



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 47(1) OF THE COMPETITION ACT 1998

CASE NO 1076/2/5/07

Pursuant to Rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar of the Competition Appeal Tribunal gives notice of the receipt of a notice of appeal, filed on 17 January 2007, under section 47(1) of the Competition Act 1998 (“the Act”) by E.ON UK plc (“E.ON” or “the appellant”) of Westwood Way, Westwood Business Park, Coventry, CV4 8LG in respect of an undated decision of the Office of Rail Regulation (“the ORR”), issued on or around 17 November 2006, relating to infringements of section 18 of the Act and Article 82 of the EC Treaty (“the Contested Decision”)¹.

The Contested Decision found that English Welsh and Scottish Railway Limited (“EWS”) had abused a dominant position in the relevant market for coal haulage by rail in Great Britain. In particular, EWS acted abusively by entering into, applying and maintaining certain agreements with industrial users of coal, including the appellant, for the haulage of coal by rail, whose terms had an exclusionary effect (the “Exclusionary Contracts”). The ORR also found that EWS had engaged in a number of abusive pricing practices. Accordingly, the ORR imposed a penalty of £4,100,000 on EWS in respect of those infringements. In addition the ORR issued directions requiring EWS to bring the infringements in respect of the Exclusionary Contracts to an end, and in particular, within 30 days, to:

- remove or modify the terms in the Exclusionary Contracts currently in existence so as to remove their exclusionary effect. In the case of the appellant, the terms in question are: Clauses 4.2, 4.3, 5.4, and 6.1 of the contract originally made between Powergen plc (now E.ON) and EWS dated 14 March 1997 (“the Agreement”); and/or
- in the event that any new contracts are concluded by EWS to exclude from those contracts any terms capable of achieving the same or similar exclusionary effect to those identified as abusive (together “the Directions”).

The appellant challenges the Contested Decision insofar as it relates to the Agreement and the Directions. In particular, the appellant submits that the Directions are “fundamentally flawed” because they:

1. have an “excessive scope” and were therefore outside ORR’s jurisdiction. Insofar as any meaningful scope can be attributed to the Directions, they are substantially wider than is necessary in order to bring the relevant infringement to an end. In particular, to the extent that the Directions require the parties to the Agreement to do more than modify clause 4.3(d), they were outside the ORR’s jurisdiction;
2. are too uncertain to be valid, since they do not make clear what amendments and/or deletions are required and consequently do not allow the parties to whom they are directed to know what they need to do in order to comply. The Directions effectively impose an obligation upon two parties to negotiate in order jointly to agree on one solution out of a number of possible solutions. Consequently the Directions suffer

¹ The text of the Contested Decision can be found at:
<http://www.offt.gov.uk/Business/Competition+Act/Decisions/index.htm>

from the same problem as “agreements-to-agree” and are too uncertain to be enforceable.

The appellant seeks the following relief from the Tribunal:

1. for the Directions to be set aside; and
2. for the matter to be remitted to the ORR for it to give alternative directions as it considers appropriate; or alternatively
3. for the Tribunal to substitute alternative directions in the form suggested by the appellant in Annex A to the notice of appeal; and
4. an Order that the ORR pay the appellant’s costs of the appeal.

Any person who considers that he has a 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
Registrar

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