<u>MBNL's response to Ofcom's consultation on Leased Lines Charge Control</u>

MBNL welcomes the opportunity to respond to Ofcom's consultation *Leased Line Charge Control*, published on 8 December 2008.

MBNL is a joint venture between T-Mobile (UK) Limited and Hutchison 3G UK Limited, which is responsible for the integration of T-Mobile (UK) Limited's 3G radio access network with that of Hutchison 3G UK Limited. The comments represent the agreed position of T-Mobile UK and H3G in representing the best interests of MBNL.

[✂] We have seen in recent years that our requirements for leased lines and backhaul products has increased significantly in line with increasing usage of bandwidth-hungry products such as mobile broadband. We expect this trend to continue and, as a result, having appropriately priced leased line products is a very important consideration for our business moving forwards. MBNL will also be migrating to purchasing more Ethernet (AISBO) lines in the future.

Given our position as a purchaser, and not a supplier, of leased lines, we do not feel it is necessary for us to provide a detailed response to all the questions in this consultation. Rather, we will focus our response on a number of key areas that we feel Ofcom needs to consider when finalising the charge controls and any further appropriate remedies on BT and KCOM. We will expand on the following issues in our response:

- The importance of setting a charge control for the initial line as well as a separate lower charge control for subsequent lines that are cheaper to install;
- MBNL considers volume (saw-tooth) discounts offered by BT to be anti-competitive; however Ofcom needs to ensure that their regulatory intervention in this area does not result in higher prices;
- MBNL is content with no specific price control for RBS backhaul, but rather with prices set consistent with the charge controlled PPC products, as set out by Ofcom;
- MBNL believes that Ofcom, in its Business Connectivity Market Review Statement, has erred in deciding that a review of the dark fibre market is not warranted

Response to key issues

1. The charge control for subsequent lines

In MBNL's response to Ofcom's 1st *Business Connectivity Market Review* Consultation, we detailed the issue that we currently have with the price control structure. The problem that we face was that whilst it appears that the first line had been correctly regulated at cost by Ofcom, the subsequent lines appear to be priced significantly above cost. Our comments from that response document are repeated below.

> *"MBNL's major issue with the current price control structure for wholesale TISBO products is that BT has a regulated price which is charged for the first line and equally for all incremental lines. While we do not have access to BT's specific costs in providing these leased lines, we do not think that it is correct that incremental lines are as costly as the original line, since significantly less work is involved in providing the incremental line.*
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> [✂]
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> *We believe that in neither case can the operational nor capital costs of providing additional capacity in our access network support this flat pricing structure by BT. We are of the view that the cost of expansion falls greatly and hence, this should be appropriately reflected in the pricing to BT's customers. We would therefore strongly support any efforts to move towards an appropriate cost-based charge control for these subsequent lines. If BT is of the view that any charge controls do not fairly reflect their costs of providing that product, then there are appropriate remedies in place to address their concern. As a BT customer, we do not want BT to be able to cross-subsidise across products and/or regions."*[1]

When setting up the first line there are a number of costs that BT will incur which will need to be recovered through their charges:

- Setting up the actual line;
- Setting up the backhaul; and
- Setting up the Network Terminating Equipment (NTE) in the core network

However when adding an incremental line, the only cost which will be incurred by BT is the cost of the NTE, which will be much lower than the combined cost of the first line. MBNL believes that the charge control needs to be amended to reflect the lower cost of subsequent lines. If the price set is the same for the further lines as it is for the first line, as is the case currently, then BT appears to be earning excessive profits on all additional lines.

Ofcom has taken a step in the right direction by ensuring that the price set for the first line is truly reflective of the costs incurred by BT. However, this regulatory

[1] MBNL response to BCMR January Consultation, p10. It should be noted that since this original consultation response was written, MBNL has negotiated slightly different prices for these same products. However, even with these new prices, the same issue with the pricing structure exists.

endeavour needs to be completed by ensuring that subsequent lines are also priced correctly.

2. Volume Discounts

MBNL welcomes Ofcom's intentions to ban saw-tooth discounts for the markets in which BT has SMP. We dealt with this issue in our response to Ofcom's 1st *Business Connectivity Market Review* Consultation, which we repeat below:

> *"We welcome Ofcom's proposals to include saw-tooth discounts within the requirement not to unduly discriminate, which is imposed on companies with SMP. MBNL has found that only BT is able to use its geographic reach to provide leased lines to all our sites. BT's competitors, although potentially cheaper, can only provide fibre to a proportion of our sites. This is problematic for us, as the contract with BT is priced on a volume basis. Therefore, if MBNL chooses to use a competitor's product where possible, the price of the remaining BT products would increase. As a result, this strategy would counter any benefit that we would have by using BT's competitors in the areas where they have a fibre presence."* [2]

However what is imperative is that Ofcom's regulatory actions do not result in the price of products going up. This would be counter-intuitive and would imply that the regulation had failed. Therefore for products for which BT currently has volume discounts in place , the correct outcome would be to ensure that the regulated price is set to be equal to the current prices including any applicable 'volume discount', irrespective of the actual volumes sold, as this would truly reflect the costs faced by BT. This regulatory intervention would allow purchasers to benefit from lower prices whilst still allowing competitors to compete effectively in areas where they are the lowest cost provider.

3. No price control for RBS Backhaul

MBNL notes that Ofcom proposes to require BT to set its RBS backhaul prices in a manner consistent with the charge controlled PPC products and say that this will have largely the same end effect on the prices as that of subjecting these services to a formal charge control. We do not object to this approach taken by Ofcom although we would urge Ofcom to keep this under review.

4. Dark Fibre Market Review

In Ofcom's 1st *Business Connectivity Market Review* Consultation, Ofcom asked whether they should investigate the potential for using a dark fibre remedy. In the statement on that market review published simultaneously with this *Leased Lines Charge Control* consultation, Ofcom have informed us that they will not be undertaking a dark fibre review. This is despite the majority of stakeholder responses indicating that they supported such a review.[3] The reasoning behind Ofcom's decision is noted below:

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[2] MBNL response to BCMR January Consultation, p10
[3] Ofcom, Business Connectivity Market Review, 8 December 2008, para8.613

> *"Having considered stakeholders responses, and having evaluated their arguments, we feel that at this stage, a review of dark fibre for the purpose of promoting competition in wholesale leased lines access markets is not warranted. The improved competitive conditions that we believe should follow from the implementation of the new regulatory remedies for leased lines, as described in this Section, will address two of the main issues (pricing and quality of service) which have prompted some stakeholders to advocate a dark fibre review."*[4]

MBNL does not understand how Ofcom has reached this conclusion without undertaking the necessary market review. The point of market reviews and detailed Impact Assessments is to be able to accurately and precisely identify the course of action that will be most beneficial. Merely stating that 'a review of dark fibre market is unwarranted' is simply abdicating responsibility from this regulatory decision.

In addition, MBNL noted in our earlier response in March 2008 that the problem in the area of dark fibre was the issue of access. We cannot clearly see how improved access will inevitably follow from the proposed regulatory remedies in leased lines. Perhaps it is Ofcom's hope that access will improve from the proposed regulatory remedies in leased lines but there can be no certainty that this is the case.

It is clear to MBNL that enabling dark fibre access would lead to significant benefits in increasing competition in the provision of high bandwidth lines to mobile operators' cell sites. This competition would in turn lead to actual benefits flowing through to consumers in the following ways:

- Enabling higher bandwidth mobile broadband service. [✂]
- The greater capacity and lower cost available to operators will mean that competitive offerings will expand the availability of mobile broadband to a wider range of customer groups (for example, more competitive mobile broadband will increasingly provide a viable broadband product for the less well off and those without a permanent address);
- Customers will benefit from lower and more flexible pricing, which would result from lower costs to the operators; and
- Operators will find it affordable to roll out high speed mobile broadband to a much greater area of the country, giving consumers a real alternative to fixed broadband services.

In addition the competition benefits would also help to bring higher bandwidth and lower costs for businesses and enterprise customers as well as local authorities, schools and other educational establishments. Allowing dark fibre access will remove bottlenecks and therefore decrease the time for new service offerings to get to the market, meaning competition and better offerings are immediately available to the customer.

As well as these significant commercial benefits, the sharing of infrastructure which more use of dark fibre would lead to also leads to environmental benefit with reduced infrastructure works and disruption to the local community. It is surely more environmentally friendly for a road to be dug up only once rather than by three separate fibre operators.

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[4] BCMR statement, p310

We understand that Ofcom may be concerned that any dark fibre requirements may stifle further developments in the fibre network and act as a barrier to BT rolling out more fibre. However given the initial CAPEX costs and the terms of the initial contract, BT would always recover the costs of building up the fibre links. Indeed once the initial contract is over, the actual local fibre end has been fully paid for by the customer. Only at this point, once the actual fibre link has been fully paid for and BT has recovered its investment, would dark fibre allow customers to decide which provider was more efficient for any subsequent backhaul service. This issue is something that can be dealt with in more detail as part of any market review.

Although we disagree that a market review should not be done at this time, we can understand the need to put the matter on hold if Ofcom believes that regulatory remedies will indeed solve any perceived problems in the short term. As a result, we do think that the correct approach would be to revisit the issue shortly after the regulatory remedies in leased lines have been implemented. At that time, a full assessment of all the issues through a market review would be appropriate.

MBNL

6 March 2009