



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 317(6) OF THE COMMUNICATIONS ACT 2003

CASE No: 1155/3/3/10

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) (“the Rules”), the Registrar gives notice of the receipt of a notice of appeal on 27 May 2010 by Top Up TV Europe Limited (“TUTV”) of 22 Grenville Street, St Helier, Jersey, JE4 8PP in respect of a statement made by the Office of Communications (“OFCOM”) of 2a Southwark Bridge Road, London SE1 9HA on 31 March 2010 (“the Statement”). TUTV is represented by Milbank, Tweed, Hadley & McCloy LLP, 10 Gresham Street, London EC2V 7JD (Reference 70625.00100/JS/EH).

The Statement was made in relation to a proposal by British Sky Broadcasting Limited (“Sky”) and Arqiva (formerly National Grid Wireless Limited) to modify their respective licences granted under the Broadcasting Act 1996 (“the 1996 Act”) in order to enable Sky to broadcast pay TV channels on Arqiva’s digital terrestrial television multiplex (more commonly known as the “Picnic proposal”).

The notice of appeal has been submitted to the Tribunal by TUTV without prejudice to the question of the Tribunal’s current jurisdiction in relation to the Statement. TUTV does not consider that the exercise of a 1996 Act power for a competition purpose has yet occurred in respect of the Statement and, as such, there is currently no basis for an appeal to the Tribunal under section 317 of the Communications Act 2003. TUTV considers that an appealable decision will only arise if and when OFCOM takes a decision to modify the relevant licences granted under the 1996 Act.

TUTV has lodged the appeal only to protect its position, given the nature of the time limit for appeals set out in Rule 8(1) of the Rules, and that, if the Statement is appealable, the deadline for appeal would have been 1 June 2010.

TUTV has also filed an application for an Order that the Tribunal either accept the notice of appeal and order a stay of those proceedings or, alternatively, grant an extension of time for the commencement of any appeal proceedings in relation to the Statement.

TUTV relies on the following grounds of appeal in its notice of appeal:

1. The findings, reasoning and conclusions in the Statement are flawed and wrong insofar as OFCOM concluded that the serious anti-competitive impacts of approving the Picnic proposal would be avoided or outweighed by a conditional approval subject to the pre-conditions referred to in the Statement. In particular the conclusion that rivals do not suffer any financial disadvantage as compared with Sky is without any factual basis and flawed.
2. OFCOM did not properly apply its statutory requirements including its duty to further the interests of consumers in relevant markets, where appropriate, by promoting competition. It failed adequately to recognise that its findings as regards the ability and incentive for Sky adversely to affect competition were themselves such as to require the rejection of the Picnic proposal (or require the addition of protective conditions in Sky’s licence). Further, and in any event, OFCOM failed to recognise the full strength of the ability and incentive of Sky to prejudice competition.
3. OFCOM erred in the comparison of certain options it considered it had before it in assessing the Picnic proposal, namely (i) unconditional consent to the Picnic proposal; (ii) consent with additional conditions; or (iii) no consent.

4. OFCOM erred in seeking to conclude its consideration of the Picnic proposal without any consideration of the relevant statutory test for licence amendments under section 12 of the 1996 Act. In reaching any “conclusion” about the Picnic proposal, it was necessary for OFCOM to consider that test, but it failed to do so.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE
Registrar

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