

Leased lines price control appeals: CityFibre and TalkTalk

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Glossary

CityFibre appeal, reference to the CMA



IN THE COMPETITION
APPEAL TRIBUNAL

BETWEEN:

Case No: 1261/3/3/16

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Appellant

-v-

THE OFFICE OF COMMUNICATIONS

Respondent

-and-

BRITISH TELECOMMUNICATIONS PLC

**CP GROUP (TALKTALK TELECOM GROUP PLC, VODAFONE LIMITED, COLT
TECHNOLOGY SERVICES AND HUTCHISON 3G UK LIMITED)**

GAMMA TELECOM HOLDINGS LIMITED

Interveners

**ORDER FOR REFERENCE OF SPECIFIED PRICE CONTROL MATTERS
TO THE COMPETITION AND MARKETS AUTHORITY**

Having regard to:

- (a) the decision (“the Decision”) made by the Respondent (“Ofcom”) in a Statement entitled “*Business Connectivity Market Review – Review of competition in the provision of leased lines*” issued on 28 April 2016 (“the BCMR Statement”);
- (b) the price control imposed on British Telecommunications plc (“BT”) by SMP Services Condition 10A set out in Schedule 1 to Annex 35 to the BCMR Statement;
- (c) the Notice of Appeal filed in relation to the Decision by the Appellant (“CityFibre”) on 28 June 2016 (“the NoA”);
- (d) Ofcom’s contention that Grounds 3 and 4b of the NoA raises specified price control matters under section 193(1) of the Communications Act 2003 (“the 2003 Act”) and Rule 16 of the Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648), which contention was not resisted by CityFibre

(e) paragraph 6 of the Tribunal's Order in this and related appeals made on 29 September 2016;

(f) the draft questions for reference to the Competition and Markets Authority ("the CMA") received from the parties on 11 November 2016 and the further correspondence received on 11 and 14 to 16 November 2016

IT IS ORDERED THAT:

1. The following matter ("the Matter") be referred to the CMA for determination on or before 31 March 2017:

In designing the leased lines charge control ("LLCC") and the cap on dark fibre access pricing, was Ofcom wrong to set the LLCC by reference to BT's costs of replacement of its network (albeit with modern equivalent technology, specifically BT's CCA FAC), instead of the costs of a reasonably efficient operator ("REO") or a modified equally efficient operator ("MEEO"), for the reasons set out in Grounds 3 and 4(b) of the NoA, having regard, in particular, to any or all of the arguments in the following paragraphs of the NoA:

- A. paragraphs 32-36, summarising the arguments under Grounds 3 and 4(b);
 - B. paragraphs 57-60, alleging failures to comply with Ofcom's duties under sections 3 and 4 of the 2003 Act; and
 - C. paragraphs 59-69 and 80, alleging failures to use the appropriate measure of costs and to take properly into account pricing in the Central London Area and CityFibre's discounting relative to BT's prices?
2. In the event that the CMA determines that Ofcom was wrong in relation to the Matter, and having regard to the fulfilment by the Tribunal of its duties under section 195 of the 2003 Act, the CMA is to include in its determination, insofar as reasonably practicable, guidance as to what directions (if any) the Tribunal should give to Ofcom on remittal of the Decision.
 3. The CMA shall notify the parties to these appeals of its determinations at the same time as it notifies the Tribunal pursuant to section 193(4) of the 2003 Act.
 4. There be liberty for all parties, including the CMA, to apply in relation to this Reference.

The Honourable Mr Justice Snowden
Chairman of the Competition Appeal Tribunal

Made: 17 November 2016
Drawn: 17 November 2016

TalkTalk appeal, reference to the CMA



IN THE COMPETITION
APPEAL TRIBUNAL

BETWEEN:

Case No.1259/3/3/16

TALKTALK TELECOM GROUP PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

-and-

NDR INTERVENERS (VODAFONE LIMITED AND HUTCHISON 3G UK LIMITED)

BRITISH TELECOMMUNICATIONS PLC

GAMMA TELECOM HOLDINGS LIMITED

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Interveners

ORDER FOR REFERENCE OF SPECIFIED PRICE CONTROL MATTERS
TO THE COMPETITION AND MARKETS AUTHORITY

Having regard to:

- (a) the decision (“the Decision”) made by the Respondent (“Ofcom”) in a Statement entitled “*Business Connectivity Market Review – Review of competition in the provision of leased lines*” issued on 28 April 2016 (“the BCMR Statement”) in particular paragraph 9.5, Annex 23 (notably A23.37-134) and Annex 33 (notably A33.258-261)
- (b) the price controls imposed on British Telecommunications PLC (“BT”) by SMP Condition 10 set out in Annex 35 (the “Condition”) of the BCMR Statement

- (c) the charges obligation in relation to Dark Fibre Access imposed on BT by SMP Services Condition 10C set out in Schedule 1 to the BCMR Statement
- (d) the Notice of Appeal (“the NoA”) filed in relation to the Decision by the Appellant (“TalkTalk”) on 27 June 2016
- (e) Ofcom’s and TalkTalk’s agreement that the NoA raises a specified price control matter under section 193(1) of the Communications Act 2003 (“the 2003 Act”) and Rule 16 of the Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648)
- (f) paragraph 6 of the Tribunal’s Order in this and related appeals of 29 September 2016
- (g) the draft questions for reference to the Competition and Markets Authority (“the CMA”) received from the parties on 11 November 2016 and correspondence and submissions received on 11 and 14 November 2016

IT IS ORDERED THAT:

1. The following matter (“the Matter”) be referred to the CMA for determination on or before 31 March 2017:

Was Ofcom wrong to decide that, in the event that Ofcom’s recommendation to the Government described in paragraph A23.111 of the BCMR Statement is not adopted, the Non-Domestic Rate costs to be deducted from the price of the reference active products in deriving the price for Dark Fibre Access at paragraph 10.C.1 of the Condition should be based on an attribution of BT’s rates costs to the fibre (rather than on some other appropriate measure) for reasons set out in paragraphs 32 to 44 of the NoA?
2. In the event that the CMA determines that Ofcom was wrong in relation to the Matter, and having regard to the fulfilment by the Tribunal of its duties under section 195 of the 2003 Act, the CMA is to include in its determination, insofar as reasonably practicable, guidance as to what directions (if any) the Tribunal should give to Ofcom on remittal of the Decision.
3. The CMA shall notify the parties to these appeals of its determinations at the same time as it notifies the Tribunal pursuant to section 193(4) of the 2003 Act.
4. There be liberty for all parties, including the CMA, to apply in relation to this Reference.

The Honourable Mr Justice Snowden
Chairman of the Competition Appeal Tribunal

Made: 17 November 2016
Drawn: 17 November 2016

**Order of the CAT extending the deadline for determination
by the CMA**



IN THE COMPETITION
APPEAL TRIBUNAL

B E T W E E N :

Case No.: 1259/3/3/16

TALKTALK TELECOM GROUP PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC
CITYFIBRE INFRASTRUCTURE HOLDINGS PLC
NDR INTERVENERS (VODAFONE LTD AND HUTCHISON 3G UK LTD)
GAMMA TELECOM HOLDINGS LTD

Interveners

A N D B E T W E E N :

Case No.: 1261/3/3/16

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC
CP GROUP (TALKTALK TELECOM GROUP PLC, VODAFONE LTD,
COLT TECHNOLOGY SERVICES AND HUTCHISON 3G UK LTD)
GAMMA TELECOM HOLDINGS LTD

Interveners

ORDER

HAVING REGARD TO the orders of the Tribunal of 17 November 2016 made in Cases 1259/3/3/16 and 1261/3/3/16 referring certain specified price control matters under section 193(1) of the Communications Act 2003 and Rule 16 of the

Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648) for determination by the Competition and Markets Authority (“CMA”) on or before 31 March 2017 (“the Matters”)

AND UPON the application of the CMA dated 7 March 2017 for an extension of seven days for determining the Matters

AND UPON there being no objections to the CMA’s application

IT IS ORDERED BY CONSENT THAT:

1. The time for the CMA to determine the Matters be extended until 4pm on 7 April 2017.
2. Costs be reserved.
3. There be liberty to apply.

The Honourable Mr Justice Snowden
Chairman of the Competition Appeal Tribunal

Made: 10 March 2017
Drawn: 13 March 2017

Glossary

Access network	The part of a telecommunications network that connects an end-user with the local telephone exchange from which point lines are connected to the core telecommunications network.
Act	Communications Act 2003. The Act setting out Ofcom 's functions, powers and duties with regard to, among other things, electronic communications.
Backhaul	Carriage of traffic from an exchange (ie the building and equipment located within the exchange area and to which all customers are connected via the access network) to a central point: transmission links used to connect local exchanges to each other and/or the core network.
Bandwidth	In digital telecommunications systems, the rate measured in bits per second (bit/s), at which information can be transferred.
Basket	Ofcom grouping of BT services for the purpose of determining a charge control.
BCM	Business Connectivity Market.
BCMR	Business Connectivity Market Review.
BEREC	Body of European Regulators for Electronic Communications.
Broadband	A service or connection which is capable of supporting always-on services which provide the end user with high data transfer speeds.
BT	BT Group plc and any subsidiary or holding company thereof including British Telecommunications plc.
CAT	Competition Appeal Tribunal.
CC	Competition Commission.
CCA	Current Cost Accounting. An accounting convention, where assets are valued and depreciated according to their current replacement cost whilst maintaining the operating or financial capital of the business entity.

CI	Contemporary Interface. A set of modern technologies used for delivery of leased line services (e.g. Ethernet or Wavelength Division Multiplex (WDM)).
CISBO	Contemporary Interface Symmetric Broadband Origination.
CityFibre	CityFibre Infrastructure Holdings plc.
CLA	Central London Area. A proposed geographic market in central London, as defined by Ofcom in its 15 May 2015 BCMR consultation .
CMA	Competition and Markets Authority.
Colt	Colt Technology Services.
CP	Communications provider. An organisation that provides electronic communications services.
CP Group	Colt, TalkTalk, Three and Vodafone (together referred to as ‘the CP Group’) permitted by the CAT to file Sols and supporting evidence in the BT and CityFibre appeals.
CRF	Common Regulatory Framework. 2002 EU legislation, subsequently amended, comprising Directives commonly known as the Framework Directive, the Authorisation Directive, the Access Directive, The Universal Service Directive and the E-Privacy Directive.
Dark fibre	Unlit optical fibre circuits.
DCR	Digital Communications Review.
DFA	Dark Fibre Access.
DRC	Direct Rental Comparison.
Duct	A facility of one or more buried tubes through which cables can be routed. Ducts are the infrastructure, eg pipes, in the ground in which cables containing copper and/or fibre are run.
EAD	Ethernet Access Direct. A BT wholesale Ethernet product offered by Openreach providing high bandwidth , point-to-point connections.

Ethernet	A packet-based technology originally developed for and still widely used in Local Area Networks (LAN) . Ethernet networking protocols are defined in IEEE 802.3 and published by the Institute of Electrical and Electronic Engineers. Developments of this technology known as Metro Ethernet or Carrier Ethernet are now being used in CPs' networks to provide leased line and backhaul services.
FAC	Fully allocated cost. An accounting approach under which all the costs of the company are distributed between its various products and services. The fully allocated cost of a product or service may therefore include some common costs that are not directly attributable to the service.
Final Statement	On 28 April 2016, Ofcom published the details of, and gave effect to, the decisions taken in the BCMR in its Final Statement , taken pursuant to section 87(9) and section 88(1)(a) of the Act .
FTTP	Fibre-to-the-Premises. An access network structure in which the optical fibre network runs from the local exchange to the end user's house or business premise. The optical fibre may be point-to-point – there is one dedicated fibre connection for each home – or may use a shared infrastructure such as a Gigabit Passive Optical Network (GPON). Sometimes also referred to as Fibre-to-the-Home (FTTH).
Gamma	Gamma Telecom Holdings Limited.
Gbit/s	Gigabits per second (1 Gigabit = 1,000,000,000 bits). A measure of bandwidth in a digital system.
Infrastructure	General term used to refer to all the equipment and plant used to provide connectivity and services to customers.
Leased line	A permanently connected communications link between two premises dedicated to the customers' exclusive use.
LLCC	Leased Lines Charge Control.
LLU	Local loop unbundling. A process by which a dominant provider's local loops are physically disconnected from its network and connected to competing provider's networks.

This enables operators other than the incumbent to use the local loop to provide services directly to customers.

Local loop	The access network connection between the customer's premises and the local serving exchange, usually comprised of two copper wires twisted together.
LP	London Periphery. A proposed geographic market as defined by Ofcom in its 15 May 2015 BCMR consultation and adjacent to the CLA .
LRIC	Long-run incremental cost. The cost that can either be avoided by stopping, or incurred by increasing, production of a specified product or service, on the basis that all other products and services are still being provided at their original level.
LRIC+	A measure of cost that is equal to LRIC plus an additional element for the recovery of non-attributable common costs.
Mbit/s	Megabits per second (1 Megabit = 1,000,000 bits). A measure of bandwidth in a digital system.
MEEO	Modified equally efficient operator.
NDR	Non-Domestic Rate.
NDR Interveners	Three and Vodafone (together referred to as 'NDR Interveners') permitted by the CAT to file Sols and supporting evidence in the TalkTalk appeal.
NoA	Notice of Appeal.
OCP	Other communications providers.
Ofcom	Office of Communications.
Openreach	BT's infrastructure division, established in 2006 pursuant to undertakings offered by BT and accepted by Ofcom , pursuant to the Enterprise Act 2002 , to ensure that rival telecom operators have equivalence of access to BT's local network.
REO	Reasonably efficient operator.

RoUK	Rest of the UK. A proposed geographic market in central London, as defined by Ofcom in its 15 May 2015 BCMR consultation , consisting of an area outside the CLA , the LP and the Hull Area. (The Hull area is defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc.)
SBO	Symmetric Broadband Origination service provides symmetric capacity from a customer's premises to an appropriate point of aggregation, generally referred to as a node, in the network hierarchy. In this context, a 'customer' refers to any public electronic communications network provider or end-user.
SME	Small and medium-sized enterprise.
SMP	Significant market power. The significant market power test is set out in European Directives. It is used by NRAs such as Ofcom , to identify those CPs which must meet additional obligations under the relevant Directives.
SoI	Statement of Intervention.
TalkTalk	TalkTalk Telecom Group plc.
Three	Hutchison 3G UK Limited.
VOA	Valuation Office Agency
Vodafone	Vodafone Limited.
VULA	Virtual unbundled local access.
WLA	Wholesale local access. Fixed telecommunications infrastructure, specifically the physical connection between end users' premises and a local exchange.