



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998

CASE NO 1046/2/4/04

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (the “Rules”), the Registrar of the Competition Appeal Tribunal (the “Tribunal”) gives notice of the receipt of a notice of appeal, dated 23 July 2004, under section 47 of the Competition Act 1998 (the “Act”) by Albion Water Limited (the “appellant”) of 71 Clarence Road, Teddington, Middlesex, TW11 0BN in respect of a decision (CA98/01/2004) taken by the Director General of Water Services (the “Director”) and published on the websites of Ofwat and the OFT on 27 May 2004 (the “Decision”)¹.

The Decision concerned a complaint made by the appellant against Dŵr Cymru Cyfyngedig (“Dŵr Cymru”) relating to common carriage for the supply of non-potable water to Shotton paper mill.

According to the notice of appeal, the appellant is the only licensed new entrant to the water industry since privatisation in 1989 and replaced Dŵr Cymru as the water undertaker to Shotton paper mill in May 1999. The appellant has, since that date, in its view been subject to a margin squeeze with the wholesale “bulk supply” price the appellant pays for water to Dŵr Cymru being the same as the prevailing retail price. The appellant states that in an attempt to avoid an anti-competitive wholesale price it sought to buy the water it needs directly from its source and approached Dŵr Cymru for a “common carriage access price” to convey this water through a system of pumps and pipelines, known as the “Ashgrove system”, which is owned by Dŵr Cymru and which supplies, inter alia, Shotton paper mill. According to the notice of appeal the common carriage access price proposed by Dŵr Cymru for access to the Ashgrove system meant that there would have been a significant negative margin between the price at which the appellant bought water and the price at which it sold it. The appellant therefore complained to the Director that the common carriage access price proposed by Dŵr Cymru bore no reasonable relation to the costs incurred by Dŵr Cymru in providing the service required.

The appellant seeks the following relief:

1. the disclosure of documents in the Director’s possession that relate to the investigation of the appellant’s complaint. In addition to internal Ofwat documents it is anticipated that this will include material gathered from the service of section 26 notices on Dŵr Cymru and United Utilities and will include, but not be limited to, relevant Dŵr Cymru board papers, correspondence with the Office of Fair Trading relating to the case, June Return data relating to Dŵr Cymru’s costs and the bulk supply price paid to United Utilities.
2. as the appellant’s view is that an understanding of Ofwat’s original decisions regarding a fair price for the bulk supply agreement between it and Dŵr Cymru is highly relevant to the conduct of the appellant’s case, the appellant asks for disclosure of documents relating to the appellant’s inset application from 23 October 1995 to the date of the initial complaint on 11 December 2000, particularly relating to price terms.
3. that the appellant be awarded its costs associated with its application.

¹ The text of the decision can be found at: <http://www.ofwat.gov.uk/NR/rdonlyres/1F266351-D26B-429A-A2C7-ADBDF2B92694/0/shotton.pdf> and at [http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/shotton_decision260504.pdf/\\$FILE/shotton_decision260504.pdf](http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/shotton_decision260504.pdf/$FILE/shotton_decision260504.pdf)

4. that the interests of justice require the Tribunal to determine the matter of infringement itself rather than remit the matter back to the Director. The Tribunal should determine the following matters on the merits of the evidence and arguments provided:
 - (a) whether Dŵr Cymru breached the chapter II prohibition by refusing to respond to requests for an access price in a timely fashion;
 - (b) whether Dŵr Cymru breached the chapter II prohibition by providing an anti-competitive access price;
 - (c) what would constitute a fair access price for the Ashgrove system that reimbursed Dŵr Cymru's costs and provided a reasonable return on capital;
 - (d) whether a fair bulk supply price from United Utilities would reflect the terms of the current price offered to Dŵr Cymru; and
 - (e) whether the terms for the non-potable bulk supply price should be consistent with the common carriage access price.
5. if the Tribunal is minded to refer the matter back to the Director, that the Tribunal provide sufficient guidance to the Director to enable him to reach a prompt and fair judgment.
6. guidance on the ways in which the conduct of the investigation could have been improved.
7. guidance on what constitutes unreasonable delay.
8. guidance on the interpretation of *Oscar Bronner* with respect to the Ashgrove system and Ofwat's use of the "NPV test".
9. such further and other relief as the Tribunal considers appropriate.

The principal grounds on which the appellant relies are that:

1. the Director erred in deciding that Dŵr Cymru did not breach the chapter II prohibition with regard to delay in producing an access price and in appearing to imply that delay is acceptable so long as it is not for anti-competitive reasons.
2. in the appellant's view it is clear that Ofwat's determination in December 1996 of a "bulk supply" price to be paid by Dŵr Cymru provides the basis for much of the Director's subsequent justification of Dŵr Cymru's behaviour. The Director erred in his analysis when setting the bulk supply price and had no persuasive evidence available to him and/or the erred in his investigation and analysis of the bulk supply price.
3. It is possible to calculate a common carriage access price using audited cost data published by Dŵr Cymru and Ofwat. The appellant submits that three alternative approaches to the calculation of a common carriage access price are possible and that each such possible alternative differs markedly from Dŵr Cymru's justification for its access price. The three possible alternatives are based on "third party costs", "water service costs" and "cost recovery". Further the appellant submits:

- (a) consideration of a cost-reflective access charge for Albion Water should reflect local or “de-averaged” costs and not “regional average costs” in line with the “special agreements” entered into by Dŵr Cymru for “bulk supply” and Dŵr Cymru’s arrangements with customers that fall outside its normal tariff structure.
 - (b) the Director has erred in fact and in the reasons given by claiming that regulatory data is not available to support a “bottom up” costs calculation in respect of the Ashgrove system (sometimes referred to as “activity based costing”). The Director further misdirects himself by claiming that any such approach would not be straightforward and would raise “serious difficulties”.
 - (c) the Director misdirects himself by dismissing “third party services” as merely a “category of revenues (and costs) referred to in Ofwat’s Regulatory Accounting Guidelines”.
 - (d) Dŵr Cymru’s approach to the calculation of various costs for the purpose of a cost recovery calculation, including treatment costs and distribution costs appear to the appellant to give rise to an unreasonable over-recovery of costs.
 - (e) the costs as calculated by the appellant using any of the possible alternatives contrast markedly with Dŵr Cymru’s justification for its common carriage access price.
4. the Director misdirected himself by taking the price in the bulk supply agreement between the appellant and Dŵr Cymru as the appropriate retail price for the “starting point” in the Director’s “retail-minus” calculation.
 5. the Director erred in concluding that the “Costs Principle” of the Water Industry Act 1991 (as amended by the Water Act 2003) would produce the same access price as that calculated by Dŵr Cymru.
 6. the Director erred in his analysis of whether the Ashgrove system is an “essential facility”. In particular:
 - (a) the Decision ignores Ofwat policy on common carriage and misapplies the *Oscar Bronner* judgment in particular by failing to take into account that the Ashgrove system was created entirely through public funding and was (the appellant understands) gifted to Dŵr Cymru.
 - (b) the Director’s “net present value” calculation is seriously impaired by errors of fact and appraisal. None of the assumptions made by the Director stands up to rigorous scrutiny but ignore evidence presented to the Director by the appellant.
 - (c) the construction of a new pipeline is not an economically viable alternative to common carriage through the Ashgrove system.

Any person who considers that he has a 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
Registrar

30 July 2004