



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998

CASE No. 1050/2/4/05

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 13 April 2005, under section 47 of the Competition Act 1998 (the “Act”) by Aqua Resources Limited (the “appellant”) of Waterside, Evesham, WR11 1BS, relating to the circumstances 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 Severn Trent Water Services (“Severn Trent”) or to provide a full explanation of the reasons for his decision.

According to the notice of appeal, the appellant was (and is) seeking access by way of “common carriage” to Severn Trent’s network in order to sell water which the appellant sources and owns to end customers.

The appellant wrote to the Director on 17 November 2003 with a complaint that Severn Trent had a stated policy, set out in its Network Access Code, of offering common carriage terms only to undertakings which were “licensed water undertakers” which was contrary to guidelines published by the Director in Ofwat’s Guidance Document for Access Codes for Common Carriage March 2003. In a letter dated 26 March 2004 the Director responded to the appellant’s letter of 17 November, indicating that he did not intend to investigate the complaint.

A further letter was sent by the appellant to the Director on 22 April 2004, requesting that the Director investigate the terms of Severn Trent’s access code under the Competition Act 1998. On 6 May Ofwat replied to the appellant on behalf of the Director, stating that “it would not be an appropriate use of resources” to investigate the appellant’s complaint as Ofwat was concentrating its resources on implementing the new water supply licensing regime set out in the Water Act 2003.

In addition to continued correspondence with the Director, the notice of appeal refers to a complaint by the appellant, in March 2004, to the Office of the Parliamentary Commissioner for Administration (the “Ombudsman”) regarding the Director’s decision not to investigate the complaint. The Ombudsman concluded, on 6 August 2004, that Ofwat’s reply to the appellant did not constitute a reasonable response to the complaint and that the appellant was suffering from an unremedied injustice. The Ombudsman considered that Ofwat should enquire why Severn Trent’s access code was contrary to the guidelines and that if Ofwat subsequently decided not to conduct an investigation it should write to the appellant with a full explanation of the reasons for its decision.

On 18 November 2004, Ofwat sent to the Ombudsman a draft of a proposed detailed response to the appellant’s complaint. The draft letter was not, in the event, sent to the appellant, but it was provided to it in February 2005, pursuant to the Freedom of Information Act 2000.

Subsequently, Severn Trent wrote to the appellant confirming that it no longer insisted that only licensed water undertakers could request access to its water network system but was prepared to allow access where applicants can demonstrate that they have the necessary operational and technical ability and managerial competence.

On 15 February 2005, Ofwat stated that the Director did not intend to take a decision responding to the appellant’s concerns about a breach of the Competition Act 1998.

The appellant considers that Severn Trent has and always has had a dominant position as it controls all access to consumers in Severn Trent's region of the UK. The appellant also considers that it is "self evident" that Severn Trent abused a dominant position by inserting restrictive provisions into its Network Access Code, contrary to Ofwat guidelines, which created an unnecessary barrier to a competitor entering the market.

The appellant refers to the reference in the decision of the Ombudsman that Severn Trent was "seen to flout" guidance given by Ofwat, "to the detriment of a prospective [network] user" and that "the simple fact was that Ofwat had advised water companies to do one thing, and Severn Trent were doing another".

The appellant considers that the appeal raises two important issues: (i) remedying injustice suffered by a small pioneer attempting to introduce competition and lower prices into water and (ii) the public interest of seeing competition in the water industry.

The appellant also believes that nearly all the other major water companies have inserted provisions in their Network Access Codes stating that access will only be granted to licensed water undertakers, so that a finding of infringement in the case of Severn Trent could have important consequences in facilitating competition throughout the country.

The appellant seeks the following relief:

- That the Tribunal should substitute a finding that Severn Trent infringed Chapter II of the Competition Act prohibiting the abuse of a dominant position;
- That the Tribunal should consider whether to order Severn Trent to pay a penalty on the grounds that the infringement was intentional or negligent.

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

20 April 2005