



COMPETITION APPEAL TRIBUNAL

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

CASE No: 1158/8/3/10

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 an appeal on 1 June 2010 under section 317(6) of the Communications Act 2003 (“the 2003 Act”) by British Sky Broadcasting Limited (“Sky”) of Grant Way, Isleworth, Middlesex TW7 5QD against a decision made by the Office of Communications (“Ofcom”) of 2a Southwark Bridge Road, London, SE1 9HA on 31 March 2010 (“the Decision”)¹. Sky is represented by Herbert Smith LLP of Exchange House, Primrose Street, London, EC2A 2HS (Reference: 2825/9491/30873711).

The Decision was taken under subsections 3(4)(b) of the Broadcasting Act 1990 (“the 1990 Act”) and 316(2) of the 2003 Act to vary, with effect from 31 March 2010, the licences granted to Sky under Part I of the 1990 Act for Sky’s pay television channels, Sky Sports 1, Sky Sports 2, Sky Sports HD and Sky Sports 2 HD (“the Licensed Services”) through the imposition of conditions concerning the supply by Sky of the programme content of the Licensed Services to other undertakings (“the Conditions”).

The Conditions, amongst other matters, imposed a “wholesale must-offer obligation” (“WMO obligation”) which compelled Sky to offer the Licensed Services to any person meeting minimum qualifying criteria (to be specified in the first place by Sky) for retail by that person to residential consumers in the UK on Qualifying Platforms upon a reasonable request in writing; within a reasonable time; on a non-exclusive basis; on fair and reasonable terms and without undue discrimination; and to supply Sky Sports 1 and 2 at charges which do not exceed specified maximum prices set by Ofcom. The Decision further required Sky to wholesale HD services on fair, reasonable and non-discriminatory terms.

By an Order dated 29 April 2010 in Case No. 1152/8/3/10 (IR) *British Sky Broadcasting Limited v Office of Communications*, the President of the Tribunal varied the Conditions on an interim basis, suspending the operation of the Decision generally and modifying Sky’s obligations in respect of specified platform operators.

In summary, the principal grounds of appeal on which Sky relies are as follows:

1. Ofcom has no jurisdiction or power to adopt the Decision under section 316 of the 2003 Act. In particular:
 - (a) Ofcom has sought to address a market which is outside the scope of section 316 of the 2003 Act;
 - (b) Ofcom has sought to mandate the supply of a service which falls outside the scope of the Licensed Services to which section 316 of the 2003 Act may apply; and
 - (c) Ofcom has failed to adhere to a competition law based approach to section 316 which it is bound to do.
2. Ofcom has erred in finding that Sky acted on an incentive to withhold supply of Sky Sports 1, Sky Sports 2, Sky Sports HD and Sky Sports 2 HD. Ofcom accepts that Sky has a strong static incentive to supply the channels. However:

¹ The Decision may be found at: http://www.ofcom.org.uk/consult/condocs/third_paytv/statement/

- (a) OFCOM has failed to advance any credible basis for any finding that Sky has a strategic incentive for Sky to withhold supply of its channels;
 - (b) OFCOM has erred in inferring from Sky's negotiations with other platform operators that Sky has and was acting on a strategic incentive to withhold supply; and
 - (c) OFCOM has erred in finding that Sky has an incentive to weaken Virgin Media, Inc. as a competitor through its terms of supply and has acted on that incentive.
3. OFCOM has erred in assessing the impact and proportionality of the WMO obligation generally; in so far as it applies to any retailer on any distribution technology; in the manner in which the wholesale prices have been set; in setting wholesale prices at all; in the imposition of pricing obligations with respect to bundles which include non-TV products; and in the imposition of supply obligations in relation to interactive services and Sky Sports HD and Sky Sports 2 HD.
 4. OFCOM has acted unlawfully in imposing the Conditions. OFCOM failed to specify the Conditions in terms which are sufficiently certain to allow Sky to know what it would need to do to observe the WMO obligation; it failed to give reasons explaining how the Conditions are appropriate for ensuring fair and effective competition in the provision of licensed services and connected services; and it failed to consult Sky appropriately before imposing the Conditions.

Accordingly, Sky seeks an order that the Tribunal:

1. set aside the Decision;
2. remit the matter to OFCOM with appropriate directions to OFCOM to give effect to the Tribunal's ruling;
3. order OFCOM to pay Sky's costs of this Appeal; and
4. grant such further or other relief as may be necessary or appropriate in the circumstances.

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 by **5pm** on **21 June 2010**.

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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