



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998

CASE NO 1058/2/4/06

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 12 January 2006, under section 47 of the Competition Act 1998 (the “Act”) by Independent Water Company Ltd, 87 Guildhall Street, Bury St Edmunds, Suffolk, IP33 1PU, in respect of a refusal by the Director General of Water Services (the “Director”) to investigate the appellant’s complaint of an abuse of a dominant position by Bristol Water Plc (“Bristol Water”).

According to the notice of appeal, the appellant had reached agreement in late December 2004 with a property developer, George Wimpey Bristol Limited (“George Wimpey”) to construct and adopt the potable water network for a new development being built by George Wimpey on Weston Road in Long Ashton, North Somerset. The appellant intended to become an inset appointee in relation to the new development, no part of which was being supplied by Bristol Water at that time.

On 17 January 2005, the appellant contacted Bristol Water and requested a bulk supply agreement for the provision of water to the new development. Financial conditions offered by Bristol Water in a meeting on 19 January 2005 and subsequently in writing on 24 February 2005 were unacceptable to the appellant. On 11 February 2005 the appellant was told by the Office of Water Services (“Ofwat”) that the issues surrounding the terms of the agreement with Bristol Water should be resolved prior to the submission of an application for an inset appointment.

By 20 May 2005, discussions between Bristol Water, Ofwat and the appellant had not made any progress, thereby putting in danger the security of water supply to the new development. As a result, the appellant submitted to Ofwat a complaint of a potential infringement of the Chapter II prohibition of the 1998 Act. On 26 May 2005 Ofwat responded to the appellant’s complaint indicating that it had appropriate powers to deal with the issue under section 40 of the Water Industry Act 1991 (the “WIA 91”) which would appear to resolve the alleged abuses and would take a shorter time to prepare than interim measures under the Act.

On 6 June 2005, the appellant agreed to withdraw its complaint under the Act and to seek a bulk supply agreement which would allow its inset application to proceed. The need for expediency caused by the impending occupation of the new development ultimately forced the appellant to accept Bristol Water’s terms in an agreement dated 5 August 2005.

Arising from information obtained as a result of a Freedom of Information question submitted to Ofwat on 21 October 2005, the appellant submits that in a letter dated 29 September 2005 from the Chief Executive Officer of Bristol Water to the Director it is stated that, assuming the appellant was to retail water at no more than Bristol Water’s retail price, the margin gained over Bristol Water’s bulk supply price would leave little room to pay for on-site leakage, regular and extensive water quality monitoring, customer service or overheads, nor, in due course, maintenance costs. The appellant submits that this constitutes a clear admission of margin squeeze.

On 8 November 2005, the appellant lodged an amended complaint against Bristol Water for a breach of the Chapter II prohibition.

Subsequently, at a meeting with Ofwat on 11 November 2005, George Wimpey were, according to the appellant, given little alternative than to request a mains water connection from Bristol Water. This

disqualified the site from its previous “greenfield” status and had the effect of preventing the appellant from pursuing its application for an inset appointment on that basis. It also meant that the liability for the network automatically transferred to Bristol Water.

On 23 November 2005, Ofwat notified the appellant that it proposed to investigate the concerns raised in the appellant’s complaints under Section 40 of the WIA 91 (determinations of bulk supply agreements) for a number of reasons, including flexibility of remedy and speed of process.

On 1 December 2005, the appellant indicated to Ofwat that, in the circumstances, it was left with no choice but to withdraw its inset application. Furthermore, the appellant informed Ofwat that its complaint was about a pattern of behaviour on the part of Bristol Water and not solely about bulk supply prices and an investigation under section 40 of the WIA 91 would not address elements of the abuse, (namely: excessive pricing, margin squeeze, discriminatory behaviour, refusal to allow access to essential facilities, delay and procrastination).

On 7 December 2005, Ofwat notified the appellant that, as a result of the appellant withdrawing from the contested market, it did not intend to commit resources into investigating the appellant’s complaint.

The appellant considers that the Director’s refusal to investigate its complaints under the Act was incorrect from the point of view of: (i) the reasons given, (ii) the law applied, (iii) the procedure followed.

The appellant seeks the following relief:

- That the Director reconsider his decision not to investigate the allegations made by the appellant against Bristol Water using his powers under the Act;
- That, considering the length of time that he has been in possession of the facts of this case (since 20 May 2005), the Director agree to investigate the matter fully within a three month period;
- That the Tribunal offer guidance to the Director as to which areas would be the most appropriate to investigate;
- Such further and other relief as the Tribunal may consider appropriate.

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
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