



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1192/3/3/12

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 8 May 2012 under section 192 of the Communications Act 2003 (“the Act”) by British Sky Broadcasting Limited (“Sky”) of Grant Way, Isleworth, Middlesex, TW7 5QD and TalkTalk Telecom Group plc (“TalkTalk”) of 11 Evesham Street, London, W11 4AR (together, “the Appellants”) against certain parts of a determination made by the Office of Communications (“OFCOM”) contained in a document dated 7 March 2012 and entitled “Charge control review for LLU and WLR services: Statement” (“the Statement”)¹. Sky is represented by Herbert Smith LLP, Exchange House, Primrose Street, London, EC2A 2HS (ref: Stephen Wisking, Andrew North and John McInnes). TalkTalk is represented by Towerhouse Consulting LLP, 10 Fitzroy Square, London, W1T 5HP (ref: Paul Brisby).

Openreach, a division of British Telecommunications Group plc (“BT”), provides a number of wholesale telecommunications services that are used by the Appellants (and/or wholly-owned subsidiaries of the Appellants). The Statement contains OFCOM’s decision setting charge controls for metal path facility (“MPF”) rental, shared metal path facility (“SMPF”) rental and wholesale line rental (“WLR”) services and ancillary services.

In summary, the principal grounds of appeal on which the Appellants rely are that OFCOM erred in its setting of prices for MPF, SMPF and/or WLR services because:

1. OFCOM failed to justify its forecasting of volumes of MPF, SMPF and WLR services and/or failed to take account of all relevant and available data on market growth;
2. OFCOM erred in over-estimating fault repair costs for MPF services;
3. OFCOM erred in using a profit weighted net replacement cost model to allocate cumulo rates (business rates paid in respect of BT’s network assets) to BT’s services and should have, instead, used an allocation based on a profit-based measure of different products (without weighting by net replacement cost);
4. OFCOM erred in using the retail price index in the valuation of BT’s duct assets purchased after 1997 and, instead, should have used data derived from BT’s current cost accounting systems; further, it failed properly to reflect a ‘national discount’ in its approach;
5. OFCOM failed to provide a sufficiently robust and transparent justification for its conclusion on income BT received from copper scrap; and
6. OFCOM failed to provide a sufficiently robust and transparent justification for its conclusion on the amount by which MPF lines are on average shorter than non-MPF lines.

¹ A non-confidential version of the Statement is available on OFCOM’s website at <http://stakeholders.ofcom.org.uk/consultations/wlr-cc-2011/statement-march2012/>.

The Appellants identify the above grounds as price control matters within the meaning of section 193 of the Act.

Accordingly, the Appellants ask that the Tribunal:

1. refer the grounds of appeal for determination by the Competition Commission (“CC”) under section 193(1) of the Act, subject to the directions sought below;
2. determine the appeal in accordance with sections 193(6) and (7) and 195 of the Act, setting aside the decision contained in the Statement and requiring OFCOM to impose a new price control on BT in accordance with the Tribunal’s determination in this appeal;
3. award Sky and TalkTalk their costs of the appeal and reference to the CC; and/or
4. grant any other relief as may be required.

Further, the Appellants ask that the Tribunal by way of directions:

1. establish a confidentiality ring which enables external advisers to Sky and TalkTalk to have access to BT confidential information;
2. list a case management conference to give directions for the future conduct of the case;
3. direct that OFCOM and BT provide copies to the confidentiality ring of certain documents, information and models;
4. in the event that there are certain specified documents which are controlled by the Valuation Office Agency (“VOA”) which neither BT nor OFCOM control, direct that the VOA disclose the same; and
5. direct that Sky and TalkTalk be permitted to amend their notice of appeal and serve supplementary evidence in support after the disclosure requested above is completed.

Any person who considers that they have 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 by **2pm on 30 May 2012**.

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, QC
Registrar

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