



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

