



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE No 1261/3/3/16

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 28 June 2016 under section 192(2) of the Communications Act 2003 (“the Act”) by CityFibre Infrastructure Holdings plc (“the Appellant”) of 15 Bedford Street, London, WC2E 2HE against a determination made by the Office of Communications (“OFCOM”) in its statement dated 28 April 2016 and entitled “Business Connectivity Market Review – Review of competition in the provision of leased lines” (“the Statement”).¹ The Appellant is represented by Preiskel & Co LLP of 4 King’s Bench Walk, London EC4Y 7DL (reference: Tim Cowen).

In its Business Connectivity Market Review OFCOM conducted a review of competition in the provision of leased lines to businesses in the UK. Leased lines are high-quality, dedicated, point-to-point data transmission services used by businesses and providers of communications services of relevance to many business information and communication technology services and mobile and residential broadband services. The Statement sets out OFCOM’s analysis of the relevant markets, identifies any provider with Significant Market Power (“SMP”) and sets out remedies to address competition problems which might otherwise arise from such SMP.

In its Statement OFCOM defined a single product market for Contemporary Interface Symmetric Broadband Origination services (the “CISBO market”) and three geographic markets for all CISBO services in the UK: the Central London Area (“CLA”), the London Periphery (“LP”) and the Rest of the UK, excluding Hull (“RoUK”). OFCOM went on to find that British Telecommunications plc (“BT”) has SMP on the CISBO market in the LP and the RoUK. As a result of these findings of SMP, OFCOM has imposed a dark fibre access (“DFA”) remedy on BT, which requires it to provide unlit strands of optical fibre to other communication providers (“CPs”). OFCOM also imposed a Leased Lines Charge Control (“LLCC”), i.e. a price cap.

The Appellant is an operator of wholesale fibre networks in major UK towns and cities. It operates pure fibre networks and owns passive fibre infrastructure serving mainly the business connectivity market. The Appellant challenges the Statement on the following grounds:

1. OFCOM erred in its definition the relevant product market. OFCOM’s definition is inconsistent with the approach set out by the European Commission in its significant market power guidelines², and Notice on Relevant Market Definition.³ In particular, OFCOM failed to conduct a forward-looking assessment of customer requirements.
2. OFCOM erred in its definition of the relevant geographic market. OFCOM wrongly used the state of competition in the CLA as a conclusive standard for an effectively competitive market (i.e. a market in which BT is not dominant). OFCOM went on to delineate all other areas as not only less competitive than the CLA but also as areas in which BT held a dominant position.
3. OFCOM erred in its design of the LLCC. OFCOM decided to base the regulated charge on BT’s costs of replacement of its network (with modern equivalent technology). According to the Notice of Appeal, this approach favours BT and its network over other the networks of others and fails to

¹ A non-confidential version of the Statement is available on OFCOM’s website at:

<http://stakeholders.ofcom.org.uk/consultations/bcmr-2015/final-statement/>.

² Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

³ Commission Notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03).

secure efficiency in sustainable competition in networks. The Appellant contends that OFCOM should instead have set the LLCC by reference to the costs of a Reasonably Efficient Operator (“REO”) or a Modified Equally Efficient Operator (“MEEO”).

4. OFCOM erred by failing to consider more fully REO-based prices and access to ducts and poles as appropriate and proportionate remedies in certain circumstances.
5. OFCOM failed to comply with its legal duty to take the ‘utmost account’ of certain comments of the European Commission on the draft Business Connectivity Market Review.

The Appellant invites the Tribunal to remit the Statement to OFCOM with the appropriate directions as to the action to be taken to give effect to the decision of the Tribunal. The Appellant states that Grounds 3 and 4 contain elements which may be regarded as price control matters which would in the usual course be referred to the Competition and Markets Authority (“CMA”) without undue delay.⁴ However, the Appellant contends that the challenge to the LLCC is not a pure price control matter, and that it therefore warrants remittal to OFCOM rather than a reference to the CMA. Alternatively, the Appellant contends that it would be appropriate to stay any reference to the CMA pending resolution of the non-price control matters.

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) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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⁴ See rule 116(1) of the Rules and section 193(1) of the Telecommunications Act 2003.