



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1149/3/3/09

B E T W E E N:

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
18 FEBRUARY 2010

1. Having regard to:

- (a) the Statement, Consultation and Notification issued by the Office of Communications (“OFCOM”) dated 26 October 2009 and entitled “Charge controls for Wholesale Line Rental and related services” (“OFCOM’s WLR Statement”);

- (b) the price controls set by Condition AAA4(WLR) in Annex 6, Schedule 1 of OFCOM's WLR Statement ("the WLR Price Controls"); and
- (c) the Notice of Appeal ("the Notice of Appeal")¹ dated 23 December 2009 lodged by The Carphone Warehouse Group Plc ("CPW") in Case 1149/3/3/09 challenging certain aspects of the setting of the WLR Price Controls and the statement within that Notice 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 ("the 2004 Rules");
- (d) the Order of the Tribunal dated 3 February 2010 establishing a timetable for the further conduct of this appeal

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 the appeal.

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

Question 1

Whether, for reasons set out within paragraphs 76 to 107 of the Notice of Appeal, the WLR Price Controls have been set at a level which is inappropriate because OFCOM failed to set the controls in such a way as to secure that the differential between, on the one hand, the price for WLR and/or WLR + SMPF and, on the other hand, MPF was at least equivalent to the long run incremental cost ("LRIC") difference between those services:

- (i) by reason of OFCOM setting the price differentials on a current cost accounting and fully allocated costs basis rather than on a LRIC basis, as explained, in particular in paragraphs 87 and 88 of the Notice of Appeal; or

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

- (ii) by reason of OFCOM having erred in its calculation of LRIC for the reasons set out in paragraphs 92 to 105 of the Notice of Appeal.

Question 2

Whether, for reasons set out within paragraphs 76 to 107 of the Notice of Appeal, the WLR Price Controls have been set at a level which is inappropriate because OFCOM should have, but did not, set those controls in such a way as to secure that the differential between on the one hand, the price for WLR and/or WLR + SMPF and, on the other hand, MPF was greater than the difference between the LRIC of those services.

Question 3

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 one or more of the ways referred to in Questions 1 and 2, 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 WLR Price Controls, indicating –
 - (a) what price controls should have been set in OFCOM's WLR Statement had OFCOM not erred in the manner identified; and
 - (b) if the WLR Price Controls set in OFCOM's WLR Statement have, during the elapsed period of those 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 those price controls applicable during the unelapsed period, what adjustments to that part of the WLR Price Controls should be made, if any.
3. The Competition Commission is directed to determine the issues contained in this reference by 31 August 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: 18 February 2010
Drawn: 24 February 2010