



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1112/3/3/09

BETWEEN:

CABLE & WIRELESS UK

Appellant

- supported by -

VERIZON UK LIMITED

Intervener

-v-

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH TELECOMMUNICATIONS PLC

Intervener

REFERENCE OF SPECIFIED PRICE CONTROL MATTERS
TO THE COMPETITION COMMISSION
16 DECEMBER 2009

1. Having regard to:

- (A) the Leased Lines Charge Control Statement and Notification issued by the Office of Communications ("OFCOM") dated 2 July 2009 (the "LLCC Decision");
- (B) the price controls set by:
 - (i) Condition G4, TISBO up to and including 8 Mbit/s, in Schedule 1 to Annex 9 of the LLCC Decision ("Condition G4");

- (ii) Condition GG4, TISBO above 8 Mbit/s up to and including 45 Mbit/s, in Schedule 2 to Annex 9 of the LLCC Decision ("Condition GG4");
 - (iii) Condition GH4, TISBO above 45 Mbit/s up to and including 155 Mbit/s, in Schedule 3 to Annex 9 of the LLCC Decision ("Condition GH4");
 - (iv) Condition HH4, AISBO up to and including 1 Gbit/s, in Schedule 4 to Annex 9 of the LLCC Decision ("Condition HH4"); and
 - (v) Condition H4, Trunk, in Schedule 5 to Annex 9 of the LLCC Decision ("Condition H4").
- (C) the Notice of Appeal ("the Notice of Appeal") dated 2 September 2009 lodged by Cable & Wireless UK ("C&W") in Case 1112/3/3/09 challenging certain aspects of the setting of Conditions G4, GG4, GH4, HH4 and H4 and the statement therein that the appeal relates exclusively to specified price control matters within the meaning of Rule 3(1) of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (the "2004 Rules");
- (E) the Defence filed by OFCOM on 16 November 2009; and
- (F) the Statements of Intervention and supporting evidence filed by each of the Interveners on 30 November and 1 December 2009

the Tribunal, pursuant to Rule 3(5) of the 2004 Rules and section 193 of the Communications Act 2003 (the "2003 Act"), hereby refers to the Competition Commission for its determination the specified price control matters 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 imposed by Conditions G4, GG4, GH4 and H4 on British Telecommunications plc ("BT") have been set at a level which is inappropriate because OFCOM erred in failing to take the utmost account of the EC Leased Lines

Recommendation¹ in setting starting prices for digital private circuit network elements ("DPCN Services") for the reasons set out in paragraphs 37 to 45 of the Notice of Appeal.

Question 2

Whether the price controls imposed by Conditions G4, GG4, GH4 and H4 on BT have been set at a level which is inappropriate because OFCOM erred in setting starting charges for DPCN Services and 2 Mbit/s Local Ends in one or more of the following respects:

(a) OFCOM erred in:

(i) that the price increases go beyond what is necessary for individual services to be priced above Ofcom's view of distributed long run incremental cost ("DLRIC") for the reasons set out in paragraph 49 of the Notice of Appeal;

(ii) concluding that the price increases were necessary to avoid BT earning a return on capital employed ("ROCE") on the TI Basket below its weighted average cost of capital ("WACC") for the reasons set out in paragraphs 49 to 51 of the Notice of Appeal;

(b) OFCOM erred in adjusting some prices and not others within the TI Basket for the reasons set out in paragraphs 52 to 56 of the Notice of Appeal;

(c) OFCOM erred in its assessment of the DLRIC for the DPCN Services and 2 Mbit/s Local Ends because it should have made further and/or different adjustments to the figures used in its costs model for the reasons set out in paragraphs 57 to 60 of the Notice of Appeal;

(d) OFCOM erred in setting the price increases to starting charges for the reasons set out in paragraphs 61 to 66 of the Notice of Appeal.

Question 3

Whether the price controls imposed by Conditions G4, GG4, GH4, H4 and HH4 on BT have been set at an inappropriate level because OFCOM erred in estimating BT's efficient costs and associated revenues for leased line services in one or more of the following respects:

(a) OFCOM erred in its use of BT's regulatory financial statements for the reasons set out in paragraphs 72 to 77 of the Notice of Appeal;

(b) OFCOM erred in its adjustments to BT's reported costs and revenues for DPCN Services for the reasons set out in paragraphs 83 to 103 of the Notice of Appeal;

(c) OFCOM erred in the allocation of costs to the services subject to the Conditions for the reasons set out in paragraph 104 of the Notice of Appeal;

¹ European Commission's Recommendation of 29 March 2005 on the provision of leased lines in the European Union, part 2 - pricing aspects of wholesale leased lines part circuits, 2005/268/EC (the "EC Leased Lines Recommendation") published at OJ 2005 L83/52.

(d) OFCOM erred in the calculation of the relevant cost of capital for the reasons set out in paragraphs 105 to 107 of the Notice of Appeal.

Question 4

Whether OFCOM erred in the setting of the point of handover charges in Part 1 of Annex C to the price controls imposed by Conditions G4, GG4, GH4 and H4 on BT in one or more of the following respects:

(a) OFCOM erred in deciding not to set the charges on Local Ends used by BT but only on those used by BT's competitors:

(i) OFCOM erred in its use of BT's estimate of the costs to be recovered by the charges for the reasons set out in paragraphs 110 to 111 of the Notice of Appeal;

(ii) OFCOM erred in not treating promotion of competition as its primary objective and/or erred in its assessment of what the promotion of competition would require for the reasons set out in paragraph 112 of the Notice of Appeal;

(iii) OFCOM erred in setting point of handover charges that are discriminatory, inefficient and/or which distort competition for the reasons set out in paragraphs 113 to 116 of the Notice of Appeal;

(iv) OFCOM erred in its assessment of its "six principles of cost recovery" for the reasons set out in paragraphs 117 to 121 of the Notice of Appeal;

(b) OFCOM erred in deciding to set the same charges on synchronous digital hierarchy and plesiochronous digital hierarchy points of handover:

(i) OFCOM erred in giving BT the discretion it did as to future charges for points of handover for the reasons set out in paragraphs 122 to 128 of the Notice of Appeal;

(ii) OFCOM erred in setting charges that are inefficient and discriminatory for the reasons set out in paragraphs 129 to 132 of the Notice of Appeal.

Question 5

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

(a) clear and precise guidance as to how any such error found should be corrected; and

(b) insofar as is reasonably practicable, a determination as to any consequential adjustments to the level of the price controls indicating:

(i) what price controls should have been set in the LLCC Decision had OFCOM not erred in the manner identified by the Competition Commission; and

(ii) if the price controls set in the LLCC Decision have, during the elapsed period of the price control been at an inappropriate level, and on the assumption that it may, having regard to the criteria in section 88 of the 2003 Act, be lawful and appropriate to adjust the price control applicable during the unelapsed period, what adjustments to that part of the price control should be made, if any.

3. The Competition Commission is directed to determine the issues contained in this reference by 30 June 2010. The Competition Commission shall notify the parties to this appeal of its determination at the same time as it notifies the Tribunal pursuant to section 193(3) of the 2003 Act.
4. Should the Competition Commission require further time for making its determination it should notify the Tribunal and the parties so that the Tribunal may decide whether to extend the time set out in the previous paragraph.
5. There shall be liberty to apply for further directions.

Vivien Rose
Chairman of the Competition Appeal Tribunal

Made: 16 December 2009
Drawn: 16 December 2009