



Neutral citation [2012] CAT 26

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1192/3/3/12

BETWEEN

(1) BRITISH SKY BROADCASTING LIMITED

(2) TALKTALK TELECOM GROUP PLC

Appellants

- supported by -

EVERYTHING EVERYWHERE LIMITED

Intervener

- and -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

**REFERENCE OF SPECIFIED PRICE CONTROL MATTERS
TO THE COMPETITION COMMISSION**

1. Having regard to:

- (A) the decision contained in a Statement entitled “Charge control review for LLU and WLR services” dated 7 March 2012, issued by the Office of Communications (“Ofcom”) (“the Decision”);
- (B) the price control imposed on British Telecommunications plc (“BT”) by paragraphs 10, 11 and 14 of, and Condition FAA4(A) in Part I, Schedule 1 to, Annex 12 of the Decision and paragraphs 10, 11, 14 and 15 of, and Condition AAAA4(WLR) in Part IV, Schedule 1 to, Annex 12 of the Decision (the “Price Controls”);

- (C) the Notice of Appeal dated 8 May 2012 and as amended on 1 August 2012 ("NoA") lodged by British Sky Broadcasting Limited ("Sky") and TalkTalk Group Telecom plc ("TalkTalk") against the Decision;
- (D) the order of the Tribunal dated 31 May 2012 and the Tribunal's letter of 31 July 2012, providing the Tribunal's case management directions in the appeal;

the Tribunal, pursuant to Rule 3(5) of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068) (the "2004 Rules") and section 193 of the Communications Act 2003, hereby refers to the Competition Commission for its determination the specified price control questions arising in this appeal.

2. By this reference the Tribunal orders the Competition Commission to determine the following questions:

Question 1

Whether the Price Controls have been set at a level which is inappropriate because Ofcom erred in one or more of the following respects, taken individually or (if appropriate) in combination:

- (i) in forecasting volumes of MPF, SMPF and WLR services for the reasons set out at paragraphs 40 to 54 of the NoA;
- (ii) in its assessment of fault repair costs for the reasons set out at paragraphs 55 to 66 of the NoA;
- (iii) in allocating Cumulo rates between different products using a method based on "Profit Weighted Net Replacement Cost" for the reasons set out at paragraphs 67 to 96A of the NoA;
- (iv) in using the Retail Price Index in order to value duct assets purchased after 1997 within the Regulatory Asset Value calculation and/or by failing separately to reflect a 'national discount' in its price index, for the reasons set out at paragraphs 97 to 119 of the NoA;
- (v) in its assessment of the income to be received from copper scrap for the reasons set out at paragraphs 120 to 131 of the NoA.

Question 2

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the Communications Act 2003 and in the event that the Competition Commission determines that Ofcom did err in relation to any of the above questions, the Competition Commission is to include in its determination:

- (i) clear and precise guidance as to how any such error found should be corrected; and
- (ii) insofar as reasonably practicable, a determination as to any consequential adjustments to the charge controls.

3. The Competition Commission is directed to determine the issues contained in this reference on or before 29 March 2013.

4. The Competition Commission shall notify the parties to these appeals of its determination at the same time as it notifies the Tribunal pursuant to section 193(4) of the Communications Act 2003.
5. There be liberty to apply.

REASONS:

1. The reference questions were agreed between the parties, save that Sky and TalkTalk proposed that a further question be referred to the Competition Commission for its determination, namely:

“Whether, in any event, Ofcom failed to provide appropriate justification for its forecasts of volumes of MPF, SMPF and WLR services for the reasons set out at paragraphs 40 to 54 of the NoA and/or its assessment of the income to be received from copper scrap for the reasons set out at paragraphs 120 to 131 of the NoA.”

2. Sky and TalkTalk submitted that Question 1 does not fully capture the issues raised in their appeal and that, without this supplementary question, Sky and TalkTalk would risk being deprived of effective relief in the event that their arguments were successful. BT and Ofcom submitted that the relevant grounds of appeal were already adequately addressed by the general wording of Question 1, and queried in any event whether the issues raised in the supplementary question properly amounted to specified price control matters within the meaning of section 193(1) of the Communications Act 2003 and rule 3 of the 2004 Rules.
3. The Tribunal has concluded that the supplementary question posed by Sky and TalkTalk is not necessary or appropriate. Section 193(6) of the Communications Act 2003 requires the Tribunal, in deciding the appeal on the merits under section 195, to decide that matter in accordance with the determination of the Competition Commission, subject to any decision by the Tribunal, taken pursuant to section 193(7), that the determination would fall to be set aside on an application for judicial review. Question 1 is an appropriate question to refer to the Competition Commission in this context, as it alleges specific errors in relation to Ofcom’s price control, by reference to which the Competition Commission can determine whether the price control has been set at an inappropriate level. The supplementary question, which is directed to the justification for Ofcom’s forecasts of service volumes and its assessment of copper scrap income, is not an appropriate question given the nature of the Competition Commission’s investigation described above.