in the context of this appeal."

25. By a letter dated 12 January 2006, OFCOM confirmed that it consents to H3G's application to withdraw. However, OFCOM indicated that it was still seeking an order from the Tribunal for payment of a "very limited proportion" of its costs, in the sum of £8,660 plus VAT, representing leading and junior counsels' fees incurred after 30 June 2006.

OFCOM's submissions on costs

26. OFCOM accepts that the Tribunal's judgement *British Telecommunications v Office of Communications (CPS save activity)* [2005] CAT 21 *("CPS save: Costs")* established the principle that costs should not be awarded in OFCOM's favour in regulatory appeals under section 192 of the 2003 Act unless good reason is shown. OFCOM does not seek the costs that it incurred up to and including the case management conference on 30 June 2006. However, OFCOM considers, for reasons set out in particular in its letters of 27 and 30 June 2006, that it was publicly committed before 30 May 2006, the date on which H3G submitted its notice of appeal, to a public consultation on the issues raised by H3G.

27. In OFCOM's submission, even if the position was unclear in H3G's mind prior to 30 May, OFCOM's commitment to a consultation should have been abundantly clear to H3G once OFCOM's letter of 27 June 2006 had been received. That commitment was reaffirmed at the case management conference of 30 June 2006. Although OFCOM does not criticise H3G for persisting with the case management conference already fixed for 30 June 2006 (and does not seek to recover the fees incurred by counsel in

preparing for and attending that hearing), OFCOM considers that it should however have been abundantly clear to H3G by the time of that hearing that there could be no further purpose in prosecuting the proceedings.

28. In OFCOM's submission the conclusion of H3G, expressed in its reply of 16 August 2006, that "the relief sought by H3G has been granted by Ofcom" is one to which H3G could and should have arrived by the end of Friday 30 June 2006. In that regard, OFCOM submits that the conduct of H3G in keeping the appeal alive after that date - thus putting OFCOM to the expense and trouble of lodging a full defence - can only be described as unreasonable. In those circumstances, even applying the restrictive principles developed in *CPS save: Costs*, an order for costs should be made.

29. OFCOM contends that H3G's decision to nevertheless persist in the appeal appears to have been motivated by a desire to keep these proceedings alive for the purpose of 'supervising', or gaining some form of enhanced status in, OFCOM's consultation process; if that was indeed the motivation, it was illegitimate. In any event, OFCOM submits that H3G's persistence in the appeal was unreasonable and led to wholly unnecessary further costs.

H3G's submissions

30. In H3G's submission, OFCOM has substantially changed its position since the lodging of the appeal. While OFCOM stated in its submissions on costs (and in the defence and correspondence) that it was always its intention to consult on the issues raised by H3G in the latter part of 2006, and that it had made this publicly known, OFCOM did not express any of this to H3G prior to the lodging of the appeal, despite H3G's direct question. Instead, OFCOM had informed H3G merely that it was looking at MNP port lead times and, after this, "may" look at direct routing. H3G refers the Tribunal to the fact that OFCOM did not respond substantively to H3G's letter dated 23 May 2006 (pre-dating the appeal) until over a month later.

31. In H3G's view, its appeal has led OFCOM to focus its mind and recognise the urgent need for action in relation to MNP in the United Kingdom, for the benefit of the conditions of competition and hence consumers, which was the very purpose of the

appeal. By its very limited application for costs OFCOM, H3G submits, is implicitly recognising the merits of the stance taken by H3G.

32. H3G submits that it was not in a position to apply for permission to withdraw before the 2006 Consultation was published on 16 November 2006. There was a public interest in the Tribunal ensuring that the relief sought by H3G was granted. This was all the more so given that OFCOM has not explicitly accepted that it erred in the statement of 30 March 2006, nor that it has failed to act. Moreover, OFCOM, when asked by H3G, refused to give any undertaking to the Tribunal as to publishing a consultation document by a set date, whether on the terms initially suggested by H3G or on any other basis.

33. H3G refers the Tribunal to the judgment of the Court of Appeal in *Ofcom v Floe Telecom* [2006] EWCA Civ 768, noting that if H3G had applied for permission to withdraw its appeal and permission had been granted, but no document was published, the Tribunal would not have been legally entitled to make any orders against or directions to OFCOM regarding the issue or scope of the 2006 Consultation.

34. H3G further submits that instructing a leading silk for a premature (and minor) application for costs was disproportionate.

35. Accordingly, H3G does not consider that it was unreasonable for it to wait for the issue of the 2006 Consultation before deciding whether to apply for permission to withdraw the appeal. To the contrary, it was the most sensible course of action.

Analysis

36. Under Rule 12(1) of the Tribunal's Rules, an appeal may be withdrawn only with the permission of the Tribunal. If the case has not proceeded to a hearing, permission may be given by the President. In this case the matter has not proceeded to a hearing. It being common ground that no purpose is served by the appeal proceeding, I give permission for the appeal to be withdrawn.

37. The only outstanding issue is costs. Since a decision on costs is ancillary to a decision to give permission to withdraw an appeal, in my view the President is similarly

empowered to rule on costs, where an appeal has not proceeded to a hearing. Costs is not a matter reserved to the Tribunal, as distinct from the President, under Rule 62 of the Tribunal's Rules.

38. The Tribunal's jurisdiction to award costs is set out in Rule 55 of the Tribunal's Rules:

> " – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales, the Court of Session, or the Supreme Court of Northern Ireland
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and, in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President, a Chairman or the Registrar or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session".

39. Rule 55 gives the Tribunal a wide discretion as to costs. The Tribunal has considered the question of costs in cases under section 192 of the 2003 Act in a number of judgments including *CPS save: Costs*, cited above; *BT v. Office of Communications (RBS backhaul: Costs*) [2005] CAT 20; and *Hutchison 3G (UK) Limited v. Office of Communications* [2006] CAT 8. The Tribunal has stated that each case will depend on its particular facts and circumstances: *Hutchison 3G*, at paragraph 42. In this still developing jurisdiction, the Tribunal is proceeding on a case-by-case basis dealing with different circumstances as they arise. However, in the cases to date under the 2003 Act the Tribunal has considered that costs should lie where they fall.

40. On the other hand, the conduct of the parties is relevant to the question of costs. The Tribunal is fully prepared to make orders for costs to sanction unreasonable conduct, whether under the 2003 Act or otherwise, if the need arises.

41. In this case OFCOM has accepted that, as to substance, the concerns raised by H3G about MNP in the United Kingdom are legitimate concerns. While it is impossible to know what would have occurred if the appeal had not been brought, it does appear that, in the context of the appeal, OFCOM was able, notably in its letters of 27 and 30 June, and at the case management conference of 30 June 2006, to clarify its intentions both as to the scope and timing of a future consultation on MNP. It is in my view impossible to say that the appeal was unreasonably brought by H3G, or was frivolous or vexatious.

42. OFCOM's essential argument is that the appeal was unreasonably continued after 30 June 2006. At that point, OFCOM's defence was due to be served by 12 July and, as we understand it, a considerable amount of work had been done on the defence up to 30 June. No claim for costs is made in that latter regard. The substantial part of the costs now claimed (some £6,320) relate to completing the defence after 30 June, between 3 and 19 July 2006.

43. I accept OFCOM's submission that, in its letter of 4 July 2006, H3G seems to have been requiring commitments from OFCOM on various matters which OFCOM could not possibly give. Nonetheless, following a meeting between the parties on 7 July, H3G's letter of that date states in a relatively restrained way that there is a difference of view between the parties as to whether the appeal is "misguided", that there are important matters in issue which H3G feels should be aired, and that H3G is not yet in a position to agree to withdrawing the appeal, at least without seeing the proposal consultation document and/or the defence. In its further letter of 13 July 2006 H3G contended that OFCOM's position was ambiguous and that:

> "Ofcom will, no doubt, spell out in detail in its defence its position. Given the above, H3G considers that this is a sensible way forward so that the issues can be considered based on Ofcom's fully articulated view, rather than on the recent correspondence."

44. In those circumstances, I find it difficult to say that H3G acted unreasonably is not withdrawing its appeal in the first week of July, without sight of the defence. It is accepted that the concerns about MNP raised in the notice of appeal by H3G were legitimate concerns. The appeal itself raised important procedural issues as to OFCOM's duties in that regard, and the scope of an appeal for "failure to act" under section 192(7)(b) of the Act. Notwithstanding OFCOM's stated intention to proceed to

a consultation in the Autumn and a decision in early 2007, the clarifications of OFCOM's position on 27 and 30 June came only shortly before the defence was due to be filed. In my view it was not unreasonable in the circumstances for H3G to take the view that, at the least, it would wish to have sight of OFCOM's considered defence before withdrawing the appeal. In my view, in this case, it was reasonable for H3G to wish to see the pleaded defence, so that it could take a fully informed decision on the future course of the appeal.

45. It also seems to me that it would have been unsatisfactory if the appeal had been withdrawn and then, despite OFCOM's best endeavours, slippage had occurred in relation to the envisaged consultation. It would by then have been difficult or impossible to resuscitate the proceedings, and H3G and other interested parties would have lacked the helpful, detailed and informative statement of OFCOM's position, as set out in the defence in this case. Work on the defence was already well advanced by 30 June, and the completion of that work has provided a clear point of reference which would otherwise have been lacking in this case.

46. It is true that, after service of the defence, H3G might well have saved itself the cost of drafting a reply, but there is no application here – in my view rightly – by H3G to recover its costs, notwithstanding H3G's contention that, from its point of view, the bringing of the appeal has achieved its object.

47. The further costs claimed by OFCOM after the service of the defence seem to me to be de minimis in the overall context of a case such as the present. Those further costs also, it appears, include the costs of applying for costs, which, on the view I take, should also lie where they fall.

48. More generally, in this evolving jurisdiction, where regulatory and legal procedures inter-twine, all parties are still to some extent "feeling their way" on procedural issues. It seems to me, in those circumstances, that the Tribunal should be slow to sanction in costs procedural decisions taken by one or the other side, unless the conduct is manifestly unreasonable. Looking at this case as a whole, it does not seem to me that the conduct of either party has been manifestly unreasonable.

49. It does not seem to me necessary to decide whether, in a case of an alleged "failure to act" under section 192(7)(b), an appellant is strictly entitled to maintain its appeal until the alleged "failure" is cured by the adoption of a relevant "act", which in this case would, according to H3G, be the issue of the consultation of 16 November 2006. In the present case the Tribunal has not decided whether there ever was any "failure to act", and if so what consequences would follow. At first sight, however, it would not appear to me unreasonable, in the circumstances of this case, for H3G to wish to maintain its appeal in existence (if quiescent) until the consultation promised by OFCOM had in fact been published.

50. In all those circumstances it seems to me that the costs incurred by OFCOM after 30 June 2006 should lie where they fall.

51. For the foregoing reasons H3G is given permission to withdraw it appeal pursuant to Rule 12 of the Tribunal's Rules. There will be no order as to for costs.

Sir Christopher Bellamy
President

Date: 23 January 2007