



[2014] CAT 22

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1211/3/3/13

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Applicant

- and-

**GAMMA TELECOM HOLDINGS LIMITED
TALKTALK TELECOM GROUP PLC**

Interveners

-v-

OFFICE OF COMMUNICATIONS

Respondent

- and -

**EE LIMITED
HUTCHISON 3G UK LIMITED
TELEFONICA O2 UK LIMITED
VODAFONE LIMITED**

Interveners

**ORDER OF THE CHAIRMAN
(LATE APPLICATION TO INTERVENE)**

UPON TalkTalk Telecom Group PLC (“TalkTalk”) having made an application on 26 November 2014 pursuant to rule 16 of the Competition Appeal Tribunal Rules (S.I. No. 1372 of 2003) (the “Tribunal Rules”) to intervene in these proceedings in support of the Appellant (“BT”) (“the Application”)

AND UPON the Tribunal considering the submissions from the parties on the Application as well as TalkTalk's further observations on those submissions

AND HAVING REGARD TO the Tribunal's case management powers under rule 19 of the Tribunal Rules as well as the Tribunal's directions for the conduct of these proceedings in an Order dated 5 November 2014 (the "Case Management Order")

IT IS ORDERED THAT:

1. TalkTalk be granted permission to intervene in support of BT and that the time for TalkTalk to intervene be extended in accordance with paragraph 2 below
2. TalkTalk file and serve its Statement of Intervention and any supporting evidence by 5pm on 22 December 2014, taking into account that pursuant to paragraph 4 of the Case Management Order Ground 1, Limb 1 and Ground 2 of the Amended Notice Appeal were stayed until further direction of the Tribunal
3. BT, the Office of Communications ("Ofcom") and Gamma Telecom Holdings Limited ("Gamma") serve on TalkTalk non-confidential versions of their respective pleadings by 5pm on 12 December 2014
4. BT, Ofcom and Gamma disclose to the relevant advisers of TalkTalk confidential versions of their pleadings as soon as possible once the relevant advisers have been admitted to the confidentiality ring established pursuant to paragraph 8 of the Case Management Order (the "Confidentiality Ring")
5. Ofcom disclose to the relevant advisers of TalkTalk the confidential information outlined in paragraph 9 of the Case Management Order as soon as possible once the relevant advisers have been admitted to the Confidentiality Ring
6. The time limit set out in paragraph 12 of the Case Management Order in respect of the service by EE Limited, Hutchison 3G UK Limited, Vodafone Limited and Telefónica O2 UK Limited (the "MNO Interveners") of their Statements of Intervention be extended to 5pm on 22 January 2015

7. There be liberty to apply

REASONS

1. Rule 15(2)(f) of the Tribunal Rules provides that any person who considers that he has sufficient interest may apply to intervene in the proceedings within three weeks of the publication of the summary of appeal on the Tribunal's website or such other period as the President may direct.
2. BT filed its Protective Notice of Appeal in these proceedings on 24 May 2013. The summary of appeal was published on 30 May 2013: it stipulated that requests for permission to intervene should be received within three weeks of the date of publication. The summary outlined the principal grounds of appeal on which BT relies.
3. Applications to intervene were received from the MNO Interveners and Gamma by 20 June 2013.
4. The proceedings were stayed pending the handing down by the Supreme Court of its judgment in case UKSC 2012/0204 (the "SC judgment") pursuant to an Order of the Tribunal dated 25 June 2013. Following the handing down of the SC judgment on 9 July 2014, the stay was lifted and case management directions were set out in an order dated 8 August 2014. A case management conference was held on 30 October 2014. The MNO Interveners and Gamma were granted permission to intervene pursuant to paragraphs 5 and 6 of the Case Management Order. This Order also set out further directions for the conduct of these proceedings.
5. TalkTalk's application to intervene was received on 26 November 2014. The application acknowledges that the request to intervene is made after the period referred to in rule 15(2)(f) and an extension of time is requested pursuant to rule 19(2)(i). This rule empowers the Tribunal to give directions as to the extension of any time limits, whether or not expired.
6. TalkTalk submits that it has good reasons for not seeking to intervene at an earlier stage. At the time the summary of appeal was published, the scope and future of

the appeal were wholly uncertain. It was clear that the SC judgment would have a significant impact on the merits and course of the appeal. In those circumstances it was, in TalkTalk's view, sensible and reasonable to await the SC judgment rather than seeking to intervene immediately. TalkTalk submitted that it was only upon the publication of the Tribunal's Case Management Order, together with the transcript of the case management conference that took place on 30 October 2014, that it became aware that the SC judgment might not be determinative of these proceedings.

7. TalkTalk submits that granting its late application would not cause any prejudice to the parties or the conduct of the proceedings given that the stay was lifted only relatively recently, and its request to intervene, if granted, can be accommodated within the timetable as set out in the Case Management Order.
8. TalkTalk considers that it has sufficient interest in the outcome of the proceedings because that outcome will have a substantial impact on its business. TalkTalk has explained that it is a terminating communications provider for certain non-geographic numbers. When a mobile customer makes a call to one of TalkTalk's numbers, the relevant mobile network operator ("MNO") sends the call to TalkTalk's number via BT, over whose network the call is transited to TalkTalk's network. TalkTalk charges BT a termination charge, which BT in turn charges the MNO, together with its own transit charge.
9. In June 2010, TalkTalk introduced ladder pricing for the termination of calls to TalkTalk's 080 numbers, applying the same principles as the BT NCCNs which are the subject of Ofcom's determination dated 4 April 2013 ("Ofcom's Determination") that is the subject of appeal by BT in these proceedings. BT agreed to TalkTalk's ladder pricing, but as a consequence of Ofcom's Determination, the MNOs have refused to pay the new charges to BT. In July this year, TalkTalk introduced ladder pricing for the termination of calls to TalkTalk's 0843/4 and 0871/2 numbers, again applying the same principles as the BT NCCNs.

10. TalkTalk has explained that the present position is that the MNOs are not paying BT the new charges, and TalkTalk is consequently not enforcing those charges against BT.
11. TalkTalk considers that it will bring a different perspective to BT's ground 3. In contrast to BT and Gamma, it is a provider of mobile services to consumers. It has experience of operating a retail billing system for mobile call services, including to non-geographic numbers.
12. BT and Gamma broadly support TalkTalk's application. Ofcom made no observations other than to state that any intervention should be limited, at this stage, to ground 3 (the other grounds having been stayed) and that TalkTalk should be directed to serve any statement of intervention within 14 days of Tribunal's order granting permission.
13. The MNO Interveners oppose the application. They submit that TalkTalk has not provided a convincing explanation for its considerable delay in applying to intervene and that it should have been aware, due to its expertise and previous involvement in these matters, that the SC judgment in a different case would not necessarily dispose of the present appeal and that ground 3 would not, in any event, be determined by it. They point out that some uncertainty regarding the eventual scope of an appeal is not a sufficient reason for failing to intervene at the outset; that late interventions are disruptive; that filing an application to intervene is not onerous; and that interveners can terminate their involvement if proceedings evolve.
14. There is a great deal of force in the submissions made by the MNO Interveners. The Tribunal has a strict approach to compliance with time limits, and in the circumstances of this case there is no good reason why TalkTalk could not have applied to intervene on time, as demonstrated by the applications of the MNO Interveners and Gamma. Moreover, TalkTalk's own explanation for its late application to intervene is far from compelling.
15. With some reluctance, however, I am prepared to accede to TalkTalk's application in this instance. This is for two reasons. First, I am persuaded of TalkTalk's

interest in this matter and that its intervention is likely to assist the Tribunal in its consideration of this appeal by providing the perspective, in support of BT, of a mobile operator with experience of ladder pricing and consumer billing of mobile services. Secondly, the intervention can be accommodated within the current timetable and prejudice to the MNO Interveners can be minimised by ensuring the TalkTalk now files its Statement of Intervention promptly and by granting the MNO Interveners additional time to file their Statements of Intervention.

Marcus Smith Q.C.
Chairman of the Competition Appeal Tribunal

Made: 11 December 2014
Drawn: 11 December 2014