



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE No 1245/3/3/16

Pursuant to rule 14(2) of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 11 January 2016 under section 192(2) of the Communications Act 2003 (“the Act”) by British Telecommunications Plc (“BT”) of 81 Newgate Street, London, EC1A 7AJ against a determination made by the Office of Communications (“OFCOM”) on 11 November 2015 of two disputes concerning BT’s average porting conveyance charges (“APCCs”) (“the Final Determination”)¹. The disputes were between BT and Gamma Telecom Holdings Limited (“Gamma”), and BT and Vodafone Limited (“Vodafone”), and were referred to OFCOM on 2 and 30 July 2015 respectively. BT is represented by BT Legal at the above address (reference: Cecile Plaidy / Frederic Dupas).

General Condition (“GC”) 18.5(a) requires that any charges for the provision of number portability made by a Communication Provider must be cost oriented.² In Guidance published in September 2014,³ OFCOM stated that for the purposes of GC 18.5(a) the costs of the provision of number portability should (with practical effect from 1 January 2015) be assessed by reference to the Long Run Incremental Cost (“LRIC”) of the services provided, rather than the LRIC+ cost measurement which the Notice of Appeal states had been applied by OFCOM prior to the September 2014 guidance coming into effect.

In the Final Determination OFCOM had declared that BT had overcharged each of Gamma and Vodafone for the provision of number portability services, in that BT had failed to calculate all elements of its APCCs on the basis of the LRIC; it had instead calculated elements of them on the basis of LRIC+. The difference between LRIC and LRIC+ is that the latter includes an amount attributable to “common costs”, *i.e.* costs which are incurred by the provision of a number of services (including those charged for the under APCC), but are not unique to the provision of any single service. OFCOM therefore directed BT to make a repayment to Gamma and Vodafone in respect of the period from 1 January 2015 to the date of the Final Determination.

BT challenges the Final Determination. Under **Ground 1** BT contends that the services for which it continued to charge LRIC+ were for “inter-switch conveyance”, which is not necessary to the provision of number portability and therefore fell outside the scope of GC 18.5(a). Alternatively, even if inter-switch conveyance fell within the scope of GC 18.5(a), BT contends that the charges did not infringe the cost orientation condition in any event. Under **Ground 2(a)** BT contends that OFCOM had no lawful basis to purport to use its regulatory powers to amend the effect of GC 18.5(a) to exclude BT’s ability to recover common costs. Further, GC 18.5(a) provided for an exception allowing BT to agree another basis for its charges and under **Ground 2(b)** BT contends it had done this, with the result that the cost orientation obligation did not apply. Alternatively, even if it was open in principle for OFCOM to change the relevant cost standard from LRIC+ to LRIC, BT contends under **Ground 3** that OFCOM was wrong to decide to do so. According to BT, the LRIC+ standard is the clearly more appropriate cost standard and OFCOM’s decision was based on inadequate and erroneous reasoning. The change in cost standard was unnecessary and disproportionate and would be harmful to competition, efficiency and innovation.

As regards the relief sought, BT requests that the Tribunal:

¹ http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01161/Final_Determination.pdf

² http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/CONSOLIDATED_VERSION_OF_GENERAL_CONDITIONS_AS_AT_28_MAY_2015.pdf, see page 72.

³ http://stakeholders.ofcom.org.uk/binaries/consultations/gc18-porting-charges-guidance/summary/Porting_charges_under_General_Condition_18.pdf

- (a) remit the dispute to OFCOM with a direction that it be redetermined on the basis that:
- i. the charges for inter-switch conveyance fall outside the terms of GC18.5(a) and Article 30(2); or
 - ii. alternatively, that the costs of such conveyance are to be taken as cost-oriented if based on LRIC+ or upon an agreement between Communications Providers; or
 - iii. alternatively, that the question of whether LRIC or LRIC+ is the more appropriate cost standard to be applied is to be redetermined in accordance with the terms of the Tribunal's judgment; and
- (b) order Gamma and Vodafone to repay the sums directed to be paid by OFCOM with interest.

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, QC (Hon)
Registrar

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