



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE: 1112/3/3/09

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 2 September 2009 under section 192 of the Communications Act 2003 (“the Act”) by Cable & Wireless UK (“the Appellant”) against certain parts of the decision (“the LLCC Decision”) made by the Office of Communications (“OFCOM”) contained in a document entitled “Leased Lines Charge Control: A new charge control framework for wholesale traditional interface and alternative interface products and services”¹. The LLCC Decision was published on 2 July 2009.

The Appellant is a provider of communications services such as IP, data, voice and hosting to large enterprises and global carrier customers. The LLCC Decision sets out price controls imposed by OFCOM on British Telecommunications Group plc’s (“BT”) provision of wholesale leased lines and various ancillary services for the period from 1 October 2009 to 30 September 2012. The Appellant’s appeal is primarily concerned with a category of leased line known as Traditional Interface Symmetric Broadband Origination services.

Broadly, the Appellant considers that the price increases on particular services² that have been allowed by the LLCC Decision should not have been allowed at all or are not to appropriate levels (i.e. they are higher than they should be) and that other price reductions have not gone far enough.

In summary the principal grounds of appeal on which the Appellant relies are that:

1. OFCOM failed to take the utmost account of the EC Commission Recommendation of 29 March 2005 on the provision of leased lines in the European Union – Part 2 – pricing aspects of wholesale leased lines part circuits (2005/268/EC) (“the EC Leased Lines Recommendation”). OFCOM has erred in that the LLCC Decision permits prices that exceed those set by the EC Leased Lines Recommendation without any justification on the basis of reliable cost accounting evidence showing that efficient costs would not otherwise be recovered.
2. OFCOM erred as a matter of fact and/or assessment in allowing BT to increase charges at the start of the price control for DPCN services and 2 Mbit/s Local Ends either at all or by as much as it has done for the following reasons:
 - (a) OFCOM erred as a matter of fact and/or assessment in concluding that increases were necessary in order for the relevant prices to be above distributed long run incremental costs and/or in order to avoid revenue on capital employed for the Traditional Interface Basket of services falling below OFCOM’s view of the appropriate cost of capital;
 - (b) OFCOM erred as a matter of assessment because the resulting structure of charges (arising from the increases made and failure to make other adjustments) is self-evidently inefficient, discriminatory and distorts competition both in the wholesale market in which the charges have direct effect and in the downstream retail market for communications services; and

¹ <http://www.ofcom.org.uk/consult/condocs/llcc/llccstatement/llccstatement.pdf>

² Specifically, Digital Private Circuit Network (“DPCN”) Local End rental charges; DPCN main link fixed charges; DPCN enhanced maintenance charges and 2 Mbit/s Local End rental charges.

- (c) OFCOM erred as a matter of fact in relying on the data it used to assess costs and revenues without further adjustment. Had it made further adjustments then it would have been clear that smaller, or even no, increases were necessary;
 - (d) It is discriminatory and disproportionate to require increases of the size and nature notified given the effects for the Appellant and competition in the market.
3. OFCOM erred as a matter of fact and/or assessment in estimating BT's efficient costs and revenues from the regulated services. In particular, OFCOM erred in using base year data that is inaccurate and/or incomplete with the result that in the base year and across the whole price control period OFCOM has under-estimated revenues and over-estimated costs.
 4. OFCOM erred as a matter of law and/or assessment in its specification of new separate charges for Points of Handover since they are discriminatory, inefficient and distort competition. Alternatively, OFCOM has not provided adequate reasons for its decision.

The Appellant submits that OFCOM's errors in setting the price control have a material impact on competition in the market.

The Appellant contends that all the grounds of appeal raised are specified price control matters within the meaning of section 193 of the Act and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. No.2068 of 2004).

The Appellant requests that the Tribunal:

1. refers the price control matters arising in this appeal for determination by the Competition Commission under section 193 of the Act;
2. determines the appeal in accordance with sections 193(6), 193(7) and 195 of the Act, setting aside the LLCC Decision and requiring OFCOM to impose a new price control on BT in respect of leased lines services with effect from 2 July 2009 in accordance with the Competition Commission's determination;
3. grants any other relief as may be required.

Further the Appellant asks that the Tribunal by way of directions:

1. expedite the appeal so as to minimise the period during which BT continues to set prices on the current erroneous basis;
2. establish a confidentiality ring to include external legal and economic advisers to the Appellant;
3. direct OFCOM to disclose to the confidentiality ring in full an unredacted version of the LLCC Model it used to calculate its price controls and all supporting information relied upon by OFCOM in determining the price controls.

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

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