



## COMPETITION APPEAL TRIBUNAL

### NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

#### CASE NO 1193/3/12

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 Telecommunications plc (“BT”) of BT Centre, 81 Newgate Street, London EC1A 7AJ against a decision made by the Office of Communications (“OFCOM”) dated 7 March 2012 and entitled “Charge control review for LLU and WLR services” (“the Statement”)<sup>1</sup>. BT is represented by BT Legal, 123 Judd Street, London WC1H 9NP (ref: Nigel Cheek, Russell Hunter, Stephen Hurley and Nancy Johnson).

The Statement sets the price that Openreach<sup>2</sup> can charge communications providers (“CPs”), including the rest of BT, for Wholesale Line Rental (“WLR”) and Local Loop Unbundling (“LLU”) products and various ancillary services. The Statement contains OFCOM’s proposals for new charge controls for WLR and LLU services for the financial years 2012/13 and 2013/14. The controls came into effect on 1 April 2012 and are due to expire on 31 March 2014.

Broadly, WLR allows CPs to “rent” an end-to-end service over the copper local loop which runs from a BT exchange to a customer’s home/premises, so that the CP can offer voice telephony services to its customers. BT provides, repairs and maintains the copper lines over which WLR is provided. LLU allows a CP to install its own equipment in a BT local exchange. The copper local loop which runs from the BT exchange to the customer’s premises is disconnected from BT equipment and connected instead to the CP’s own network. This puts the CP in complete control of the services it offers to its customers, which commonly consist of broadband and/or voice telephony. The two main types of LLU products are Metallic Path Facility (“MPF”), which allows a CP to provide the customer with broadband and voice services, and Shared Metallic Path Facility (“SMPF”), which only allows provision of broadband, with voice services being provided separately (through WLR).

In summary, BT’s appeal has three elements:

1. BT challenges a number of alleged material errors in OFCOM’s allocation of costs or income associated with LLU and WLR services and the valuation of relevant assets over the period of the charge control, relating to:
  - i. The level of Corporate Overheads for which allowance is made in calculating the costs of providing the Core Rental Services (“CRS”);
  - ii. The level of ‘Cumulo Rates’ (i.e. the non-domestic rates that BT pays on its rateable network assets in the UK) for which allowance is made in relation to the CRS;
  - iii. The use of standard copper “Work Activity Units” in valuing the copper assets used to deliver CRS, when more accurate cost information was available;

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<sup>1</sup> A non-confidential version of the Statement is available at <http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/statement/statementMarch12.pdf>

<sup>2</sup> Openreach is a functionally separate business within BT, which was set up as a result of a number of undertakings in lieu given to OFCOM by BT on 22 September 2005 as part of measures intended by OFCOM to increase competition in the provision of telecommunications services over fixed lines. Openreach manages BT’s copper access network (known as the “local loop”) so that other BT businesses and competing communications providers can access that network on an open and equal basis.

- iv. The level of re-allocation of income from the recovery of copper cable to the CRS by way of a reduction to the level of the allowed costs;
  - v. The calculation of the weighted costs of MPF Single Migration, SMPF New Provide and SMPF Single Migration ancillary services;
  - vi. The allocation of repair costs as between the CRS, to reflect higher costs associated with a contractually agreed faster repair time for faults on the line; and
  - vii. The allocation of the costs of copper line testing equipment as between the CRS.
2. BT challenges OFCOM's use of Regulatory Asset Value ("RAV") adjustment in valuing BT's "duct assets" (a collective group of physical assets which includes underground duct, cabinets and manholes). BT considers that OFCOM's reasons for applying the RAV adjustment are flawed, insubstantial and inadequate to support the approach adopted, and that OFCOM erred in applying the RAV adjustment, rather than valuing all of BT's duct assets on a Current Cost Accounting basis.
3. Finally, BT appeals against OFCOM's:
- i. Failure to allow BT to recover any contribution to the funding of BT's pensions deficit repair ("PDR") contributions;
  - ii. Decision to calculate BT's cost of capital on the basis of a gearing level of 50% rather than 40%; and
  - iii. Decision not to include an allowance for the cost of servicing BT's embedded debt (i.e. pre-existing debt that incurs fixed servicing charges during the charge control period under consideration).

In the case of each of the elements of BT's appeal as set out in paragraph 1, above, BT contends that OFCOM made errors of fact and/or calculation in determining the charge control. If and insofar as OFCOM contends that these apparent errors were in fact exercises of its judgment/discretion, then BT challenges that exercise of judgment/discretion.

In respect of: (a) the allocation of the costs of test access equipment as between the CRS; (b) the decision to apply the RAV adjustment; (c) the decision to refuse to allow BT to recover a contribution towards its PDR costs; (d) the decision to calculate BT's cost of capital on the basis of a gearing level of 50%; and (e) the decision to refuse to allow BT to recover the costs of servicing its embedded debt, BT contends that OFCOM erred in fact and more generally in the exercise of its judgment/discretion.

As a result, BT alleges that OFCOM has erred in law, insofar as it has had regard to immaterial considerations or failed to have regard to material considerations, placed improper weight on certain factors and insufficient weight on others. In consequence, OFCOM has failed to satisfy its statutory duties and reached conclusions that are unreasonable and/or disproportionate in the circumstances.

BT contends that its appeal concerns price control matters for the purpose of section 193(1) of the Act and seeks a reference to the Competition Commission at the earliest opportunity.

By way of final relief BT seeks:

1. a decision of the Tribunal allowing its appeal;
2. an order remitting the LLU and WLR Charge Control to OFCOM with directions that OFCOM should amend the charge control in order to reflect the Tribunal's decision with immediate effect;

3. in the alternative, an order for reconsideration by OFCOM in the light of the directions from the Tribunal; and
4. a direction that OFCOM pay BT's costs of the appeal.

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 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](http://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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