



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1087/3/3/11

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 19 September 2011 under section 192 of the Communications Act 2003 (“the Act”) by British Telecommunications plc (“BT”) of BT Centre, 81 Newgate Street, London EC1A 7AJ against a determination made by the Office of Communications (“OFCOM”) contained in a document dated 20 July 2011 and entitled “WBA Charge Control – Charge Control framework for WBA Market 1 services, Statement” (“the Statement”)¹. BT is represented by BT Legal, 81 Newgate Street, London, EC1A 7AJ (ref: Nigel Paterson, Nancy Johnson and Sophie Bouckaert).

The Statement sets out price controls imposed by OFCOM in respect of wholesale broadband access (“WBA”) services provided by BT in a particular geographic market within the UK entitled “Market 1”, which comprises those exchanges where only BT is present. The Statement follows a decision dated 3 December 2010 contained in a document entitled “Review of the wholesale broadband access markets, Statement on market definition, market power determinations and remedies” in which OFCOM, inter alia, made findings of significant market power (“SMP”) in Market 1.

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

1. OFCOM’s decision to disallow pension deficit repair payment costs (“PDR”) was made on the basis of a misapplication of the fundamental principles which underlie the model of RPI-X regulation (the WBA Charge Control set out in the Statement is in the form of an RPI-X charge control), and accordingly its own statutory duties and regulatory objectives;
2. OFCOM erred in fact and/or law in failing to reflect the cost of embedded debt in assessing BT’s cost of debt. Rather than calculating a weighted average that reflects the cost of such embedded debt, as well as the cost of other debt, OFCOM used only an estimated cost of new debt; and
3. OFCOM erred in calculating BT’s Weighted Average Cost of Capital (“WACC”) on the basis of its assumption of gearing. That assumption was unjustified by the evidence and leads to a significant, and unwarranted, reduction in the cost of capital allowed by OFCOM to BT.

Insofar as the above determinations involved an exercise of regulatory judgment and/or discretion, BT contends that OFCOM erred in exercising that judgment/discretion, in that the solution it adopted was clearly inferior to that for which BT contends.

BT contends that its appeal concerns price control matters for the purpose of section 193(1) of the Act and seeks an immediate reference to the Competition Commission.

By way of final relief BT seeks:

1. a decision of the Tribunal allowing its appeal;
2. a decision that OFCOM ought to have:

¹ A non-confidential version of the Statement is available at <http://stakeholders.ofcom.org.uk/binaries/consultations/823069/statement/statement.pdf>

- i. allowed BT to recover an appropriate allocation of its cost of its PDR payments to products regulated in the WBA Charge Control; and
- ii. allowed BT to recover the cost of its capital using a WACC figure which:
 - a) includes the cost of embedded debt; and
 - b) reflects BT's assumption with regard to gearing;
3. an order remitting the WBA Charge Control to OFCOM with directions that OFCOM should amend the charge control in order to reflect the decision set out in paragraph 2 above with immediate effect;
4. in the alternative, whilst BT would strongly prefer that the Tribunal direct the required changes to the charge control, it seeks an order for reconsideration by OFCOM in the light of the directions of the Tribunal; and
5. a direction that OFCOM pay BT's costs of the appeal.

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

Published 23 September 2011