

**REFERENCE OF A DISPUTE TO OFCOM  
BY VIRGIN MEDIA LIMITED  
UNDER S.185 OF THE COMMUNICATIONS ACT 2003**

**A: PRELIMINARY INFORMATION**

1. This is a reference of a dispute to OFCOM under s.185 of the Communications Act 2003 (“the Act”) by Virgin Media Limited (“Virgin”).
  
2. The relevant contact at Virgin in respect of this reference is Annemaree McDonough, Regulatory Counsel, Virgin Media Limited, 160 Great Portland Street W1W 5QA. Telephone: 020 7299 5866. Fax: 020 7299 5460. E-mail: Annemaree.Mcdonough@virginmedia.co.uk
  
3. Virgin provides communications services, including voice, data, internet and television services, to customers throughout the United Kingdom. Virgin provides services to its business customers through its division which during the period of this dispute was known as Ntl-Telewest Business. Recently Ntl-Telewest changed its name to Virgin Media Business.

The other party to this dispute is British Telecommunications Plc of 81 Newgate Street London EC17AJ.

4. The dispute relates to the charges for ethernet services provided by BT through initially its BT Wholesale and then its Openreach Division to Virgin and its legal predecessor (NTL Group Limited) between 1 April 2006 and 31 March 2009. During this period, BT charged Virgin charges that were not cost

orientated in accordance with the relevant ex ante conditions applicable to these services and therefore has overcharged Virgin.

5. In spite of extensive commercial attempts by Virgin to reach an agreement with BT to reimburse it for the charges for Ethernet services to the extent that those charges exceeded the cost orientated charge, BT has refused to provide such reimbursement.
  
6. In making this dispute reference to OFCOM, Virgin seeks:
  - a. a declaration under s.190(2) of the Act that the charges charged by BT to Virgin in respect of Ethernet services during the period 1 April 2006 and 31 March 2009 were not cost orientated;
  - b. a declaration of the proper amount of the charges for Ethernet services provided by BT;
  - c. a direction requiring BT to make a payment to Virgin of sums by way of adjustment of the overpayment in the sum of £[~~2~~] plus interest as set out in Annex A or such other amount as Ofcom may determine, plus interest.
  
7. Copies of relevant documents are annexed to this reference.

**B: THE ISSUE IN DISPUTE**

**(a) Interconnection Agreement**

8. NTL Group Limited (the legal predecessor of Virgin Media Limited) entered into the standard form agreement with BT Plc for the provision of these services. Prior to October 2006 the services were ordered from BT Wholesale. Since October 2006 NTL Group Limited ordered the services from BT's Openreach Division.

9. On 8 February 2007 NTL Group Limited changed its name to Virgin Media Limited although the services continued to be ordered under the NTL Group Limited account.

**(b) OFCOM's 2004 statement**

10. On 24 June 2004, OFCOM published its statement on Review of the Retail Leased Line, Symmetric Broadband Origination Wholesale Trunk Segments Markets Final Statement and Notification ("the 2004 Statement").

11. In the 2004 Statement, OFCOM:

- a. found that BT had SMP in the market for the provision wholesale alternative interface symmetric broadband origination at all bandwidths;
- b. imposed the following relevant SMP conditions on BT in respect of that market
  - Requirement to provide network access on reasonable request (Condition HH1);
  - Requirement not to unduly discriminate (Condition HH2)
  - Basis of Charges (Condition HH3).

12. Condition HH3 provides as follows:

*HH3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition HH1 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.*

*HH3.2 The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition*

13. In setting the cost orientation condition Ofcom said “*The condition will apply across all services within the market. This means that the price of all services provided by BT in the market should be based on LRIC and allowing an appropriate mark-up for the recovery of common costs.*”

Ofcom confirms that all new services that are introduced into this market will also be covered by the same pricing rule. This is because new services in the same market would be expected to be subject to the same competitive conditions as existing services. This does not however mean that BT cannot recover costs appropriate to new wholesale services. The recovery of efficiently incurred costs for new wholesale services was discussed in paragraphs 2.23-2.25 of Oftel’s access guidelines.

*Although this condition will apply to all new services in this market, and the expectation is that the treatment of new services under the condition will be the same as for existing services, there may be occasional exceptions to this rule. This may arise where the new service is innovative and thus warrants a different regulatory approach. There are three ways in which such services can be dealt with;*

- i) The service may be so innovative that it falls in a completely new and separate market. In this case the appropriate regulatory obligations will be determined by Ofcom following analysis of this new market.*
- ii) The new service falls within the market but Ofcom determines that an alternative charging basis is appropriate. For example, a different charging basis may be appropriate for services offered during a trial.*
- iii) The new service falls within the market and the cost orientation obligation is applied, but there might be a range of prices which would be consistent with cost orientation given the uncertainty about the take up and future profitability of the service. In determining whether a charge is not cost orientated, Ofcom would consider whether the expected or achieved return on capital was excessive. In making this assessment, Ofcom will need to take account of the*

*risk of the new service failing and the lost investment that would result. This therefore maintains an appropriate incentive for the communications provider to invest in new services and technologies.*

*The condition contains a clause enabling Ofcom to determine that a price need not be set on a forward looking LRIC basis. This is particularly relevant to scenario ii) above where Ofcom determines that an alternative charging basis is appropriate. If BT wishes to set a price for a service in any of the markets on any other basis than forward looking LRIC, it must apply to Ofcom for permission to do this.*

*Ofcom considers that the cost orientation condition is justifiable and a proportionate response to the extent of competition in the markets analysed. It enables competitors to purchase services at a rate which will enable them to develop competitive services to the benefit of consumers, whilst at the same time allowing BT a fair rate of return which it would expect in a competitive market. The potential for a degree of flexibility envisaged in the approach to the recovery of cost of capital recognises that some investments will carry a higher degree of risk than others and does not remove incentives for the development of new services.”*

**(c) Ofcom’s 2008 Statement**

14. On 8 December 2008 Ofcom published its statement on the Business Connectivity Market Review (“the 2008 Statement”).

15. In the 2008 Statement Ofcom:

- (a) found that BT had SMP in the wholesale market for alternative interface symmetric broadband origination services with a bandwidth capacity up to and including one gigabit per second;
- (b) imposed the following relevant SMP conditions on BT in that market;
  - i. Requirement to provide network access on reasonable request (Condition HH1);
  - ii. Requirement not to unduly discriminate (Condition HH2)

iii. Basis of Charges (Condition HH3)

16. In the 2008 statement the Basis of Charges condition read as follows:

*HH3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition HH1 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.*

*HH3.2 For the avoidance of any doubt, where the charge offered, payable or proposed for Network Access covered by Condition HH1 is for a service which is subject to a charge control under Condition HH4, the Dominant Provider shall secure and shall be able to demonstrate to the satisfaction of Ofcom, that such a charge satisfies the requirement of Condition HH3.1*

*HH3.2 [sic] The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition.*

17. In discussing the relevant services in the 2008 Statement Ofcom made the following comments “*After reviewing the cost and revenue data for these services in Annex 12 of the January 2008 consultation, we provisionally concluded that the return that BT was earning on low bandwidth AISBO services appeared to be significantly in excess of its cost of capital. We considered that such returns were not compatible with those earned in a competitive market, and as a result, efficient competition might be restricted or distorted. In addition, those high returns could have detrimental effects for end users through the setting of retail prices above those that could be found in a competitive market.” (Emphasis added)*

*BT has been subject to a cost orientation requirement for these services since the 2003/04 Review. We considered however that, given the relatively high returns, a cost orientation alone might not be enough in the future. We therefore considered that, among other things, Ofcom should look further at the adoption of charge controls for low bandwidth AISBO services and that we would consult separately on it.*

**(d) Ofcom's 2009 Statement**

18. Following on from the above comments in the 2008 statement, Ofcom consulted on a charge control for low bandwidth AISBO services in a consultation document published on 8 December 2008.

19. On 2 July 2009 Ofcom published its statement on the Leased Lines Charge Control (the Charge Control Statement) which on a forward looking basis subjected BT's AISBO charges to a charge control and imposed a new SMP Condition HH4 (Charge Control) on BT in respect of the low bandwidth AISBO market.

**(e) Virgin's complaint**

20. Virgin believes that BT has significantly overcharged for local end rentals when compared against the relevant LRIC ceilings specified in BT's Regulatory Accounts for the following services:

- WES 100Mbit/s, 1 Gbit/s and 10Mbit.
- BES 100Mbit/s and 1 Gbit.

**Table 1: Local End Rental Charge Comparison with LRIC Ceiling<sup>1</sup>**

	Year Ending		
<b>100MBit/s WES Rental External</b>	31-Mar-07	31-Mar-08	31-Mar-09
Average Price	£9,015.98	£5,871.40	£2,656.36
LRIC Ceiling	£5,119.94	£3,604.18	£1,781.55
Average Price / LRIC Ceiling	176%	163%	149%
<b>1GBit/s WES Rental External</b>	31-Mar-07	31-Mar-08	31-Mar-09
Average Price	£31,471.15	£18,476.01	£7,568.75
LRIC Ceiling	£5,499.52	£4,911.87	£1,821.56
Average Price / LRIC Ceiling	572%	376%	416%
<b>100MBit/s BES Rental External</b>	31-Mar-07	31-Mar-08	31-Mar-09
Average Price	£8,917.00	£4,603.87	£2,687.33
LRIC Ceiling	£5,072.76	£1,988.36	£1,620.75
Average Price / LRIC Ceiling	176%	232%	166%
<b>1GBit/s BES Rental External</b>	31-Mar-07	31-Mar-08	31-Mar-09
Average Price	£22,860.00	£15,172.23	£4,473.48
LRIC Ceiling	£5,498.62	£3,139.18	£1,660.32
Average Price / LRIC Ceiling	416%	483%	269%
<b>10MBit/s WES Rental External</b>	31-Mar-07	31-Mar-08	31-Mar-09
Average Price	Not included		£2,039.89
LRIC Ceiling	Not included		£1,789.80
Average Price / LRIC Ceiling	Not included		114%

21. Virgin’s analysis uses the average prices for services and the LRIC ceilings costs that are published in BT’s Regulated Financial Statements (RFS).<sup>2</sup> Virgin has derived its estimate of the level of BT overcharge, by taking the average price for each service class and deducting the LRIC ceiling. This overcharge has been converted into a percentage.

22. As table 1 demonstrates:

- the 100Mbit/s WES Local End Rental was between 149% and 176% of its LRIC ceiling during the years ending 31 March 2007 to 31 March 2009;

<sup>1</sup> Source: Page 50-53 of ‘Current Cost Financial Statements for 2009 including Openreach, Statement for Ofcom’, and Page 42 ‘Additional Information in relation to BT’s Current Cost Financial Statements for 2008’. N.B. Y/e 31 Mar 2007 and 31 Mar 2008 are Per Circuit, while, y/e 31 Mar 2009 is Per End

<sup>2</sup> In respect of the 2006/7 year the prices in the BT RFS and Virgin Media refund calculations do not disaggregate mainlink and local ends. This should not however be taken as VM accepting that this level of aggregation is appropriate. VM reiterates its position in paragraph 33 that local ends and mainlinks should be disaggregated.



- the 1Gbit/s WES Local End Rental was between 416% and 572% of its LRIC ceiling during the years ending 31 March 2007 to 31 March 2009
- the 100Mbit/s BES Local End Rental was between 166% and 176% of its LRIC ceiling during the years ending 31 March 2007 to 31 March 2009
- the 1 Gbit/s WES Local End Rental was between 269% and 416% of its LRIC ceiling during the years ending 31 March 2007 to 31 March 2009.

23. Virgin also notes that the 10Mbit/s WES Local End Rental Average Prices were 114% of the LRIC ceiling in the year ending 31 March 2009.

24. In addition to the overcharge on Local End Rentals Virgin believes that BT has significantly overcharged for connection charges when compared against the relevant LRIC ceilings specified in BT’s Regulatory Accounts for the following services:

- BES 100Mbit/s
- BES 1Gbit/s

**Table 2: BES Connection Charge Comparison with LRIC Ceiling<sup>3</sup>**

	Year Ending		
<b>100Mbit/s BES Connection External</b>	31-Mar-07	31-Mar-08	31-Mar-09
Average Price	£5,500.00	£5,482.12	£2,369.80
LRIC Ceiling	£2,237.80	£3,749.95	£1,703.56
Average Price / LRIC Ceiling	246%	146%	139%

<b>1Gbit/s BES Connection External</b>	31-Mar-07
Average Price	£10,400.00
LRIC Ceiling	£7,683.18
Average Price / LRIC Ceiling	135%

25. As table 2 demonstrates:

- the 100 Mbit/s BES Connection charge was between 139% and 246% of its LRIC ceiling in the years ending 31 March 2007 – 31 March 2009.

<sup>3</sup> Source: Page 50-53 of ‘Current Cost Financial Statements for 2009 including Openreach, Statement for Ofcom’, and Page 42 ‘Additional Information in relation to BT’s Current Cost Financial Statements for 2008’. N.B. Y/e 31 Mar 2007 and 31 Mar 2008 are Per Circuit, while, y/e 31 Mar 2009 is Per End

26. Virgin’s calculations also illustrate that BT has overcharged for 1Gbit/ connection charges in 2007. Virgin Media notes that for a number of the services the overcharge can be described as persistent and significant (in that it has lasted for three financial years) and is well over 100% of the LRIC ceiling. In Virgin’s view the charges for which the charge is persistent and significant are therefore less likely to be attributable to potential one off factors.

27. The overcharge is also demonstrated for the same services when one compares BT’s average prices against fully allocated costs (FAC).

28. As table 3 demonstrates when compared against FAC:

**Table 3: Local End Rental Charge Comparison with FAC<sup>4</sup>**

	Year Ending		
	31-Mar-07	31-Mar-08	31-Mar-09
<b>100MBit/s WES Rental External</b>			
Average Price	£9,015.98	£5,871.40	£2,656.36
FAC	£4,614.44	£2,732.93	£1,365.22
Average Price / FAC	195%	215%	195%
<b>1GBit/s WES Rental External</b>			
Average Price	£31,471.15	£18,476.01	£7,568.75
FAC	£4,708.94	£3,276.03	£1,382.65
Average Price / FAC	668%	564%	547%
<b>100MBit/s BES Rental External</b>			
Average Price	£8,917.00	£4,603.87	£2,687.33
FAC	£5,302.82	£1,412.49	£1,239.00
Average Price / FAC	168%	326%	217%
<b>1GBit/s BES Rental External</b>			
Average Price	£22,860.00	£15,172.23	£4,473.48
FAC	£5,408.83	£1,918.43	£1,256.25
Average Price / FAC	423%	791%	356%
<b>10MBit/s WES Rental External</b>			
Average Price	Not included		£2,039.89
FAC	Not included		£1,368.82
Average Price / FAC	Not included		149%

<sup>4</sup> Source: Page 50-53 of ‘Current Cost Financial Statements for 2009 including Openreach, Statement for Ofcom’, and Page 42 ‘Additional Information in relation to BT’s Current Cost Financial Statements for 2008’. N.B. Y/e 31 Mar 2007 and 31 Mar 2008 are Per Circuit, while, y/e 31 Mar 2009 is Per End

- 100Mbit/s WES Local End Rental is between 195% and 215% of its FAC during the years ending 31 March 2007 to 31 March 2009;
- 1Gbit/s WES Local End Rental is between 457% and 668% of its FAC during the years ending 31 March 2007 to 31 March 2009;
- 100Mbit/s BES Local End Rental is between 168% and 217% of its FAC during the years ending 31 March 2007 to 31 March 2009;
- 1Gbit/s WES Local End Rental is between 356% and 791% of its FAC during the years ending 31 March 2007 to 31 March 2009.
- 10 M/bit WES Local End Rental is 149% of its FAC during the year ending 31 March 2009.

29. In respect of connection charges table 4 demonstrates that when compared against FAC:

- 100 Mbit/s BES connection charge is between 235% and 340% of its FAC during the years ending 31March 2007 to 31 March 2009;
- 1Gbit/s BES connection charge is 180% of its FAC in the year ending 31 March 2007.

**Table 4 BES Connection Charge Comparison with FAC<sup>5</sup>**

<b>100MBit/s BES Connection External</b>	Year Ending		
	31-Mar-07	31-Mar-08	31-Mar-09
Average Price	£5,500.00	£5,482.12	£2,369.80
FAC	£1,618.68	£1,739.80	£1,007.87
Average Price / FAC	340%	315%	235%

<b>1GBit/s BES Connection External</b>	31-Mar-07
Average Price	£10,400.00
FAC	£5,766.30
Average Price / FAC	180%

30. Virgin notes that its own more detailed analysis builds on the position that Ofcom found in its Business Connectivity Market Review consultation of June 2008 where Ofcom had found based on their preliminary analysis that:

<sup>5</sup> Source: Page 50-53 of 'Current Cost Financial Statements for 2009 including Openreach, Statement for Ofcom', and Page 42 'Additional Information in relation to BT's Current Cost Financial Statements for 2008'. N.B. Y/e 31 Mar 2007 and 31 Mar 2008 are Per Circuit, while, y/e 31 Mar 2009 is Per End

- Charges for local ends for higher bandwidth WES/WEES service exceeded their costs for 06/07;
  - WES Connection charges with two exceptions appeared to be well above cost.
31. Virgin notes that Ofcom's analysis of 2006 pricing was conducted using list prices and a preliminary assessment of costs.
32. Virgin has conducted its analysis on a disaggregated basis (ie the separation of local end rentals and connection charges) which it believes is the correct approach based on the requirement that each and every charge should be reasonably derived from the costs of provision.
33. During the negotiations on this matter BT suggested that Local End Rentals should not be considered on a disaggregated basis but the charges should be aggregated with Mainlinks. However Virgin rejects this claim of aggregation of services on the basis that to do so would not only be wrong in principle but would also mean that the combined DSAC comparison would produce results that depend upon the proportions of services purchased. The Ethernet services (main link rental, local end connections and local end rentals) that Virgin and other carriers buy from BT are not purchased in fixed proportions and would therefore require Ofcom to carry out a series of cost orientation tests that differ by carrier. In the interests of regulatory certainty it is more appropriate to apply the DSAC test to each and every individual charge.
34. Virgin also believes that the correct way of approaching this dispute is to apply the DSAC test as a first order test. We are of the view that this is a reasonable measure and also well established method (going back to 1997) by which to undertake a first order assessment of compliance with a cost orientation obligation – and hence by which overcharging can be identified. The DSAC test is also accepted by BT as can be seen from the fact that in their own Primary Accounting Documents BT says the following “*A similar approach is taken with Stand Alone Costs in order to derive ceilings for individual components.*”

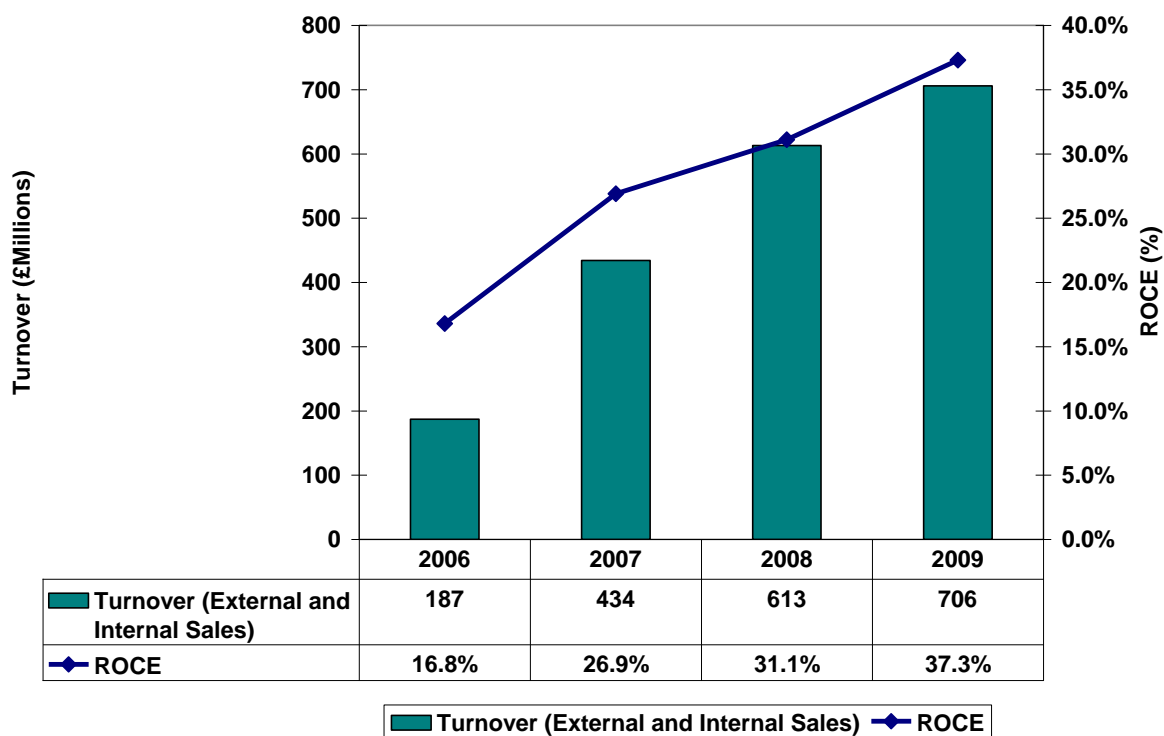
*The economic test for an unduly high price is that each service should be priced below its Stand Alone Cost. As with price floors this principle also applies to combinations of services. Complex combinatorial tests are avoided through the use of DSACs, which reduce pricing freedom by lowering the maximum price that can be charged. This results in ceilings for individual components that are below their actual SACs.”* BT also says that *“The SAC of Rest of Network components will also be calculated as a single figure. DSACs will be produced for the individual Rest of Network components, in the same way as DSACs are calculated for components within Core. The distribution of fixed common costs that are shared between Access and other increments is apportioned over the Access components using equal proportional mark-ups to derived DSACs. This method attributes the FCC to the components in proportion to the amounts of the cost category included within the LRIC of each component. The DSAC based ceilings for services will be, in some cases, considerably below the SAC of the service.”*<sup>6</sup>

35. Further, it is consistent with the approach taken by Ofcom in other recent disputes relating to alleged breaches of cost orientation including the PPC determination. It is also clear from Ofcom’s statement quoted above in paragraph 13 that it has been clear to all parties that the Oftel Access Guidelines would be applicable to issues of cost in the Ethernet market.

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<sup>6</sup> See BT Primary Accounting Documents 7 September 2006. See Section 5.3.5. Similar although not identical wording has been included in the Primary Accounting Documents in the years, 2007, 2008, 2009.

**Figure 1: BT Openreach Ethernet Financial performance<sup>7</sup>**



36. Virgin also notes that Figure 1 above illustrates that BT’s Return on Capital Employed (ROCE) for Ethernet services increased dramatically from 26.9% to 37.3% in 2009. This is much higher than the 11% WACC used in the 2008/9 Leased Line Charge Control applied to the below 1Gbit/s Ethernet market. In Virgin’s view the high ROCE in the Ethernet market clearly indicates the prevalence and persistence of excessive charges for Ethernet services.

37. The total overcharge that Virgin is claiming for has been calculated by taking the percentage referred to in paragraph 21 and multiplying it to the Virgin spend for each relevant service. Virgin’s spend has been sourced from BT invoices.

38. As Ofcom would be aware BT’s RFS do not disaggregate each service into the individual services that BT sells. BT’s RFS groups different services together. In relation to Ethernet services BT’s RFS, shows a summary of profitability by BES and WES services broken down into broad service categories (eg 10Mbit/s, 100Mbit/s, 1 Gbit/s and other speeds). So, for example the 10Mbit/s WES

<sup>7</sup> Source: BT’s Regulated Financial Statements. As per BT’s RFS the 2009 figures represents just the below 1Gbit/s and below Ethernet market in the year ending 31 March 2009.

service class includes all variants of the service such as: WES/WEES 10, WES/WEES10 Managed, WES/WEES 10 Local Reach, WES Local Access Managed. Virgin's spend has therefore been grouped into the categories shown in BT's RFS in order to ensure the same categories as BT's RFS.

### **C: HISTORY OF COMMERCIAL NEGOTIATIONS**

39. Virgin first approached BT about the overcharge of Ethernet services in 2009. Virgin met with BT on 23 October 2009 to outline its claim. Following this meeting a series of correspondence followed some of which was conducted on a without prejudice basis. Copies of the relevant e-mail exchanges and correspondence are provided at Tab 1 to this reference as well as meeting minutes of the 23 October 2009.
40. It is clear to Virgin that following BT's letter of 2 March 2010 there is no further room for discussion between the parties and that they are in dispute about the existence of an overcharge and the necessity for a repayment.

### **D: OFCOM'S JURISDICTION**

41. OFCOM has undoubted jurisdiction to determine this dispute; indeed, it is under a duty to do so.
42. Section 185(1)(a) of the Act provides that section 185 applies "in the case of a dispute relating to the provision of network access if it is...a dispute between different communications providers". Virgin and BT are both communications providers. The dispute relates to the provision of network access. This dispute therefore falls within s.185(1).
43. There is nothing in the wording of the Act that precludes its application to historic disputes. Indeed, s.190(2)(d) gives OFCOM power to make a direction

for payment “for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts *have been paid* by one of the parties of the dispute to the other” (emphasis added). This confirms that s.185 applies to disputes relating to the past, and not just disputes concerning the present and/or future.

44. This approach has been confirmed by the Competition Appeals Tribunal in its judgement of 11 June 2010. In paragraph 111 of the judgement (Tab 2) the Tribunal concluded “*We do not consider that the Dispute Resolution Process-at least when initiated under section 185(1) draws any distinction between current, prospective or historical disputes. The same conclusion probably pertains in relation to section 185(2), but (for the reasons given in paragraph [84] above) we have not had to construe section 185(2) and we do not do so.*”
45. The combined effect of ss.186(2) and (3) of the Act is that OFCOM has an obligation to determine a dispute referred under s.185, unless it considers:
- a. that there are alternative means available for resolving the dispute,
  - b. that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4; and
  - c. that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it.
46. In the present case, there are no alternative means for resolving the dispute. There is no cause of action before the civil courts and there is no prospect of ADR. BT has refused to resolve the dispute by negotiation. Virgin cannot compel BT to engage in ADR.
47. It follows that OFCOM is under a statutory duty to resolve this dispute.

## **E: DETAILS OF OVERPAYMENT**



48. As indicated above, Virgin seeks a direction under s.190 (2)(d) of the Act requiring BT to make a payment to Virgin of sums by way of adjustment of the overpayment of charges in respect of Ethernet services during the period 1 April 2006 and 31 March 2009.
49. Virgin asks OFCOM to make a direction under s.190 (2)(d) of the Act that BT pay the sum of £[~~5~~] plus interest or such other sum as Ofcom may determine, plus interest, to Virgin. Annex A sets out Virgin's calculation of the overpayment
50. Virgin believes that a direction for an overpayment is appropriate given the fact that BT is subject to an SMP obligation which requires it to charge cost oriented prices. The SMP obligation was imposed in order to resolve competition problems in the relevant market. Resolving the dispute in this way would therefore be fair as between BT and Virgin and would also be reasonable from the point of view of Ofcom's regulatory objectives and consistent with Ofcom's community requirements as set out in the Communications Act 2003.
51. In particular Virgin believes that resolving the dispute in this way is consistent with Ofcom's primary statutory duties under section 3 of the Communications Act 2003 to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In particular Virgin notes that resolving the dispute in this way would help to secure the availability throughout the United Kingdom of a wide range of electronic communications services by ensuring that competitors were able to compete with BT in relevant markets. In addition resolving the dispute in this way would promote competition in relevant markets, would encourage investment and innovation by competitors in relevant markets and would encourage the availability and use of high speed data transfer services throughout the UK.
52. Resolving the dispute in this way would also ensure be consistent with Ofcom's duty to act in accordance with the Community requirements under section 4 of the Communications Act. In particular Virgin refers to the first Community

requirement which requires Ofcom to promote competition in relation to the provision of electronic communications networks and electronic communications services, and the fifth Community requirement which requires Ofcom to encourage the provision of network access for the purpose of securing efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities and the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available.

**DECLARATION BY AN OFFICER OF THE COMPANY**

53. Before making this submission to OFCOM, to the best of my knowledge and belief, Virgin Media Limited has used its best endeavours to resolve this dispute through commercial negotiation.

Signed:

Position:

Date: