



**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1111/3/3/09

BETWEEN:

THE CARPHONE WAREHOUSE GROUP PLC

Appellant

- supported by -

BRITISH SKY BROADCASTING LIMITED

Intervener

-v-

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

**REFERENCE OF SPECIFIED PRICE CONTROL MATTERS
TO THE COMPETITION COMMISSION**

27 NOVEMBER 2009

1. Having regard to:

- (A) the Statement and Notification issued by the Office of Communications (“OFCOM”) dated 22 May 2009 and entitled “A new pricing framework for Openreach” (“OFCOM’s Statement”);
- (B) the price controls set by Condition FA3(A) (“Condition FA3(A)”) in Annex 3, Schedule 1 of OFCOM’s Statement;
- (C) the Notice of Appeal (“the Notice of Appeal”)¹ dated 21 July 2009 lodged by Carphone Warehouse (“CPW”) in Case 1111/3/3/09 challenging certain

¹ All references to the pleadings herein should be understood as references to the pleadings as amended, insofar as appropriate.

aspects of the setting of Conditions FA3(A) and the statement therein that the appeal raises specified price control matters within the meaning of Rule 3(1) of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004;

- (E) the Defence and supporting evidence filed by OFCOM on 26 October 2009; and
- (F) the Statements of Intervention filed by British Sky Broadcasting Limited on 6 November 2009 and British Telecommunications plc (“BT”) on 10 November 2009

the Tribunal, pursuant to Rule 3(5) of the 2004 Rules and section 193 of the Communications Act 2003 (“the 2003 Act”), hereby refers to the Competition Commission for its determination the specified price control matters arising in these appeals.

2. By this reference the Tribunal orders the Competition Commission to determine the following questions:

Question 1

Whether the price controls imposed by Condition FA3(A) on BT have been set at a level which is inappropriate because OFCOM erred in estimating BT’s efficient costs in 2012/13 for metallic path facility rental (“MPF”), shared metallic path facility rental (“SMPF”) and associated ancillary services (“ancillary services”) in one or more of the following respects:

- (i) OFCOM erred in its estimation of the level of efficiency improvements that might reasonably have been expected to be achieved in respect of Openreach’s costs and/or BT Group’s costs allocated to Openreach for the reasons set out in paragraphs 76 to 84 of the Notice of Appeal;
- (ii) OFCOM erred in its calculation of Openreach’s cost of capital for the reasons set out in paragraphs 85 to 87 of the Notice of Appeal;
- (iii) OFCOM erred in the allocation of costs as between Openreach and BT’s other business activities for the reasons set out in paragraph 91 of the Notice of Appeal;
- (iv) OFCOM erred in the allocation of costs as between MPF on the one hand, and wholesale line rental and SMPF on the other, to provide the basis for decisions on respective price controls for each of those services, for the reasons set out in paragraphs 92 to 100 of the Notice of Appeal;

(v) OFCOM erred in its assessment of inflation for the reasons set out in paragraph 101 of the Notice of Appeal.

Question 2

Whether the price controls imposed on BT are inappropriate because OFCOM erred in specifying the price caps for baskets of ancillary services imposed on BT in one or more of the following respects:

(i) OFCOM erred in setting the individual price caps on the baskets of ancillary services for the reasons set out in paragraphs 106 to 113 of the Notice of Appeal;

(ii) OFCOM failed to provide sufficient or appropriate safeguards to prevent anti-competitive exploitation by BT of its pricing latitude in respect of the baskets of ancillary services for the reasons set out in paragraphs 114 to 118 of the Notice of Appeal;

Question 3

Whether OFCOM erred in setting the glide path for MPF and SMPF and/or by making certain one-off adjustments to the prices of certain ancillary services for the reasons set out in paragraphs 119 to 125 and 127 to 129 of the Notice of Appeal.

Question 4

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the 2003 Act and in the event that the Competition Commission determines that Ofcom erred in relation to any of the above questions, the Competition Commission is to include in its determination:

(i) clear and precise guidance as to how any such error found should be corrected; and

(ii) insofar as is reasonably practicable, a determination as to any consequential adjustments to the level of the price controls,

indicating:

(a) what price controls should have been set in OFCOM's Statement had OFCOM not erred in the manner identified; and

(b) if the price controls set in OFCOM's Statement have, during the elapsed period of the price control been at an inappropriate level, and on the assumption that it may, having regard to the criteria in section 88 of the 2003 Act, be lawful and appropriate to adjust the price control applicable during the unelapsed period, what adjustments to that part of the price control should be made, if any.

3. The Competition Commission is directed to determine the issues contained in this reference by 1 June 2010. The Competition Commission shall notify the parties to this appeal of its determination at the same time as it notifies the Tribunal pursuant to section 193(3) of the 2003 Act.

4. Should the Competition Commission require further time for making its determination it should notify the Tribunal and the parties so that the Tribunal may decide whether to extend the time set out in the previous paragraph.
5. There shall be liberty to apply for further directions.

Vivien Rose
Chairman of the Competition Appeal Tribunal

Made: 27 November 2009
Drawn: 27 November 2009