



Neutral citation [2012] CAT 18

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Numbers: 1192/3/3/12  
1193/3/3/12

Victoria House  
Bloomsbury Place  
London WC1A 2EB

26 June 2012

Before:

VIVIEN ROSE  
(Chairman)  
JONATHAN MAY  
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) BRITISH SKY BROADCASTING LIMITED**  
**(2) TALKTALK TELECOM GROUP PLC**

Appellants

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

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**RULING (PERMISSION TO INTERVENE)**

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1. On 24 May 2012, Everything Everywhere Limited (“EE”) applied to the Tribunal, pursuant to rule 16 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) (“the Tribunal Rules”), for permission to intervene in each of these appeals. EE’s proposed intervention was limited to supporting the appellants in ground 1 of the appeal by British Sky Broadcasting Limited (“Sky”) and TalkTalk Telecom Group PLC (“TalkTalk”) and supporting the appellant in ground 1(vii) of the appeal by British Telecommunications plc (“BT”).
2. EE’s application for permission comprised a single paragraph. EE stated simply that the products covered by the price control are inputs into the services supplied by EE and also inputs into the services supplied by EE’s competitors. Accordingly, the price that BT charges for these products is “of key commercial and competitive significance to EE’s fixed voice and broadband business”. EE asserted that this meant that the outcome of the proceedings was “of sufficient commercial interest” to EE to support its application.
3. None of the parties objected to EE’s proposed intervention. However, the Tribunal did not consider that the application showed that EE had a sufficient interest for the purposes of rule 16. Moreover, the application contained no information as to why the Tribunal should exercise its discretion to allow the intervention even if a sufficient interest had been demonstrated. At the case management conference on 31 May 2012 (“the CMC”) the Tribunal, having indicated that it was minded to dismiss EE’s applications, invited EE’s counsel to make any further submissions in support of the application. Two further points were raised. The first, relevant to the intervention in the *Sky/TalkTalk* appeal, concerned the forecast of future fixed voice call volumes. There is some competitive interaction between fixed and mobile services and EE, as the leading mobile operator, has mobile related data that is potentially relevant to forward looking fixed volume forecasts. We were not convinced by this since Ofcom itself is fully able to provide the Competition Commission with an overall view of industry volume forecasts of fixed and mobile calls. So far as the *BT* appeal was concerned EE said that they have a different

perspective from Sky and TalkTalk because those appellants provide their downstream services by buying MPF whereas EE provides its services using WLR and SMPF. The appeal could affect the relative costs of these two competing strategies. The Tribunal was still not satisfied that this interest outweighed the additional element of complication that any intervention brings to already complex proceedings. In a short ruling delivered in the course of the CMC, the Tribunal therefore dismissed EE's application.

4. On 11 June 2012, EE renewed its application for permission to intervene in these proceedings ("the Application"). The Application was, this time, supported by detailed reasons by which EE sought to demonstrate a sufficient interest in these proceedings for the purposes of rule 16 and explain why it should be allowed to intervene. EE set out more detail of the financial implications for its business of the issues that it wants to challenge, rather than simply stating that it also buys the services covered by the price control. As far as the *BT* appeal is concerned, EE now submits that the way that copper line testing costs are allocated would set an important precedent for future WLR and LLU price controls. EE distinguishes its own market position from that of Sky and TalkTalk because EE is a small and actively growing competitor in the fixed broadband market whereas Sky and TalkTalk are mature and established competitors. EE explains therefore that it would be able to advance evidence and submissions before the Competition Commission in a way that could not be replicated by the appellants, such that its interests would not be adequately protected by submissions made by the parties alone. EE also pointed to its involvement in the consultation process leading to Ofcom's decision, and, finally, assured the Tribunal that its intervention would not unduly delay or disrupt the proceedings.
5. These reasons should have been put forward by EE in its original application. Parties should not expect that the Tribunal will automatically grant permission to intervene wherever a party is potentially affected by the outcome of proceedings in its capacity as a purchaser of the relevant services. Even if the other parties do not object, sufficient reasons must be advanced to allow the Tribunal properly to determine

whether a proposed intervener has a sufficient interest and whether allowing the intervention would be consistent with the just, expeditious and economical conduct of the proceedings. This is particularly the case where a potential intervener has not itself challenged the decision in its own appeal and where it seeks to intervene in support of an appellant (as opposed to the regulator). It will generally be the case that the appellant will be well placed to make all relevant submissions in support of its appeal.

6. Given the potential for interventions to add complexity and cost to proceedings, it is important that the Tribunal has the necessary information to decide whether these factors are outweighed by the intervener's potential contribution in the particular proceedings concerned. This evaluation will be highly dependent on the facts of the individual case, so that reference to previous Tribunal decisions is unlikely to be helpful. In all cases it is incumbent on a proposed intervener to advance sufficiently detailed reasons to enable the Tribunal to exercise its discretion under rule 16.
7. We have considered, therefore, how to respond to EE's renewed application, made, it is said, pursuant to the liberty to apply granted in the order made after the CMC. Liberty to apply is certainly not to be regarded as an invitation to the parties to renew unsuccessful applications. However, we are prepared in this case to make an exception and, having unanimously concluded that EE has now disclosed a sufficient interest in the outcome of these proceedings, we allow the Application. In particular, we accept that EE's position as a smaller market participant will allow it to bring a different perspective to these proceedings, and that excluding EE might risk the loss of this perspective, in particular as proceedings before the Competition Commission are limited to the parties and any interveners formally admitted by the Tribunal (see paragraph 2.7 of the Competition Commission's April 2011 guidelines on price control appeals under section 193 of the Communications Act 2003).
8. We note EE's commitment that its intervention should not unduly disrupt or delay the proceedings, and are mindful of the need not to disturb the timetable established

by the Tribunal's Order of 31 May 2012 in these proceedings. Accordingly, we direct that:

- (a) EE be granted permission to intervene in support of ground 1 of the *Sky/TalkTalk* appeal and in support of ground 1(vii) of the *BT* appeal;
  - (b) EE file and serve a statement of intervention in the *BT* appeal by 25 June 2012;
  - (c) EE file and serve a statement of intervention in the *Sky/TalkTalk* appeal within one week of Sky/TalkTalk filing their draft amended notice of appeal (pursuant to paragraph 6(d) of the Tribunal's Order of 31 May 2012);
  - (d) EE liaise as appropriate with the Appellants to avoid any unnecessary duplication in their submissions.
9. In light of the very limited scope of EE's intervention in the *BT* appeal we do not consider that this decision requires an extension to the time allowed to Ofcom to file its defence or that any other adjustment to the timetable needs to be made.

Vivien Rose

Jonathan May

Stephen Wilks

Charles Dhanowa  
Registrar

Date: 26 June 2012