



**Broadcasting Transmission
Services: a review of the market**
Final statement

Consultation

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Section 1

Summary

- 1.1 A new regulatory framework for electronic communications networks and services entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The basis for the new regulatory framework is five EU Communications Directives.
- 1.2 The new Directives require national regulatory authorities (“NRAs”), such as Ofcom, to carry out reviews of competition in communications markets to ensure that regulation remains appropriate and proportionate in the light of changing market conditions. A series of market reviews has been carried out over the last 24 months and this review of broadcasting transmission services is one of the final reviews.

Scope of this review

The previous consultations

- 1.3 Ofcom consulted on its proposals on market definition, findings of significant market power (“SMP”) and regulatory remedies on 11 November 2004¹ (“the November consultation”). Ofcom has considered all the responses to this consultation carefully and taken them into account in making its final decision.
- 1.4 Ofcom's previous documents and statements in relation to broadcasting transmission may be found at http://www.ofcom.org.uk/consult/condocs/bcast_trans_serv/.

Ofcom's decision

- 1.5 This document sets out Ofcom's final decision and concludes the broadcasting transmission services market review.
- 1.6 Ofcom has identified the following markets for the purposes of assessing competition and imposing appropriate regulatory remedies:
 - Market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by Crown Castle for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a national, regional or metropolitan basis.
 - Market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by ntl:broadcast for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a national, regional or metropolitan basis.
 - Market for the provision of access to other masts, sites and shared or shareable antenna systems used for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users.

¹ http://www.ofcom.org.uk/consult/condocs/bcast_trans_serv/bts/?a=87101

- 1.7 These markets for access to masts and sites are unchanged from those previously consulted on. Further details of these market definitions, and the approach taken by Ofcom in identifying these markets, are contained in Section 3. A proposal to identify downstream markets for managed transmission services had also been consulted upon in that document, but that proposal was withdrawn on 24 January 2005. The provision of managed transmission services to digital public service broadcasters was addressed in the consultation document "Provision of Managed Transmission Services to Public Service Broadcasters", 28 February 2005². That consultation closed on 31 March.
- 1.8 Ofcom concludes that:
- Crown Castle holds a position of significant market power ("SMP") in the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by Crown Castle for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a national, regional or metropolitan basis.
 - ntl:broadcast holds a position of SMP in the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by ntl:broadcast for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a national, regional or metropolitan basis.
 - No supplier has SMP in the market for provision of access to other masts, sites and shared or shareable antenna systems used for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users.
- 1.9 Ofcom's market power assessment in this respect is unchanged from the November consultation. Further details of Ofcom's market power assessment are set out in Section 4.
- 1.10 Given the positions of dominance variously enjoyed by Crown Castle and ntl:broadcast, Ofcom imposes conditions on each of them in the markets in which they respectively have dominance as follows:
- requirement to provide network access to their respective masts and sites on reasonable request;
 - requirement not to unduly discriminate in that provision of network access;
 - requirement to provide network access to their respective masts and sites on cost-orientated terms;
 - requirement to publish a Reference Offer for that provision of network access.
- 1.11 Further details of the remedies imposed are contained in Section 5 and the conditions are contained in annex 2 to this document. The remedies are mainly unchanged from those set out in the November consultation, although some minor amendments are explained below.

² http://www.ofcom.org.uk/consult/condocs/bcast_trans_serv/must_carry/?a=87101

Discontinuation of existing regulation

- 1.12 As Ofcom has decided to impose remedies on Crown Castle and ntl:broadcast in the markets for access to their respective masts and sites, the continuation notices which had been issued to maintain the effect of certain provisions contained in licence conditions that existed under the Telecommunications Act 1984 prior to 25 July 2003 will now be discontinued (as discussed in 2.12 of the November consultation). The discontinuation notices are set out at annexes 4 and 5 to this document.

Section 2

Introduction

A new regulatory regime

- 2.1 A new regulatory framework for electronic communications networks and services entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The basis for the new regulatory framework is five EU Communications Directives:
- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the “Framework Directive”);
 - Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the “Access Directive”);
 - Directive 2002/20/EC on the authorisation of electronic communications networks and services (the “Authorisation Directive”);
 - Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services , (the “Universal Service Directive”); and
 - Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the “Privacy Directive”).
- 2.2 The Framework Directive provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives which read across all five Directives. Article 8 of the Framework Directive sets out three key policy objectives which have been taken into account in the preparation of this statement, namely promotion of competition, development of the internal market and the promotion of the interests of the citizens of the European Union. The Authorisation Directive establishes a new system whereby any person will be generally authorised to provide electronic communications services and/or networks without prior approval. The general authorisation replaces the former licensing regime. The Universal Service Directive defines a basic set of services that must be provided to end-users. The Access Directive sets out the terms on which providers may access each others' networks and services with a view to providing publicly available electronic communications services. These four Directives were implemented in the UK on 25 July 2003 by the Communications Act 2003 (the “Act”). The Privacy Directive establishes users' rights with regard to the privacy of their communications. This Directive was implemented by Regulations which came into force on 11 December 2003.

Market reviews

- 2.3 The new Directives require national regulatory authorities (“NRAs”), such as Ofcom, to carry out reviews of competition in communications markets to ensure that regulation remains appropriate and proportionate in the light of changing market conditions. A series of market reviews has been carried out over the last 24 months and this review of the market for broadcasting transmission services, to deliver broadcast content to end users, is one of the final reviews to be conducted.
- 2.4 Each market review has three stages:
- definition of the relevant market or markets;

- assessment of competition in each market, in particular whether any undertakings have significant market power (“SMP”) in a given market; and
- assessment of appropriate regulatory obligations where there has been a finding of SMP.

2.5 More detailed requirements and guidance concerning the conduct of market reviews are provided in the EU Communications Directives, the Act and in additional documents issued by the European Commission and Oftel. As required by the new regime, in conducting this review, Ofcom has taken the utmost account of the two European Commission documents discussed below.

Recommendation on relevant product and service markets

2.6 The European Commission has identified in its recommendation on relevant product and service markets, adopted on 11 February 2003 (the “Recommendation”), a set of product and service markets within the electronic communications sector, in which ex ante regulation may be warranted³. The Recommendation seeks to promote harmonisation across the European Union by ensuring that the same markets are subject to a market analysis in all the EU Member States. However, NRAs are able to regulate markets that differ from those identified in the Recommendation where this is justified by national circumstances and where the Commission does not raise any objections. Accordingly, NRAs are to define relevant markets appropriate to national circumstances, provided that the utmost account is taken of the markets listed in the Recommendation.

Guidelines on market analysis and the assessment of SMP

2.7 The European Commission has also issued guidelines on market analysis and the assessment of SMP (the “SMP Guidelines”)⁴. Ofcom is also required to take the utmost account of these guidelines when identifying a services market and when considering whether to make a market power determination under section 79 of the Act. Oftel produced additional guidelines on the criteria to assess effective competition, which can be found at http://www.ofcom.org.uk/static/archive/oftel/publications/about_oftel/2002/smpg0802.htm.

Scope of this review

2.8 This review addresses the broadcasting transmission services used to deliver broadcast content to end-users (i.e. viewers and listeners to television and radio) which is one of the markets identified in the Recommendation. These services include transmission of broadcast content to end users via cable, satellite and terrestrial transmission networks, but for reasons outlined at 3.17 – 3.25 of the November consultation this review has addressed terrestrial broadcasting transmission only. Terrestrial transmission is presently received via analogue and digital sources in households, but there are plans to switch fully to digital terrestrial broadcasting by 2012.

³ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

⁴ 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).

- 2.9 For UK television, terrestrial broadcasting transmission services are accessed through the masts and sites of the terrestrial transmission network. This network is currently operated by two companies, National Transcommunications Limited (“ntl:broadcast”) and Crown Castle UK Limited (“Crown Castle”), who operate a service split across the UK (they each have around half the sites, with no practical overlap between any of the sites with each other). To achieve a national service, ntl:broadcast and Crown Castle have been required under licence conditions (which were continued from July 2003) to share sites with each other.
- 2.10 For UK radio, this service is accessed both through the masts and sites of ntl:broadcast and Crown Castle, and in some cases via other provision such as mounting antennae on tall buildings. There is more potential overlap between ntl:broadcast and Crown Castle for the purposes of radio broadcasting to certain areas. This is discussed in section 3. A fuller description of the products and services is set out at 3.27 – 3.34 of the November consultation.
- 2.11 To date, what the UK terrestrial television broadcasters, primarily the public service broadcasters, acquire – either directly for analogue or via digital multiplex licensees – is a managed transmission service (“MTS”) from Crown Castle (BBC) and ntl:broadcast (the other PSBs). There are a number of commercial channels on digital multiplexes which also acquire an MTS, from both ntl:broadcast and Crown Castle via the multiplexes. This service involves content being sent from broadcasters’ studios to mast sites, and the transmission companies arranging for it to be transmitted from those mast sites to the viewers and listeners at home, as specified by the broadcasters. In the case of radio broadcasters, a similar situation applies. However, in some cases radio broadcasters may be able to use a wider range of locations from which to transmit, and ntl:broadcast and Crown Castle are not the exclusive providers of transmission from their sites. In some instances radio broadcasters self-provide MTS.
- 2.12 There are a range of elements involved in the terrestrial transmission of broadcast content to end-users. As mentioned above, the broadcasters’ content must be transported from their studio to the transmission site and thence to the end-user via terrestrial transmission. Transport from the studio to the transmission site may be carried out via a range of options including by fixed line and by satellite. The market review documents “A Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets: Final Statement and Notification” (issued by Ofcom on 24 June 2004) and “Wholesale International Services markets: Final Explanatory Statement and Notification” (issued by Ofcom on 18 November 2003) discussed those means of conveyance, and therefore those elements of transmission have not been analysed further. Also, the provision of MTS has been considered separately in the February 2005 Ofcom document “Provision of Managed Transmission Services to Public Service Broadcasters” and is not considered further here.

The previous consultations

- 2.13 Ofcom consulted on its proposals on market definition, findings of SMP and regulatory remedies on 11 November 2004. As required by Article 7 of the Framework Directive (as implemented by sections 50 and 81 of the Act), Ofcom’s proposals were also sent to the European Commission and to other NRAs. The proposals were also sent to the Secretary of State. As noted at 1.7, Ofcom subsequently withdrew from the November consultation the proposals relating to MTS. Ofcom has considered all responses relating to access to masts and sites carefully and taken them into account in making

its final decision. Where Ofcom's final decision differs from its proposals in either of the previous consultations, these differences are identified in each section.

Ofcom's decision

2.14 This document sets out Ofcom's final decision and concludes the broadcasting transmission services market review. Annex 2 contains the formal notification that implements Ofcom's decision.

Section 3

Market definition

3.1 Ofcom has considered the responses to the previous consultations carefully and has taken them into account in making its final decision. Ofcom's decision on market definition relating to access to masts and sites is unchanged from that set out in the previous consultation.

Introduction

3.2 Section 79(1) of the Act provides that before a market power determination may be considered, Ofcom must identify the markets which are, in its opinion, the ones which, in the circumstances of the United Kingdom, are the markets in relation to which it is appropriate to consider such a determination and to analyse those markets. In identifying relevant markets, Ofcom is required to take the utmost account of all applicable guidelines and recommendations issued by the Commission.

The market definition process

3.3 There are two dimensions to the definition of a relevant market: the relevant products to be included in the same market and the geographic extent of the market. Ofcom's approach to market definition follows that used by the UK competition authorities (see Office of Fair Trading: *Market Definition: Understanding competition law*, December 2004), which is in line with the approaches adopted by the European Commission (as set out in its *Notice on the definition of the relevant market for the purposes of Community competition law*⁵) and US authorities.

Upstream, intermediate and downstream markets

3.4 In the November consultation (3.48 – 3.55) Ofcom considered that there were three levels of services associated with terrestrial broadcasting of content to end users: upstream, intermediate and downstream levels. This review concerns the supply of services at the upstream level. Moreover, the access to masts and sites services under consideration are at the most upstream end of the value chain, and are generally used as inputs to other intermediate products such as the provision of managed transmission services to broadcasters or multiplex licensees.

3.5 However, in undertaking the relevant market definition exercise, it is informative first to consider competition at downstream levels, since demand for the relevant upstream products is driven by intermediate demand and ultimately by retail demand. As Ofcom discussed the retail and intermediate markets at length in the November consultation, and, given that MTS have now been considered separately, these discussions will not be reiterated here, but rather the market definition relevant to this document (the upstream markets for access to masts and sites) will be described here.

Retail product markets

3.6 The November consultation (3.58 – 3.64) discussed the nature of the retail markets for television and radio in detail. Ofcom considered that the following markets may exist at the retail level:

- Analogue television content broadcast to end users by terrestrial transmission;

⁵ OJ [1997] C372/5

- Analogue radio content broadcast to end users by terrestrial transmission;
- Digital television content broadcast to end users by terrestrial transmission;
- Digital radio content broadcast to end users by terrestrial transmission.

3.7 Ofcom has not received representations further to the November consultation which have caused its views in respect of this market to change. Therefore the market definitions outlined above remain. However, Ofcom also remains of the opinion that a view on the relevant retail markets is very significant because, as discussed at 3.97 – 3.103 of the November consultation, the definition of the wholesale markets is informed by, but not entirely determined by the market definition at the retail level.

Intermediate markets

3.8 The November consultation (3.66 – 3.81) discussed the nature of the intermediate market for managed broadcasting transmission services in detail. Ofcom proposed the following markets at the intermediate level:

- The provision of terrestrial managed transmissions services for the purpose of providing analogue and/or digital terrestrial broadcasting transmissions services within the United Kingdom, to deliver a national broadcast service;
- The provision of terrestrial managed transmission services for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver other than a national broadcast service.

3.9 As mentioned, Ofcom has now withdrawn its proposals in relation to these markets and is consulting separately on new proposals for regulating MTS.

Wholesale markets

Market for access to masts and sites: access for the purpose of national terrestrial television transmission and terrestrial radio transmission

3.10 With regard to the product market under consideration, Ofcom noted in the November consultation (3.104 – 3.107) that there is in practice no demand side substitution between digital and analogue terrestrial transmission. However, all access is typically provided by a single provider. This is because suppliers of access will seek to exploit the economies of scale and scope by providing access for analogue and digital transmission, both to television and (often) radio broadcasters. This suggests that competing providers of access will have to compete for customers rather than in relation to particular services per customers. Such competition means that customers choose the access provider who can provide the range of services at the lowest price. The fact that access services are typically provided as a cluster of a range of services suggests that all access services should be treated as part of the same wholesale market.

3.11 As discussed above (2.8 - 2.12), the main customers for access to mast and site networks operated by Crown Castle and ntl:broadcast are those companies themselves from each other, in order to provide MTS downstream. On the demand side, Crown Castle and ntl:broadcast may not, owing to the derived demand resulting from their customers' obligations, substitute to another transmission platform at the upstream market level⁶. The potential for Crown Castle and ntl:broadcast to switch is

⁶ Television broadcasters and multiplex licensees have specific obligations to use named masts and sites in order to serve their audiences, and these obligations will influence a managed transmission services provider's need for access to the upstream infrastructure. This is addressed in detail at section 3.35 of the November consultation.

therefore limited and would not constrain the pricing of a hypothetical monopolist in the market for access to masts and sites. As all terrestrial television customers for MTS have similar requirements with regards to obligations, any provider of television MTS needs to be able to access masts and sites and may not substitute to alternatives if they wish to provide that service. National radio broadcasters have similar constraints owing to the need to cover a large area and to purchase a nationwide bundle of access to masts, likely to be most readily achieved by using the mast networks of ntl:broadcast and Crown Castle.

Access to sites for national, regional and metropolitan transmission

- 3.12 There are similar constraints with regard to demand-side substitution in relation to accessing masts and sites for the purposes of terrestrial radio broadcasting for national, regional and metropolitan areas. For many radio licences, the ability of radio broadcasters to switch the sites from which they can transmit may be very limited. Thus the licence obligations may only be in practice secured by using all nationally available current masts and sites. Thus a provider of radio MTS would be faced with a certain number of broadcaster requirements that may only be met through accessing all sites nationally or regionally.
- 3.13 The key issue in this respect is likely to be the size of the mast and the power required for the transmission: a high powered transmission will tend to need to transmit from a significant height in order to cover the required area while remaining within spectrum constraints. These will tend to be best achieved by using the tall, purpose-built transmission masts and towers which are operated by ntl:broadcast and Crown Castle and which have been acquired, constructed or installed for the purpose of national, regional and metropolitan broadcasting. The detailed discussion of these issues is at paragraphs 3.35 – 3.47 of the November consultation.
- 3.14 There is scope for supply-side substitution at the upstream level of access to masts and sites as between the provision of access to the masts and sites for analogue and digital transmission of broadcast content and for both radio and television transmission of broadcast content. This is because masts and sites are generally common inputs across both radio and television MTS. However, supply side substitution from the owners of sites that are not currently used for television or radio broadcasting (for example telecommunications transmission) is in practice very difficult. This is because only particular sites and masts are suitable for television transmission – particularly due to height and location requirements. In addition, a supply side substitution would need to have alternative sites available throughout the country. This would be difficult given the planning constraints upon installing masts throughout the country (particularly if an existing mast were nearby already) and of securing a site which was in a suitable location for television viewers in particular, whose aerials will be pointing towards the mast of their existing transmitter. Supply side substitution by others from other sites is therefore unlikely to be feasible and would not therefore exercise a constraint on the ability of a hypothetical monopolist to raise prices above the competitive level.

Access to sites for other masts and sites

- 3.15 Several local radio broadcasters use independent sites such as tall buildings or masts operated by other parties (e.g. utilities, public services) for transmission. A local broadcaster already using sites, when faced with a price rise by a hypothetical monopolist above the competitive level might be able to secure access to similar alternative sites (where available – which is very likely as local transmission does not need to be from such a high vantage as other forms of transmission) without requiring

a cost based access to the sites used for national radio and television broadcasting transmission. The sites for which local broadcasters are likely to find alternatives are those which are likely to be below 50m in height and which carry transmissions below 2kW e.r.p. (effective radiated power). These are sites which will not primarily have been acquired, constructed or installed for the purpose of provision of national, regional and metropolitan terrestrial broadcasting transmission and although they may be used for broadcasting (amongst other things in many cases) they are likely to have alternative substitutes. Below those heights and power levels, substitutability is likely to be greater from alternative providers.

- 3.16 On the supply side too, should there be sufficient alternative sites in the close vicinity, access to those sites for the purposes of local broadcasting is likely to be easily made available. Ofcom notes that masts owned by other parties such as utilities and public services are also used for local broadcasting.
- 3.17 Ofcom is therefore of the view that competitive conditions in the market for sites used for local broadcasting are different to those used for other types of broadcasting. The market for access to sites for local transmission is therefore separate from the market for access to sites for the purpose of national, regional and metropolitan broadcasting transmission.

Geographic markets for access to masts and sites for the purpose of transmission

- 3.18 The access market for masts and sites is influenced by the need of the purchasers (providers at the intermediate level of MTS) to secure access to the masts and sites that will fulfil the requirements of their customers, the different broadcasters.
- 3.19 For television broadcasters (almost all of whom are presently national), they are totally constrained by their obligations as to which masts and sites they may use. Thus their MTS providers are similarly constrained and there is no geographic substitute to using the Crown Castle and ntl:broadcast sites as specified.
- 3.20 The situation is slightly different with regard to national, regional and metropolitan radio transmission. For some sites that are commercially significant for radio Ofcom is aware that there may be pairs of local substitutes: Croydon and Crystal Palace for London; Black Hill and Kirk O'Shotts for Glasgow and wider area; Sutton Coldfield and Lichfield for Birmingham and wider area; Divis and Black Mountain for Belfast and wider area; Rowridge and Chillerton Down for Southampton and the Isle of Wight; and Caldbeck and Sandale for Carlisle, Cumbria and Dumfries and Galloway. There may therefore be opportunities for supply side substitution between Crown Castle and ntl:broadcast for the provision of access to masts and sites to serve those areas, amongst others. Thus, it might be considered appropriate to identify a number of contestable local markets.
- 3.21 Ofcom is not minded to pursue this. Ofcom notes that radio transmission – particularly at the national, regional and metropolitan level tends to take place from sites at which television transmission also takes place, and in such cases the design of the sites will have been configured to meet the needs of television broadcasters. Similarly, given the greater cost of television transmission, the bulk of the income generated by such sites is likely to be from television. Ofcom notes that market definition is not an end in itself but is a tool aimed at the identification of positions of market power. Accordingly, it is of the view that the very limited degree of substitutability at such sites can be disregarded for the purpose of market definition as it would not in practice affect its views concerning significant market power.

- 3.22 The extent of the geographic market can be examined by analysing the competitive conditions in each geographic area. The economics of scale and scope mean that an MTS provider is likely to choose to secure a range or cluster of sites and masts to provide television and radio broadcasting. Although in some areas customers may be able to obtain access from multiple providers, the fact that access to the sites is sold in a bundle means that effectively, the choice is between the bundle offered by providers and not between individual sites in different geographic areas offered by different providers. In addition, the customers for access all have broadcast customers (radio and television) with similar requirements in terms of need to broadcast from specific locations. If a hypothetical monopolist of one site increased its prices, a company providing MTS to a broadcaster would not be able to substitute to an alternative mast owing to the broadcaster's obligations or location needs.
- 3.23 Throughout the UK there are 1,154 television broadcast masts and sites the ownership or operation of which is split broadly 50/50 between ntl:broadcast and Crown Castle. Each mast on each site for analogue and digital transmission provides full coverage for its area, therefore in the relevant area, the owner of the mast (ntl:broadcast or Crown Castle) has 100% market share. There is no practical overlap between the areas served by masts for television broadcasting; therefore the masts and sites of each company may be aggregated into two geographical markets. Although there is some measure of overlap between certain masts used for radio broadcasting (particularly in some regional/metropolitan areas such as for some London licence areas), as discussed at 3.20, for all practical purposes this overlap is between ntl:broadcast and Crown Castle only and will only have a practical substitutability in a limited number of cases – and ntl:broadcast and Crown Castle remain the major providers.
- 3.24 Although there are masts used (especially for local radio) which are not operated by ntl:broadcast or Crown Castle, they tend not to be high revenue sites and not used either for television. In the market for access to masts and sites, where Crown Castle, ntl:broadcast and others purchase access in order to provide a MTS, the hypothetical monopolist test suggests each mast is in a separate market due to lack of demand- and supply side substitutes in each area. To be able to offer MTS in a certain area a company needs to have access to the relevant mast in that area. However, as access to ntl:broadcast and Crown Castle sites is usually purchased in aggregate for broadcasting as a bundle with similar competitive conditions throughout (always for television), they shall be addressed here as two separate geographical markets for access to masts and sites.
- 3.25 As far as sites and masts used for local radio broadcasting are concerned, the analysis of the geographic market could imply that there are several localised markets between which the competitive conditions differ. However, Ofcom believes that such an analysis is unlikely to add clarity to the analysis. Ofcom believes that the geographic extent of the market for local sites is national. That is, access to masts and sites used for local broadcasting transmission may be considered to be one national market.

Responses to the November consultation

- 3.26 There was agreement from most respondents that there were markets for access to masts and sites. Some concern was expressed about the precision of the definition of the market for masts and sites for national, regional and metropolitan broadcasting and the fact that Ofcom had not provided an exact list of those sites to which access requirements would apply with regard to radio in particular (the list of national television sites is set out in licences). In informal discussions, Ofcom sought to elicit from stakeholders a more precise way in which to define those sites to which obligations would attach. Following those discussion, Ofcom considers that the

interpretation used in the consultation is the most precise which is reasonably practical, namely masts and sites acquired, constructed or installed for the purpose of national, regional and metropolitan broadcasting, likely to be those above 50m in height and/or broadcasting signals equal to or over 2kW e.r.p. (effective radiated power). CRCA proposed an alternative measure which used not more than 500W e.r.p. and a population measure (MCA) of fewer than 200,000 as reflecting the requirements of local radio. Ofcom's task is to find a method of distinguishing between sites for which there are few if any substitutes and those for which substitutes are reasonably readily available. A tall purpose-built structure is most likely to be needed for radio transmission either where the geographical coverage required necessitates higher power levels or when population density requires a high vantage point. The Institute of Local Television said that local television should not be forgotten, but acknowledged that it may be too early a stage to include local television in these considerations.

- 3.27 In summary, Ofcom's view is that the sites "acquired, constructed or installed for the purpose of national, regional and metropolitan broadcasting" are those:
- a. identified in transmission licences as part of the national television transmission network; or
 - b. used for radio transmission and either over 50m in height or where transmissions at or above 2kW e.r.p. is practised

Conclusion on market definition

- 3.28 Ofcom identifies the following markets, in relation to which it is appropriate to consider whether to make a market power determination, relevant to the current review:
- Market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by Crown Castle for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a national, regional or metropolitan basis.
 - Market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by ntl:broadcast for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a national, regional or metropolitan basis.
 - Market for the provision of access to other masts, sites and shared or shareable antenna systems used for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users.

Forward look

- 3.29 Ofcom does not expect the market definitions for access to masts and sites to change over the immediate future, as broadcasters are likely to remain tied to the use of ntl:broadcast and Crown Castle masts and sites by their obligations. The earliest break point which may affect the market is likely to be the 2008 – 2012 period during which time the installation work for digital switchover will be undertaken. The time period for this review should cover the period for the negotiation and agreement of contracts for switchover. In addition, Ofcom also notes stakeholders' views (in discussion) that the timing of any review would need to be carefully selected to not

introduce unhelpful uncertainty to the market at a time when the digital transmission switchover may be being rolled-out. Therefore, the most appropriate time to consider the state of the market may be when the switchover project has been well advanced, the post-switchover settlement will be clearer and any new developments (such as a greater presence of local television) may be taken into account.

For terrestrial radio transmission, a similar situation applies in that there is a foreseeable need for radio broadcasters to use analogue transmission and, as the digital radio market develops, digital terrestrial transmission. Despite the fact that digital radio is a growing sector, it seems likely that analogue radio will continue to remain important for a long period into the future.

The relationship between the market definition and the European Commission's Recommendation

3.30 In Section 2, it has been explained that Ofcom must take the utmost account of the Commission's SMP Guidelines and Recommendation.

3.31 The Commission has, in its Recommendation, defined the following as a relevant market in accordance with Article 15(3) of the Framework Directive:

Broadcasting transmission services, to deliver broadcast content to end users.

3.32 As explained at 2.8, the markets identified at 3.28 relate to terrestrial broadcasting transmission services only. The Commission's response⁷ to the UK's notification of 11 November 2004 invited Ofcom to have regard to any future Commission decision on trans-national satellite broadcasting transmission services under Article 15(4) of the Framework Directive. The Commission noted that should such a decision be taken, and should Ofcom be an NRA concerned by such a decision, Ofcom would be required to conduct the market analysis with regard to wholesale satellite transmission services with other NRAs identified in such a decision in line with Article 16(5) of the Framework Directive.

3.33 Ofcom notes this, and will have regard to any Commission decisions in this area.

The relationship between this market review and the Competition Act 1998 and Enterprise Act 2002 and EC Competition Law investigations

3.34 The economic analysis carried out in the November consultation and in this statement is for the purposes of determining the relevant markets and whether an undertaking or undertakings have SMP in the relevant markets. It is without prejudice to any economic analysis that may be carried out in relation to any investigation pursuant to the Competition Act 1998 (relating to the application of the Chapter I or II prohibitions) or the Enterprise Act 2002 or Articles 81 or 82 of the EC Treaty.

3.35 The fact that economic analysis carried out for a market review is without prejudice to future competition law investigations and decisions is recognised in Article 15(1) of the Framework Directive which provides that:

"...the recommendation shall identify...markets...the characteristics of which may be such as to justify the imposition of regulatory obligations...without prejudice to markets that may be defined in specific cases under competition law..."

⁷ Case UK/2004/0111: Broadcasting transmission services to deliver broadcast content to end users in the United Kingdom ("UK"). Comments pursuant to Article 7(3) of Directive 2002/21/EC1

- 3.36 This intention is further evidenced in the European Commission's SMP Guidelines, which state:

Paragraph 25: "...Article 15(1) of the Framework Directive makes clear that the markets to be defined by NRAs for the purpose of ex ante regulation are without prejudice to those defined by NCAs and by the Commission in the exercise of their respective powers under competition law in specific cases." (This is repeated at paragraph 27)

Paragraph 27: "...Although NRAs and competition authorities, when examining the same issues in the same circumstances and with the same objectives, should in principle reach the same conclusions, it cannot be excluded that, given the *differences outlined above, and in particular the broader focus of the NRAs' assessment, markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not always be identical.*"

Paragraph 28: "...market definitions under the new regulatory framework, even in similar areas, may in some cases, be different from those markets defined by competition authorities."

- 3.37 In addition, it is up to all communications providers to ensure that they comply with their legal obligations under all the laws applicable to the carrying out of their businesses. It is incumbent upon all providers to keep abreast of changes in the markets in which they operate, and in their position in such markets, which may result in legal obligations under the Competition Act 1998, the Enterprise Act 2002 or Articles 81 and 82 of the EC Treaty applying to their conduct.

Section 4

Market power assessment

- 4.1 Ofcom has considered the responses to the previous consultations relating to access to masts and sites carefully and has taken them into account in making its final decision. Ofcom's final decision on SMP is unchanged from that set out in the November consultation.

Introduction

- 4.2 Section 45 of the Act details the various conditions that may be set under the new regime. Section 46 details those on whom conditions may be imposed. In relation to SMP services conditions, section 46(7) provides that they may be imposed on a particular person who is a communications provider or a person who makes associated facilities available and who has been determined to have SMP in a "services market", i.e. a specific market for electronic communications networks, electronic communications services or associated facilities. Accordingly, having identified the relevant market, Ofcom is required to analyse the market in order to assess whether any person or persons have SMP as defined in section 78 of the Act (in line with Article 14 of the Framework Directive).
- 4.3 Under section 78(1) of the Act and Article 14 of the Framework Directive, SMP has been defined so that it is equivalent to the competition law concept of dominance. Specifically, the Framework Directive states that *"An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."*
- 4.4 The Framework Directive and the Commission's SMP Guidelines state that a market shall be deemed effectively competitive if no communications provider in that market, either individually or collectively, has SMP.
- 4.5 SMP may be held by only one company in the market (single dominance) or by more than one company together (collective dominance). The SMP assessment in this review focuses on single dominance as Ofcom does not believe that there is a realistic possibility that SMP is held by more than one company in the access markets considered (since Crown Castle's and ntl:broadcast's respective networks have no practical overlap, for example). As a consequence, none of the criteria to assess collective dominance will be reviewed further in this analysis.
- 4.6 The assessments of SMP outlined below have been based on the evidence available to Ofcom and have taken account of the comments made in response to the November consultation
- 4.7 In assessing whether any undertaking has SMP within these relevant markets, Ofcom has taken the utmost account of all relevant European Commission recommendations and guidelines, including the Commission's SMP Guidelines.

Assessment of SMP against relevant criteria: markets for access to masts and sites for (respectively) ntl:broadcast and Crown Castle to provide terrestrial broadcast services for national, regional and metropolitan transmission

- 4.8 In Ofcom's view, the most important criteria for the assessment of SMP in the markets for provision of access to masts and sites are: market share, control of an infrastructure which may not be easily duplicated, barriers to entry and countervailing buyer power.

Market share

- 4.9 Paragraph 75 of the SMP Guidelines states that "Market shares are often used as a proxy for market power... According to established case law, very large market shares – in excess of 50% – are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position."
- 4.10 Ofcom has defined two national markets for access to, respectively, well over 500 Crown Castle and ntl:broadcast sites. There are very limited possibilities for a service provider seeking access to a Crown Castle site to access an ntl:broadcast site (or vice versa) as an alternative (there is a very limited degree of overlap in radio and no practical overlap for television). Each company therefore can be regarded as holding a virtual 100% share of its respective market. Moreover, this situation has persisted for at least 20 years, albeit that ownership of each group of sites has changed during that period. As indicated in the SMP Guidelines such a high market share suggests strongly that the owner of any network of masts has SMP in that geographic market.
- 4.11 However, as the existence of a large market share cannot on its own establish that a dominant position exists Ofcom has considered the overall economic characteristics of the market, particularly taking into account the further criteria set out below.

Barriers to entry and control of infrastructure

- 4.12 Control or ownership of a large network may present a significant barrier to entering that market, particularly if a competitor would have to invest large costs and time to replicate the infrastructure. Both ntl:broadcast and Crown Castle have control of their respective infrastructure, i.e. the masts and sites required for terrestrial broadcasting transmission, which is not easily duplicated. There are large sunk costs involved in entering this market e.g. the location and acquisition of land and the installation of masts. Such costs, once sunk could not be recovered on exit from the market as the mast network has limited alternative usage. Even without the sunk costs involved, there is little potential for entry as any entrant would find it extremely difficult to obtain the necessary permissions (e.g. planning) to establish a duplicating mast network. Oftel previously concluded (November consultation, 4.14) that there was no potential for new entry into these markets owing not least to planning restrictions, and there have been no subsequent changes to planning rules which would cause Ofcom to change this view. The only entrants into this market over the last 20 years have been through privatisation and acquisition, not by organic growth and Ofcom is of the view that this situation may persist.

Countervailing buyer power

- 4.13 In theory, ntl:broadcast and Crown Castle could exercise some measure of countervailing buyer power on each other, as each requires access to the other's sites and could threaten retaliatory action if access on reasonable terms were refused. In practice, they have addressed this requirement for access by putting in place an

agreement to share the sites and masts on mutually agreed terms. There is no additional countervailing buyer power that each can exert on the other. However, there is no incentive for either company to allow access to its sites to any other party as such access would increase competition for its downstream business. Ofcom therefore considers that there is presently very limited countervailing buyer power that a third party can have at the upstream level of access to masts and sites.

Conclusion on significant market power

4.14 Ofcom's conclusion on the basis of the economic characteristics explained above is that each of ntl:broadcast and Crown Castle have a position of SMP as set out in 4.3 in relation to the respective markets for access to the masts and sites acquired, constructed or installed by each of them for the purposes of national, regional and metropolitan; analogue and digital television and radio broadcasting.

Likelihood of competition developing in the future

4.15 Ofcom considers that it is highly likely that the proposed SMP of each of ntl:broadcast and Crown Castle in the upstream wholesale market for access to masts and site is durable for the period of this review. As noted above, the markets are not dynamic (e.g. limited prospect of entry) and Ofcom considers that the present conditions are likely to persist (especially the entry barriers such as cost of establishing a mast network and planning obstacles to doing so). Similarly Ofcom does not anticipate a change in buyer power as the obligations for broadcasters to continue to use terrestrial transmission are expected to persist in the digital era.

Market power assessment in the market for access to other masts and sites for local broadcasting transmission

4.16 Local broadcasting is primarily radio. There are a very limited number of local television licensees and some of them are for limited periods, so that their presence is unlikely to affect an analysis of competition in the market for access to sites and masts for local broadcasting transmission. Local radio transmission has significant differences to national, regional and metropolitan transmission. The costs of supply are much lower and broadcasters have greater flexibility over transmission locations – they are not required to use designated sites in the way that television broadcasters are; nor do they need to use masts of a considerable height to serve a large population or geographic area. A local radio broadcaster does not need to transmit from large, purpose-built masts but may rather in many cases secure optimum coverage from rooftops or from non-broadcasting sites. An illustration of the lack of barriers to entry in this field is that it is easy to establish very short-term broadcasting projects (which may cover a sporting event or a school fair). Ofcom's conclusion is that the local market for access to masts and sites is effectively competitive, and that there is no SMP.

4.17 Should a case arise where a particular mast (owned or operated by ntl:broadcast, Crown Castle or another party) is the only effective site which may be used by a local broadcaster and were that site to be an essential facility for such a broadcaster, Ofcom would consider its powers to deal with such a scenario. Ofcom does not currently consider that it would be proportionate to impose ex-ante regulation for access to such sites.

Responses to the November consultation

- 4.18 One respondent took the view that the long-standing existence of a site sharing agreement between ntl:broadcast and Crown Castle suggested that further ex ante regulation in that area was not required. A respondent also took the view that many sites which were important for national, regional and metropolitan radio broadcasters were not owned or operated by either Crown Castle or ntl:broadcast and that this should be taken into account when considering SMP..
- 4.19 Ofcom notes this, but takes the view that the fundamental issue with regard to market power is the substitutability of individual sites for broadcasting. In the November consultation, Ofcom had drawn attention to the fact that there would be situations in which there might be some competition between ntl:broadcast and Crown Castle and indeed other providers of transmission sites (3.111). However, access to sites is not generally sold at the level of the individual site but at the level of the set of sites owned by each of ntl:broadcast and Crown Castle. The relevant question, in terms of the impact of the cases where there was some degree of substitutability between sites owned by different companies, is then whether that substitutability is sufficient to constrain the price of access to the set of sites. Given the very small number of sites where substitutability is possible, Ofcom took the view that the constraint was insufficient to constrain prices, and that it did not undermine the finding that the sites owned by ntl:broadcast and those owned by Crown Castle were each in a separate market.
- 4.20 Ofcom's aim in regulation of masts and sites is to promote greater competition and market entry for the provision of broadcasting services downstream, including self-provision. Ofcom acknowledges that the site sharing agreements have enabled both Crown Castle and ntl:broadcast to offer broadcasting services across the UK, but to maintain that situation alone would lead to an ossification of provision downstream, with no fundamental incentive for either ntl:broadcast or Crown Castle to permit any form of third party entry or self-provision – leading to a diminution of prospects for greater competition going forward. With regard to individual sites which may not be under Crown Castle nor ntl:broadcast's control, Ofcom notes (as at 4.17) that it would consider its powers to deal with such a scenario if it arose.

Section 5

Approach to regulatory remedies

- 5.1 As explained in section 4, Ofcom takes the view that ntl:broadcast and Crown Castle have SMP in the respective markets for access to their masts and sites for the purposes of terrestrial broadcast transmission services on a national, regional and metropolitan basis. In this section, Ofcom proposes the SMP services conditions to be set as the regulatory remedies to deal with ntl:broadcast and Crown Castle's SMP.
- 5.2 Ofcom has considered the responses to the previous consultation in relation to access to masts and sites carefully and has taken them into account in coming to its final decision. Ofcom's final decision on general remedies is unchanged, although a few minor changes are explained below.

Legal framework

- 5.3 Section 87(1) of the Act provides that, where Ofcom has made a determination that a person is dominant in a particular market, it must set such SMP services conditions as it considers appropriate and as are authorised in the Act. This implements Article 8 of the Access Directive.
- 5.4 Paragraphs 21 and 114 of the Commission's SMP Guidelines state that NRAs must impose one or more SMP conditions on a dominant provider and that it would be inconsistent with the objectives of the Framework Directive not to impose any SMP conditions on an undertaking which has SMP. This creates a strong presumption that Ofcom should impose at least one appropriate SMP condition where SMP is confirmed.
- 5.5 The Act (sections 45-50 and 87-92) sets out the obligations that Ofcom can impose if it finds that any undertaking has SMP. Sections 87 to 92 implement Articles 9 to 13 of the Access Directive and Articles 17 to 19 of the Universal Service Directive. The obligations relevant to this market review are, in particular:
- the provision of network access on reasonable request;
 - no undue discrimination;
 - basis of charges; and
 - transparency.

Communications Act tests

- 5.6 Recital 27 of the Framework Directive provides that ex-ante regulation should only be imposed where there is not effective competition and where competition law remedies are not sufficient to address the problem. In order to provide a full analysis, Ofcom has, therefore, also considered the option of no ex- ante regulation, and whether it would be sufficient to rely on competition law alone, while noting the presumption referred to in paragraph 5.3.
- 5.7 Section 4 of the Act sets out the Community duties on Ofcom which flow from Article 8 of the Framework Directive. Ofcom, in considering whether to impose any conditions has considered all of these requirements. In particular, it has considered the requirement to promote competition in relation to the provision of electronic

communications networks, electronic communications services and associated facilities. Section 3 of the Act sets out Ofcom's general duties and Ofcom has also taken these into consideration in this document, particular the desirability of promoting competition.

5.8 As well as being appropriate (see section 87(1)), each SMP condition must also satisfy the tests set out in section 47 of the Act, namely that each condition must be:

- objectively justifiable in relation to the networks, services or facilities to which it relates;
- not such as to discriminate unduly against particular persons or a particular description of persons;
- proportionate as to what the condition is intended to achieve; and
- in relation to what it is intended to achieve, transparent.

5.9 It is Ofcom's view that the remedies imposed satisfy the relevant requirements specified in the Act and relevant EU Directives, as detailed above. This view is explained in detail in the following sections.

Joint ERG/EC approach on appropriate remedies in the new regulatory framework

5.10 The European Regulators Group and the Commission have jointly issued a document entitled Joint ERG/EC approach on appropriate remedies in the new regulatory framework, 23 April 2004, that sets out practical guidance on the selection of appropriate remedies to be imposed on providers of SMP. Ofcom participated fully in the preparation of that document and believes that the remedies set out below are consistent with the guidance provided by the ERG and the Commission.

Impact assessment

5.11 The analysis set out in annex 5 represents an impact assessment for the purposes of section 7 of the Act. Impact assessments provide a valuable way of assessing different options for regulation and showing why a preferred option is chosen. They form part of best practice policymaking and are commonly used by other regulators.

5.12 Ofcom is required to carry out an impact assessment where, amongst other things, regulation is likely to have a significant impact on persons carrying on businesses in the markets for any of the services, facilities, apparatus or directories, in relation to which Ofcom carries out its functions.

5.13 Ofcom has considered the responses to the previous consultation carefully and has taken them into account in coming to its final decision. Ofcom's final decision on general remedies is unchanged although a few minor changes are explained below.

Characteristics of communications markets in general

5.14 Generally, the case for ex ante regulation in communications markets is based on the existence of market failures, which, by themselves or in combination, mean that competition might not be able to become established, if the regulator relied solely on its ex post competition law powers that are established for dealing with more conventional sectors of the economy. Therefore, it is appropriate for ex ante regulation to be used to address these market failures and any entry barriers that might otherwise prevent effective competition from becoming established. By

imposing ex ante regulation that promotes competition, it may be possible to reduce such regulation, as markets become more competitive, and place greater reliance on ex post competition law.

Aims of regulation

5.15 The purpose of regulation is to ensure that broadcasting transmission services may be secured on reasonable terms. Ultimately, this is to the benefit of viewers and listeners. Given the position of SMP that Ofcom has identified in the markets for access to masts and sites, there is a risk that, in the absence of regulation, the SMP players would exploit that market power thus restricting opportunities for market entry; by raising prices for access to the wholesale inputs above a competitive level, or by supplying on terms inferior to those which could be expected in a competitive market.

Remedies: markets for access to masts and sites for the purposes of national, regional and metropolitan terrestrial broadcasting

5.16 Ofcom considers that, given the designated SMP status of ntl:broadcast and Crown Castle in their respective markets for access to masts and sites, it is necessary to impose ex ante regulation upon the two providers of masts and sites for terrestrial broadcasting services.

5.17 Having considered the arguments raised during Ofcom's November consultation and summarised below, Ofcom has decided to impose a limited set of access obligations on the operators of the terrestrial masts and sites, ntl:broadcast and Crown Castle. The obligations comprise:

- requirement to provide network access which has been reasonably requested on fair and reasonable terms;
- requirement not to discriminate unduly;
- requirement that charges should be reasonably related to costs of provision; and
- requirement to publish a reference offer.

5.18 Subject to the elaboration of the reference offer requirement discussed in paragraph 5.73, these are in line with Ofcom's proposals in the November consultation. The obligations will only apply within the market in which SMP has been identified, that is, the market for access to the masts and sites developed for the purpose of national, regional and metropolitan transmission. They apply to the extent necessary for the purposes of national, regional and metropolitan broadcasting transmission services, to deliver content to end users. Ofcom does not intend to regulate access to other masts and sites or to access provided for other purposes as these are likely to fall outside the markets defined.

5.19 The term "network access" is very broadly defined in the Act. Without intending to limit the scope of the definition, in this context it means such access to the sites, masts and antenna systems (including where applicable, access to allow for the installation and maintenance of broadcast transmission equipment and related equipment and for the connection of such equipment to power and other essential services) as is necessary from time to time to enable a third party public electronic communications provider effectively to provide analogue and/or digital terrestrial broadcasting transmission services. It would in particular cover the following services provided by site operators:

- access to allow for the installation and maintenance of broadcast transmission equipment and related equipment (or provision of access to permit installation by third parties);
- access to allow for the connection of such equipment to power and other essential services;
- access to sites for the use or establishment of common or exclusive building accommodation;
- access to and use of shared or shareable broadcast equipment comprising combiners, feeders, data lines, antennae, transmitters and self-contained equipment housing.

- 5.20 The reference offer will set out the terms on which services expected to be commonly provided are made available by the site operators to public electronic communications network or service providers, for example, providers of managed transmission services. It does not represent an exhaustive list of the services which might be the subject of a reasonable request. Its purpose is to provide a sufficient degree of certainty to allow providers of managed transmission services to plan and run their businesses efficiently, while not preventing them from submitting bespoke requests or requesting additional services where circumstances suggest it. Any terms not covered by the reference offer would, in the first instance, be subject to commercial negotiation with a right for either party to bring a dispute about such terms to Ofcom for resolution.
- 5.21 The reference offer would make clear, amongst other things, the different charges to be applied for different elements of network access. Such charges should be cost-orientated.

Treatment of existing contracts under the new regulations

- 5.22 Ofcom considers that to require all existing contracts to be renegotiated to match certain aspects of the proposed regulations would be disproportionate. In particular, the terms of the reference offer deal with the offer of access as provided from this point, and to require the providers to renegotiate existing, long-running contracts in order to match the newly-developed reference offer would be burdensome both upon the provider and their customers. This also applies to existing contracts with regard to cost-orientation and non-discrimination.
- 5.23 In the November consultation, Ofcom also proposed that the remedies should not apply to existing analogue contracts and included a specific exclusion in the remedies to that effect. This was on the basis that existing analogue MTS contracts appeared likely to be rolled over, implying that no change for apparently satisfactory existing commercial access arrangements in respect of those contracts was likely to be necessary. However, the underlying premise now appears less likely to be fulfilled. Accordingly, Ofcom no longer sees a justification for a broad exclusion for analogue transmission – there may be a need for third parties to seek access for the purpose of analogue transmission, and in such a case, ntl:broadcast and Crown Castle should be obliged to provide the relevant statement or reference offer (depending on timing) in response to a reasonable request.
- 5.24 Ofcom does however believe that the network access obligations (JA1 and JB1 below) should apply to existing contracts, as the required service will be needed, as sought by the customers. Any refusal to supply, cessation of supply or imposition of unreasonable terms of supply by ntl:broadcast or Crown Castle would have serious consequences for the ability of broadcasters to continue to supply their services.

5.25 Ofcom also believes that all new contracts must comply with the terms of the reference offer and the no undue discrimination and cost-orientation obligations, and that the same should apply to contracts which represent a material amendment to an existing contract. This is to ensure that any provision of managed transmission under new or revised contracts is provided on the terms covered by the proposed SMP conditions. Moreover, all access, whether covered by an existing access agreement or not, should be supplied on fair and reasonable terms.

Ofcom's views on regulation: market for access to masts and sites for the purpose of provision of national, regional and metropolitan broadcasting transmission services

5.26 Ofcom, having taking into consideration the views expressed in the November consultation, concludes that network access obligations should be imposed on ntl:broadcast and Crown Castle in respect of their masts and sites, for the purposes of providing national, regional and metropolitan terrestrial transmission, to deliver broadcast content to end users.

5.27 The requirement to offer network access means that either ntl:broadcast, Crown Castle, or third party public electronic communications providers would be able to enter the market for the provision of managed transmission services for broadcasting. The network access obligations should serve to deter excessive pricing at the level of access to masts and sites (and otherwise promote reasonable terms of supply) and as a consequence may help to promote competition and prevent excessive prices downstream in relation to MTS.

5.28 The primary measures of success of these remedies is that access to masts and sites would be available on reasonable terms. An additional measure of success would be if, over time, the market for managed transmission became more dynamic with more entrants (whether third parties or broadcasters self-supplying) becoming engaged in the market.

5.29 In the event of a dispute or complaint arising about charges for network access, Ofcom would aim to exercise the information-gathering powers in Article 5 of the Framework Directive or under the Competition Act in order to collect information about underlying costs.

Specific conditions to be applied to ntl:broadcast and Crown Castle in relation to masts and sites

Requirement to provide network access on fair and reasonable terms which has been reasonably requested for the purposes of national, regional and metropolitan broadcasting transmission

5.30 Section 87(3) of the Act authorises the setting of SMP services conditions requiring the dominant providers (i.e. each of ntl:broadcast and Crown Castle) to provide network access as Ofcom may from time to time provide. These conditions may, pursuant to section 87(5), include provision for securing fairness and reasonableness in the way in which requests for network access are made and responded to and for securing that the obligations in the conditions are complied with within periods and at times required by or under the conditions. When considering the imposition of such conditions in a particular case, Ofcom must have regard to the six factors set out in section 87(4) of the Act, including, inter alia, the technical and economic viability of the network access.

- 5.31 This aims to address the problem outlined in section 4: that ntl:broadcast and Crown Castle have SMP in the market for access to their respective networks for terrestrial broadcasting transmission. As discussed, market entry into these markets would be daunting and unlikely at this time – there are substantial barriers to entry. Ofcom has decided that the obligation should be framed in terms of the dominant provider being required to provide network access to its network to Third Parties on reasonable request. Network access is a fairly broad term and is defined in sections 151(3) and (4) of the Act. Third Party has been defined as a person providing a public electronic communications network or a public electronic communications services. Accordingly, any party that is not a provider of an ECN or an ECS may not get regulated access. Any party seeking access to ntl:broadcast and Crown Castle’s masts would be doing so in order to provide terrestrial broadcasting transmission services (an ECS).
- 5.32 Under this condition, Ofcom has the power to make directions. It is envisaged that this power would be used, where appropriate, to deal with issues relating to specific forms of network access or the particular terms and conditions on which network access is provided. This condition requires the dominant providers to comply with any such direction. Any contravention of a direction may therefore result in a contravention of the condition itself and thus be subject to enforcement action under sections 94 – 104 of the Act.
- 5.33 Further guidance as to how Ofcom proposes to apply the network access obligation may be found in “Imposing access obligations under the new EU Directives September 2002” (“the Access Guidelines”) which may be found at http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/acce0902.htm. Ofcom is currently considering issuing further guidelines on discrimination, on which it intends to consult shortly.
- 5.34 Unlike the other conditions proposed for these markets and discussed below, this condition will apply to all access provided within these markets, whether provided under the terms of existing agreements or new contracts.

Communication Act tests

- 5.35 Ofcom considers that the condition (condition JA1 and JB1 for ntl:broadcast and Crown Castle respectively, at annex 2) meets the tests set out in the Act.
- 5.36 Ofcom has considered its duties under section 3 and all the Community requirements set out in section 4 of the Act. In particular, the condition is aimed at promoting competition in downstream markets by opening up access to the masts and sites network, and securing efficient and sustainable competition for the maximum benefits for end users; by mitigating the SMP held by ntl:broadcast and Crown Castle as discussed in section 4 of this document.
- 5.37 Section 47 requires that conditions be objectively justifiable, non-discriminatory, proportionate and transparent.
- 5.38 This condition would require ntl:broadcast and Crown Castle to provide access to their masts and sites to providers of public electronic communications networks (ECN) and electronic communications services (ECS) for the purposes of terrestrial broadcasting transmission on reasonable request. This aims to address the problem that there is a very limited choice of masts and sites (none at all for national television transmission) from which providers of managed transmission services may secure transmission for terrestrial broadcasters. The scope of the requirement is proportionate as it has been carefully drawn to address the networks of masts and sites for which Ofcom believes

there are no effective substitutes. For television broadcasting, the lists of sites appended to broadcasters' obligations effectively set out an indicative list of the sites to which the obligation should attach. With regard to national, regional and metropolitan radio broadcasting, there are differences. Ofcom is aware that there is likely to be substitutability for smaller masts and towers and that broadcasting may take place from sites which have not been acquired, constructed or installed for that purpose. It is likely in such cases that an access obligation would be disproportionate. Also, a key aspect of transmission which leads to radio broadcasters having limited or no choice as to which mast and site are used is transmission strength and therefore Ofcom has sought to distinguish between the different types of sites to which the access obligation should be attached for radio broadcasting: the obligation should attach to sites acquired, constructed or installed for the purpose of broadcasting, and to those sites which either exceed 50m in height or from which radio transmissions exceed 2kW e.r.p. Thus the obligation relates specifically to the market where SMP has been identified and allows access to be denied where a request is not reasonable. In these respects Ofcom considers the proposed condition to be objectively justifiable. It does not discriminate against terrestrial transmission methods as competitive conditions are different in relation to terrestrial transmission compared to other modes of transmission, and it is transparent as it applies to the specific area where SMP is held, and will lead to the production of a reference offer which makes clear to all what is on offer.

- 5.39 The requirement upon ntl:broadcast and Crown Castle to provide network access on fair and reasonable terms guards against ntl:broadcast and Crown Castle using their SMP to raise prices to an excessive level or to supply on terms inferior to those which would be available in a competitive market. The ERG Common Position on Remedies notes that conditions covering fairness and reasonableness may be particularly useful to protect against strategies aimed at restricting access such as excessive pricing. It is proportionate as it is addressed specifically to the market where SMP resides. It does not preclude ntl:broadcast and Crown Castle from differentiating in price (e.g. for bundled services) where such differentiation may be objectively justified.
- 5.40 Section 87(4) of the Act requires that Ofcom take into account the technical feasibility of the provision of a network access requirement. The network access requirement being proposed for each of ntl:broadcast and Crown Castle is broadly akin to that already provided by those companies to each other under their present site sharing agreement and thus the technical feasibility of offering the network access should not be in doubt. In addition, in line with section 87(4)(d), Ofcom considers that the requirement to provide network access in this upstream market is important in order to secure effective competition in the long term in relation to downstream services.

Requirement not to unduly discriminate

- 5.41 Section 87(6)(a) of the Act authorises the setting of an SMP services condition requiring the dominant provider not to unduly discriminate against particular persons, or against a particular description of persons, in relation to matters connected with the provision of network access.
- 5.42 Where providers with SMP are vertically integrated, like ntl:broadcast and Crown Castle, there are incentives for them to provide wholesale services on terms and conditions that discriminate in favour of any downstream activities in such a way as to have an effect on competition. In particular, there are incentives to charge competing providers more for inputs than the amount charged to any downstream arms thereby increasing the costs of competing providers and providing themselves with an unfair competitive advantage. They might also provide services on different terms and

conditions, for example with different delivery timescales, which would disadvantage competing providers and in turn consumers.

- 5.43 A requirement not to unduly discriminate is intended, principally, to prevent dominant providers from discriminating in favour of their own downstream activities and to ensure that competing providers are placed in an equivalent position to their downstream arms.
- 5.44 A prohibition of discrimination might have disadvantages if it prevented discrimination that was economically efficient or justified. However, the proposed condition provides that there should be no undue discrimination. Oftel's Access Guidelines note that the application of a condition prohibiting undue discrimination does not mean that there should not be any differences in treatment between undertakings, rather that any differences should be objectively justifiable, for example, by differences in underlying costs of supplying different undertakings. The Access Guidelines, however, also note that there is a rebuttable presumption that a vertically integrated SMP operator discriminating in favour of its own downstream activities or between its own different activities would have an effect on competition (paragraph 3.9). As already noted, Ofcom intends to consult on its non-discrimination guidelines shortly.
- 5.45 Ofcom therefore has decided to apply a non-discrimination obligation in the market for access to the masts and sites of each of ntl:broadcast and Crown Castle for the purpose of national, regional and metropolitan broadcasting in which each of ntl:broadcast and Crown Castle have SMP. This accords with Recital 17 of the Access Directive, which states that non-discrimination obligations ensure that undertakings with market power do not distort competition, in particularly where they are vertically integrated undertakings that supply inputs to their own downstream provision.
- 5.46 For the reasons described in paragraphs 5.22 – 5.25, Ofcom considers that the non-discrimination requirement should not apply in respect of access granted under existing access agreements for the purpose of fulfilling existing managed transmission contracts.
- 5.47 Ofcom considered whether it would be appropriate to time-limit this exemption but is of the view that it is not necessary. It will become otiose in due course, as the existing contracts expire or are amended, renewed or extended. In the meantime, purchasers under new contracts are fully protected by the conditions summarised in 5.17.
- 5.48 Ofcom has also decided to delete Conditions JA2.2 and JB2.2. These provisions were intended to be an example of how the no undue discrimination provisions in JA2.1 and JB2.1 would apply in practice. As noted above, Ofcom intends to consult on guidelines for interpreting no undue discrimination and, for clarity, Ofcom therefore considers it appropriate to delete JA2.2 and JB2.2.

Communication Act tests

- 5.49 Ofcom considers that the condition (conditions JA2 and JB2 for ntl:broadcast and Crown Castle respectively at annex 2) meets the tests set out in the Act.
- 5.50 Ofcom has considered its duties under section 3 and all the Community requirements set out in section 4 of the Act. In particular the condition aims to promote competition and secure efficient and sustainable competition for the maximum benefit of end users by promoting competition in downstream services for terrestrial broadcasting transmission.

5.51 Section 47 requires that conditions be objectively justifiable, non-discriminatory, proportionate and transparent. This condition requires ntl:broadcast and Crown Castle not to unduly discriminate when providing access to their masts and sites for the purpose of terrestrial broadcasting. This is an objectively justifiable requirement as both ntl:broadcast and Crown Castle have SMP in their respective markets. It ensures that all public ECS and ECN providers entering the market to compete in the provision of downstream services will be treated in a broadly equivalent manner. It is proportionate as it does not preclude differential pricing where such differentiation may be objectively justified. It does not unduly discriminate as it applies only to those operators found to have SMP and its scope is limited by the extent of the SMP. It is transparent because the condition is clearly explained here and set out in annex 2.

Requirement that charges for network access be reasonably derived from the costs of provision

5.52 Section 87(9) of the Act authorises the setting of SMP service conditions imposing rules regarding the recovery of costs and cost orientation on dominant providers.

5.53 In a competitive market, the pricing of services on the basis of the commercial judgements of individual companies could be expected to deliver cost-reflective pricing. However, where competition cannot be expected to provide effective pricing constraints, ex-ante regulation is desirable to prevent excessive pricing. Such intervention should also have as its objective the aim of moving the market towards a position where effective competition is realised. Where the competition problem arises at an upstream stage in the production chain, it is likely to be appropriate to regulate the pricing of wholesale inputs, in order to allow effective competition to develop in downstream markets, rather than control downstream prices themselves.

5.54 In markets where competition is not effective, dominant providers are likely to set excessive prices, in order to maximise their profits and, where the dominant provider is vertically integrated, to increase the costs of competing providers. Higher wholesale charges are likely to mean higher prices downstream and competing providers being less able to compete with the vertically dominant provider in the downstream market. In the long-term this may result in market exit.

5.55 Ofcom has commenced detailed discussions with stakeholders on what cost-orientation should mean in this market with a view to avoiding ambiguity that might lead to unnecessary disputes. Ofcom's recent consultation document on cost of capital⁸ outlined some basic principles that may also be useful to note.

5.56 For the reasons described in 5.22 – 5.25, Ofcom considers that the cost-orientation requirement should not apply in respect of access granted under existing access agreements for the purpose of fulfilling existing transmission contracts. As in 5.47, Ofcom considers it unnecessary to time-limit this exemption.

Communication Act tests

5.57 Ofcom considers that the condition (Conditions JA3 and JB3 for ntl:broadcast and Crown Castle respectively, at annex 2) meets the tests set out in the Act. Ofcom has considered all its duties under section 3 and all the Community requirements set out in section 4 of the Act. In particular, the condition is aimed at promoting competition and securing efficient and sustainable competition for the maximum benefit of end users by ensuring that charges for upstream inputs are set at a level that enables competition to develop downstream.

⁸ "Ofcom's approach to risk in the assessment of the cost of capital", January 2005

- 5.58 Section 47 requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. This condition would require ntl:broadcast and Crown Castle to provide network access on terms that were related to the costs of their provision, to avoid the risk of excessive pricing. The objective justification for this is that it guards against ntl:broadcast and Crown Castle raising prices to levels that were not reflective of costs and offers a basis for investigating such prices in the event of necessary regulatory intervention. It is proportionate as it is confined to the specific area of Crown Castle and ntl:broadcast's SMP at this level of the market. It ensures that ntl:broadcast and Crown Castle may allow for the realistic costs of provision to be accounted for when setting prices. It does not itself unduly discriminate as it applies solely to Crown Castle and ntl:broadcast and does not exclude them from making flexible pricing decisions where objectively justified. It is transparent as there is clear comfort for electronic communications providers that they can counter the providers' respective SMP with an appeal to the regulator in the event of a complaint.
- 5.59 Ofcom considers that the tests in section 88 of the Act have been met. As noted above, there is a risk that in situations where SMP is persistent, pricing will be distorted and above the competitive level, as dominant providers are likely to want to charge excessive prices in order to maximise profits and increase the costs of competitors, or deter potential competitors. The condition is appropriate in order to promote efficiency and sustainable competition and provide the greatest possible benefits to end users by enabling downstream providers to buy upstream inputs at levels that might be expected in a competitive market.
- 5.60 The extent of investment of the dominant provider has been taken into account as set out in section 88(2), as the obligation provides for an appropriate return on capital to be included in the charges.

Transparency

- 5.61 Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish all such information, and in such manner as Ofcom may direct, for the purpose of securing transparency. Section 87(6)(c) of the Act authorises the setting of SMP services conditions requiring the dominant provider to publish, in such manner as Ofcom may direct, the terms and conditions on which it is willing to enter into an access contract. Section 87(6)(d) also permits the setting of SMP services conditions requiring the dominant provider to include specified terms and conditions into the reference offer. Finally, section 87(6)(e) permits the setting of SMP services conditions requiring the dominant provider to make such modifications to the reference offer as may be directed from time to time.
- 5.62 This section considers the transparency requirement to publish a reference offer.

Requirement to publish a reference offer

- 5.63 A requirement to publish a reference offer has two main purposes, namely, to assist transparency for the monitoring of potential anti-competitive behaviour and to give visibility to the terms and conditions on which other providers will purchase upstream inputs. This helps to ensure stability in markets and, without it, incentives to invest might be undermined and market entry be less likely.
- 5.64 The publication of a reference offer will potentially allow for speedier negotiations, avoid possible disputes and give confidence to those purchasing wholesale services that they are being provided on non-discriminatory terms. Without this, market entry

might be deterred to the detriment of the long-term development of competition and hence end users.

- 5.65 The condition requires the publication of a reference offer and specifies the information to be included in that reference offer (set out below) and how the reference offer should be published. It prohibits the dominant provider from departing from the charges, terms and conditions in the reference offer and requires it to comply with any directions Ofcom may make from time to time under the condition.
- 5.66 The published reference offer should set out, amongst other things:
- a clear description of the services on offer;
 - terms and conditions including charges and ordering, provisioning, billing and dispute resolution procedures;
 - information relating to technical issues; and
 - conditions relating to maintenance and quality (service level agreements ("SLAs") and service level guarantees ("SLGs"));
 - conditions for site access; and
 - safety standards.
- 5.67 A reference offer would enable a public ECS or ECN provider seeking access to have available a transparent account of what may be obtained, and on what terms. It gives effect to the network access condition. As noted in the ERG Common Position on Remedies, a reference offer can be a means to achieve transparency and can make access and other obligations more effective. It would be difficult for network access to be obtained without being clear about what is involved and in particular, difficult for any potential new entrants to fully inform themselves about how access shall operate and thus to develop their business plan. It is available to any provider of public ECN or ECS and thus aids the likelihood of competition developing in the market. It is proportionate as it may, if they so choose be developed from ntl:broadcast and Crown Castle's existing site sharing agreement ratecard. The ERG Common Position on Remedies also suggests that, where practicable, remedies should be designed to be incentive-compatible. Ofcom is of the view that developing a reference offer to encourage customers to use networks is likely to be an effective way for the providers to maximise the use of their assets, in both regulated and unregulated fields.
- 5.68 For the reasons described in 5.22 – 5.25, Ofcom considers that the requirement to publish a reference offer should not apply in respect of access granted under existing access agreements for the purpose of fulfilling existing transmission contracts. As in 5.47, Ofcom considers it unnecessary to time-limit this exemption.
- 5.69 Ofcom has given consideration to and received representations with regard to the date of publication of the reference offer. The reference offer is clearly a vital input for the development of bids for the digital switchover contracts and therefore need to be available in a timely manner, however they represent a new way of working for the providers. As noted below at 5.73, Ofcom has now set a date for the production of reference offers of 30 December 2005 and has also included a requirement for the transmission companies, when a network access request is made, to provide a statement giving a reasonable indication of the terms and conditions on which network access would be provided.

Communications Act tests

- 5.70 Ofcom considers that this condition (Conditions JA4 and JB4 for ntl:broadcast and Crown Castle, respectively, at annex 2) meets the tests set out in the Act.
- 5.71 Ofcom has considered its duties under section 3 and all the Community requirements set out in section 4 of the Act. In particular, the condition is aimed at promoting competition and securing efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have the necessary information to allow them to make informed decisions about purchasing upstream inputs in order to enter and compete downstream.
- 5.72 Section 47 requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. The condition is objectively justifiable in that it requires that terms and conditions are published in order to encourage competition and provide stability in markets. It is proportionate, as only information that is considered necessary to allow providers to make informed decisions about competing in downstream markets is required to be provided. In addition, ntl:broadcast and Crown Castle already operate a 'reference offer' type arrangement through their site sharing agreement, from which it may be logical to evolve their reference offer. It does not unduly discriminate as it is applied to both ntl:broadcast and Crown Castle and no other provider has SMP in these markets. Finally, it is transparent in that it is clear in its intention to ensure that ntl:broadcast and Crown Castle publish details of how their upstream inputs should be made available.

Responses to the November consultation

- 5.73 There were some concerns expressed about the deadline for production of the reference offers, with (as noted at 5.69) views on both sides. Ofcom is satisfied that it would be impractical to impose a 3 month deadline for a binding reference offer, as originally intended, as there is insufficient clarity at present concerning the details of the access required, in particular for digital television transmission, and because of the significant volume of work required. Taking account of these comments, Ofcom has made two modifications to its original proposals. It has revised the deadline to 30 December 2005, which should allow the transmission companies sufficient time from publication of this document to develop a full range of reference offers. When a network access request is made in the interim period to 30 December 2005, Ofcom has included an additional requirement for the transmission companies to provide a statement giving a reasonable indication of the terms and conditions on which network access would be provided. Ofcom expects that this should give transparency in the interim period and allow prospective third party providers a reasonable opportunity to compete against Crown Castle and ntl:Broadcast for any contracts for Managed Transmission Services which may be awarded this year.
- 5.74 Ofcom has informally taken the views of stakeholders on this matter and Ofcom's movement to accommodate the timing issues associated with preparation of the reference offer was appreciated. Ofcom will work with all stakeholders over the coming weeks and months on these issues, in particular to facilitate the progression of the digital switchover project.

Annex 1

List of representations received in response to the November consultation

Non confidential responses

Capital Radio
Chrysalis Radio
Commercial Radio Companies Association
Institute of Local Television
Internet Service Providers' Association
smg
Nick Zimmerman

Confidential responses

D3&4
Crown Castle
Five
ntl:broadcast
SDN Limited

Annex 2

NOTIFICATION UNDER SECTIONS 48(1) AND 79(4) OF THE COMMUNICATIONS ACT 2003

The identification of markets, the making of market power determinations and the setting of SMP services conditions in relation to ntl:broadcast and Crown Castle

WHEREAS

- A. The Office of Communications (“Ofcom”) issued a notification pursuant to section 48(2) and 80 of the Communications Act 2003 (“the Act”) setting out their proposals for identification of markets, the making of market power determinations and the setting of SMP services conditions on 11 November 2004 (“the First Notification”);
- B. A copy of the First Notification was sent to the Secretary of State in accordance with section 50(1)(a) of the Act and to the European Commission and to the regulatory authorities of every other member state in accordance with sections 50(3) and 81 of the Act;
- C. In the First Notification and the accompanying explanatory statement, Ofcom invited representations about any of the proposals set out therein by 22 December 2004;
- D. By virtue of section 80(6) of the Act, Ofcom may give effect to any proposals to identify a market for the purpose of making a market power determination or any proposals for making a market power determination set out in the First Notification, with or without modification, where –
 - i. they have considered every representation about the proposals made to them within the period specified in the First Notification; and
 - ii. they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State; but
 - iii. Ofcom’s power to give effect to such proposals is subject to sections 82 and 83 of the Act;
- E. By virtue of section 48(5) of the Act, Ofcom may give effect to any proposals to set SMP services conditions set out in the First Notification, with or without modification, where –
 - i. they have considered every representation about the proposals made to them within the period specified in the First Notification; and
 - ii. they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;
- F. Ofcom received responses to the First Notification and has considered every such representation made to it in respect of the proposals set out in the First Notification and the accompanying explanatory statement; and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose;

The European Commission has not made a notification for the purposes of Article 7(4) of the Framework Directive as referred to in section 82 of the Act and the proposals do not relate to a transnational market as referred to in section 83 of the Act;

THEREFORE

1. Ofcom in accordance with sections 79 of the Act identify the following markets for the purpose of making market power determinations:

Masts and sites

- a. the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by ntl:broadcast for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a National, Regional or Metropolitan basis;
 - b. the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by Crown Castle for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a National, Regional or Metropolitan basis;
 - c. the provision of access to the mast and site network and shared or shareable antenna systems other than to those masts, site networks and shared or shareable antenna systems acquired, constructed or installed by ntl:broadcast or Crown Castle for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services within the United Kingdom, to deliver broadcast content to end users on a National, Regional or Metropolitan basis;
2. Ofcom in accordance with section 79 of the Act make the following market power determinations in relation to the markets referred to in paragraph 1 above:
 - a. in relation to the market set out at paragraph 1(a), ntl:broadcast;
 - b. in relation to the market set out at paragraph 1(b), Crown Castle;
 3. Ofcom make a market power determination that no person has significant market power in relation to the market referred to in paragraph 1(c).
 4. Ofcom in accordance with section 48(1) of the Act and section 79 of the Act hereby set pursuant to section 45 of the Act the SMP services conditions on the persons referred to in paragraph 2(a) and 2(b) above as set out in Schedules 1 and 2, respectively, to this Notification to take effect, unless otherwise stated in those Schedules, on the date of publication of this Notification.
 5. The effect of and Ofcom's reasons for the decisions referred to in paragraphs 1 to 4 above are contained in the explanatory statement published with this Notification.
 6. In identifying and analysing the markets referred to in paragraph 1 above, and in considering whether to make the decisions set out in this Notification, Ofcom have taken due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of a Community

instrument, and relate to market identification or analysis, as required by section 79 of the Act.

7. Ofcom consider that the SMP services conditions referred to in paragraph 4 above comply with the requirements of sections 45 to 50 and sections 78 to 92 of the Act, as appropriate and relevant to each such SMP services condition.
8. In making all of the decisions referred to in paragraphs 1 to 4 of this Notification Ofcom have considered and acted in accordance with the six Community requirements in section 4 of the Act and their duties in section 3 of the Act.
9. Copies of this Notification and the accompanying explanatory statement have been sent to the Secretary of State in accordance with section 50(1)(a) and section 81(1) of the Act and to the European Commission and to the regulatory authorities of every other member State in accordance with sections 50(2) and 81(2) of the Act.
10. Save for the purposes of paragraph 1 of this Notification and except as otherwise defined in this Notification, words or expressions used shall have the same meaning as in the Act.
11. In this Notification:
 - a. "Crown Castle" means Crown Castle UK Limited whose registered company number is 03196207 (including any change of company name under the same company number) including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
 - b. "National, Regional or Metropolitan" means any or all of:
 - i. transmission of national television;
 - ii. transmission of signals at or above a power level of 2 kW e.r.p.; and
 - iii. transmission of signals from masts at or above 50 metres in height;
 - c. "ntl:broadcast" means National Transcommunications Limited whose registered company number is 02487597 (including any change of company name under the same company number) including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
 - d. "Ofcom" means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;
 - e. "United Kingdom" has the meaning given to it in the Interpretation Act 1978.

JIM NIBLETT

Competition Policy Director

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

28 April 2005

SCHEDULE 1

The conditions imposed on ntl:broadcast under the Communications Act 2003 as a result of the analysis of the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by ntl:broadcast for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services in the United Kingdom, to deliver content to end users on a National, Regional or Metropolitan basis in which ntl:broadcast has been found to have significant market power

Part 1: Definitions and Interpretation of these conditions

1. These conditions shall apply to the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by ntl:broadcast for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services in the United Kingdom, to deliver content to end users on a National, Regional or Metropolitan basis.
2. Conditions JA2, JA3 and JA4 shall not apply to the provision of Network Access pursuant to a contract or arrangement which existed at the date these conditions entered into force for the provision of all other terrestrial managed transmission services.
3. Paragraph 2 shall not apply to any material amendment of terms which existed at the date these conditions entered into force.
4. For the purpose of interpreting the conditions imposed on the Dominant Provider following a review of the market referred to in paragraph 1 the following definitions shall apply:

“Act” means the Communications Act 2003;

“Dominant Provider” means National Transcommunications Limited, whose registered company number is 02487597 (including any change of company name under the same company number), and any National Transcommunications Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

“National, Regional or Metropolitan” means any or all of:

- i. transmission of national television;
- ii. transmission of signals at or above a power level of 2 kW e.r.p.; and
- iii. transmission of signals from masts at or above 50 metres in height;

“Ofcom” means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002

“Public Service Broadcaster” means a Public Service Broadcaster, as defined in section 271(8) of the Act;

“Reference Offer” means the terms and conditions on which the Dominant Provider is willing to enter into an Access Contract.

“Third Party” means a person providing a public Electronic Communications Service or a person providing a public Electronic Communications Network;

“United Kingdom” has the meaning given to it in the Interpretation Act 1978.

5. Save for the purposes of paragraphs 1 to 4 of this Schedule and except as otherwise defined in this Schedule, words or expressions used shall have the same meaning as in the Act.
6. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.
7. Headings and titles shall be disregarded.

Part 2: The conditions

Condition JA1 – Requirement to provide network access on reasonable request

- JA1.1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.
- JA1.2 The provision of Network Access in accordance with paragraph 1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.
- JA1.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

Condition JA2 – Requirement not to unduly discriminate

JA2.1 The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with Network Access.

Condition JA3 – Basis of charges

- JA3.1 Unless Ofcom direct 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 JA1 is reasonably derived from the costs of provision and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.
- JA3.2 The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition.

Condition JA4 – Requirement to publish a reference offer

JA4.1 Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.

JA4.2 Subject to paragraph 10 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes at least the following:

JA4.2.1 In relation to the provision of Network Access for the purposes of the delivery of content to end users by means of a Television Multiplex Service licensed under Part I of the Broadcasting Act 1996:

- a. a description of the Network Access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of the Network Access);
- b. the locations of the points of Network Access; and
- c. relevant charges, terms of payment and billing procedures;

JA4.2.2 In relation to the provision of Network Access for the purposes of the delivery of content to end users other than by means of a Television Multiplex Service licensed under Part I of the Broadcasting Act 1996 a statement of the principles and methodology which the Dominant Provider will apply in order to determine the matters referred to in Condition JA4.2.1;

JA4.2.3 In relation to the provision of Network Access:

- a. the technical standards for Network Access (including any usage restrictions and other security issues);
- b. the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- c. any ordering and provisioning procedures;
- d. details of maintenance and quality as follows:
 - i. specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
 - ii. service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
 - iii. the amount of compensation payable by one party to another for failure to perform contractual commitments;
 - iv. a definition and limitation of liability and indemnity; and

- v. procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
 - e. a dispute resolution procedure to be used between the parties;
 - f. details of duration and renegotiation of agreements;
 - g. provisions regarding confidentiality of non-public parts of the agreements;
 - h. rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts); and
 - i. the standard terms and conditions for the provision of Network Access.
- JA4.3 To the extent that the Dominant Provider provides to itself Network Access that:
- i. is the same, similar or equivalent to that provided to any other person; or
 - ii. may be used for a purpose that is the same, similar or equivalent to that provided to any other person,
- in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other person, the Dominant Provider shall ensure that it publishes a Reference Offer in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in Condition JA4.2.1 to JA4.2.3.
- JA4.4 The Dominant Provider shall publish a Reference Offer by 30 December 2005.
- JA4.5 In relation to any request for Network Access received before 30 December 2005 the Dominant Provider shall, as soon as reasonably practicable after such a request, publish a statement ("Statement") setting out a reasonable indication of the terms and conditions (including charges) on which Network Access would be provided.
- JA4.6 In so far as it is possible, the Statement shall include those matters detailed in Conditions JA 4.2.1 to JA 4.2.3.
- JA4.7 From 30 December 2005 the Reference Offer published by the Dominant Provider shall take precedence over the Statement.
- JA4.8 The Dominant Provider shall update and publish the Reference Offer or the Statement in relation to any amendments or in relation to any further Network Access provided after the date this Condition enters into force.
- JA4.9 Publication referred to above shall be effected by:
- a. placing a copy of the Reference Offer or the Statement on any relevant website operated or controlled by the Dominant Provider; and
 - b. sending a copy of the Reference Offer or the Statement to Ofcom.
- JA4.10 The Dominant Provider shall send a copy of the current version of the Reference Offer or the Statement to any person at that person's written request (or such parts which have been requested).

- JA4.11 The Dominant Provider shall make such modifications to the Reference Offer or the Statement as Ofcom may direct from time to time.
- JA4.12 The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.
- JA4.13 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

SCHEDULE 2

The conditions imposed on Crown Castle under the Communications Act 2003 as a result of the analysis of the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by Crown Castle for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services in the United Kingdom, to deliver content to end users on a National, Regional or Metropolitan basis in which Crown Castle has been found to have significant market power

Part 1: Definitions and Interpretation of these conditions

1. These conditions shall apply to the market for the provision of access to the mast and site network and shared or shareable antenna systems acquired, constructed or installed by Crown Castle for the purpose of providing analogue and/or digital terrestrial broadcasting transmission services in the United Kingdom, to deliver content to end users on a National, Regional or Metropolitan basis.
2. Conditions JB2, JB3 and JB4 shall not apply to the provision of Network Access pursuant to a contract or arrangement which existed at the date these conditions entered into force for the provision of all other terrestrial managed transmission services.
3. Paragraph 2 shall not apply to any material amendment of terms which existed at the date these conditions entered into force.
4. For the purpose of interpreting the conditions imposed on the Dominant Provider following a review of the market referred to in paragraph 1 the following definitions shall apply:

“Act” means the Communications Act 2003;

“Dominant Provider” means Crown Castle UK Limited, whose registered company number is 03196207 (including any change of company name under the same company number), and any Crown Castle UK Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

“National, Regional or Metropolitan” means any or all of:

- (i) transmission of national television;
- (ii) transmission of signals at or above a power level of 2 kW e.r.p.; and
- (iii) transmission of signals from masts at or above 50 metres in height;

“Ofcom” means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;

“Public Service Broadcaster” means a Public Service Broadcaster, as defined in section 271(8) of the Act;

“Reference Offer” means the terms and conditions on which the Dominant Provider is willing to enter into an Access Contract.

“Third Party” means a person providing a public Electronic Communications Service or a person providing a public Electronic Communications Network;

“United Kingdom” has the meaning given to it in the Interpretation Act 1978.

5. Save for the purposes of paragraphs 1 to 4 of this Schedule and except as otherwise defined in this Schedule, words or expressions used shall have the same meaning as in the Act.
6. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.
7. Headings and titles shall be disregarded.

Part 2: The conditions

Condition JB1 – Requirement to provide network access on reasonable request

- JB1.1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.
- JB1.2 The provision of Network Access in accordance with paragraph 1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.
- JB1.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

Condition JB2 – Requirement not to unduly discriminate

JB2.1 The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with Network Access.

Condition JB3 – Basis of charges

- JB3.1 Unless Ofcom direct 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 JB1 is reasonably derived from the costs of provision and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.
- JB3.2 The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition.

Condition JB4 – Requirement to publish a reference offer

- JB4.1 Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.
- JB4.2 Subject to paragraph 10 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes at least the following:
- JA4.2.1 In relation to the provision of Network Access for the purposes of the delivery of content to end users by means of a Television Multiplex Service licensed under Part I of the Broadcasting Act 1996:
- a. a description of the Network Access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of the Network Access);
 - b. the locations of the points of Network Access; and
 - c. relevant charges, terms of payment and billing procedures;
- JA4.2.2 In relation to the provision of Network Access for the purposes of the delivery of content to end users other than by means of a Television Multiplex Service licensed under Part I of the Broadcasting Act 1996 a statement of the principles and methodology which the Dominant Provider will apply in order to determine the matters referred to in Condition JB4.2.1;
- JA4.2.3 In relation to the provision of Network Access:
- a. the technical standards for Network Access (including any usage restrictions and other security issues);
 - b. the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
 - c. any ordering and provisioning procedures;
 - d. details of maintenance and quality as follows:
 - i. specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
 - ii. service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
 - iii. the amount of compensation payable by one party to another for failure to perform contractual commitments;
 - iv. a definition and limitation of liability and indemnity; and

- v. procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
 - e. a dispute resolution procedure to be used between the parties;
 - f. details of duration and renegotiation of agreements;
 - g. provisions regarding confidentiality of non-public parts of the agreements;
 - h. rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts); and
 - i. the standard terms and conditions for the provision of Network Access.
- JB4.3 To the extent that the Dominant Provider provides to itself Network Access that:
- j. is the same, similar or equivalent to that provided to any other person; or
 - k. may be used for a purpose that is the same, similar or equivalent to that provided to any other person,
- in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other person, the Dominant Provider shall ensure that it publishes a Reference Offer in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in Condition JB4.2.1 to JB4.2.3.
- JB4.4 The Dominant Provider shall publish a Reference Offer by 30 December 2005.
- JB4.5 In relation to any request for Network Access received before 30 December 2005 the Dominant Provider shall, as soon as reasonably practicable after such a request, publish a statement ("Statement") setting out a reasonable indication of the terms and conditions (including charges) on which Network Access would be provided.
- JB4.6 In so far as it is possible, the Statement shall include those matters detailed in Conditions JA 4.2.1 to JA 4.2.3.
- JB4.7 From 30 December 2005 the Reference Offer published by the Dominant Provider shall take precedence over the Statement.
- JB4.8 The Dominant Provider shall update and publish the Reference Offer or the Statement in relation to any amendments or in relation to any further Network Access provided after the date this Condition enters into force.
- JB4.9 Publication referred to above shall be effected by:
- a. placing a copy of the Reference Offer or the Statement on any relevant website operated or controlled by the Dominant Provider; and
 - b. sending a copy of the Reference Offer or the Statement to Ofcom.
- JB4.10 The Dominant Provider shall send a copy of the current version of the Reference Offer or the Statement to any person at that person's written request (or such parts which have been requested).

- JB4.11 The Dominant Provider shall make such modifications to the Reference Offer or the Statement as Ofcom may direct from time to time.
- JB4.12 The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.
- JB4.13 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

Annex 3

NOTICE TO CROWN CASTLE UK LIMITED UNDER PARAGRAPH 9 OF SCHEDULE 18 TO THE COMMUNICATIONS ACT 2003

Notice that the continued provisions set out in the continuation notice given to Crown Castle UK Limited on 23 July 2003 will cease to have effect from 29 April 2005

1. The Office of Communications ('OFCOM'), in accordance with Paragraph 9(9) of Schedule 18 to the Communications Act 2003 ('the Act') hereby give notice to Crown Castle UK Limited ('Crown Castle') that all of the continued provisions contained in Schedule 1 to the continuation notice given to Crown Castle on 23 July 2003, which had effect from 25 July 2003, ('the Continuation Notice'), will cease to have effect from 29 April 2005 ('the Discontinued Provisions').
2. In giving this notice, the Ofcom have, in accordance with Paragraph 9 (11) of Schedule 18 to the Act, taken all steps necessary for enabling them to decide whether or not to set a condition under Chapter 1 of Part 2 of the Act for the purpose of replacing the continued provisions and whether or not to exercise their power to set a condition under that Chapter for that purpose.
3. All directions, determinations, consents and other provisions which were continued under the Continuation Notice by virtue of Paragraph 9(8) of Schedule 18 to the Act will also cease to have effect from 29 April 2005 to the extent that they were given or made for the purposes of the Discontinued Provisions.
4. Ofcom consulted on its proposals to discontinue the Discontinued Provisions on 11 November 2004 in the consultation document entitled 'Broadcasting Transmission Services: A review of the market' and requested comments by 22 December 2004. Ofcom have taken into account the comments it received during that consultation.
5. In this notice, except as otherwise provided or unless the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act. For the purposes of interpreting this notice, headings and titles shall be disregarded.



JIM NIBLETT

Competition Policy Director

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

29 April 2005

Annex 4

NOTICE TO NATIONAL TRANSCOMMUNICATIONS LTD UNDER PARAGRAPH 9 OF SCHEDULE 18 TO THE COMMUNICATIONS ACT 2003

Notice that the continued provisions set out in the continuation notice given to National Transcommunications Ltd on 23 July 2003 will cease to have effect from 29 April 2005

1. The Office of Communications ('OFCOM'), in accordance with Paragraph 9(9) of Schedule 18 to the Communications Act 2003 ('the Act') hereby give notice to National Transcommunications Ltd ('ntl') that all of the continued provisions contained in Schedule 1 to the continuation notice given to ntl on 23 July 2003, which had effect from 25 July 2003, ('the Continuation Notice'), will cease to have effect from 29 April 2005 ('the Discontinued Provisions').
2. In giving this notice, Ofcom have, in accordance with Paragraph 9 (11) of Schedule 18 to the Act, taken all steps necessary for enabling them to decide whether or not to set a condition under Chapter 1 of Part 2 of the Act for the purpose of replacing the continued provisions and whether or not to exercise their power to set a condition under that Chapter for that purpose.
3. All directions, determinations, consents and other provisions which were continued under the Continuation Notice by virtue of Paragraph 9(8) of Schedule 18 to the Act will also cease to have effect from 29 April 2005 to the extent that they were given or made for the purposes of the Discontinued Provisions.
4. Ofcom consulted on its proposals to discontinue the Discontinued Provisions on 11 November 2004 in the consultation document entitled 'Broadcasting Transmission Services: A review of the market' and requested comments by 22 December 2004. Ofcom have taken into account the comments it received during that consultation.
5. In this notice, except as otherwise provided or unless the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act. For the purposes of interpreting this notice, headings and titles shall be disregarded.

Jim Niblett

JIM NIBLETT

Competition Policy Director

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

29 April 2005

Annex 5

Impact Assessment

The issue that Ofcom needs to address

- A5.1 Under the 2002 EU Regulatory Framework for Electronic Communications, national regulators – for the UK, Ofcom – are obliged to conduct reviews of the state of competition in a range of communications markets and, where they find Significant Market Power (SMP), to propose regulatory remedies. Oftel conducted a national consultation on broadcasting transmission services November 2004 – January 2005.
- A5.2 These regulatory proposals seek to further the interests of consumers by promoting competition in the market for broadcast transmission services to end users. In line with Ofcom's principles, they aim to reduce regulation in this market, seek to ensure that such regulatory interventions as are proposed are evidence based and proportionate, and with extensive informal and formal consultation they fit with Ofcom's principles of consulting widely and assessing regulatory impact. This review primarily fits with Ofcom's values of being commercially aware and of stakeholder engagement.
- A5.3 As noted in sections 3 and 4, Ofcom proposes that ntl:broadcast and Crown Castle have SMP in access to their respective masts and sites for national, regional and metropolitan broadcasting. In the light of this, Ofcom believes that there is a risk of exploitation of this SMP to the detriment of the provision of such services, or to the terms and conditions under which such services are provided. Were this to arise, this would conflict with Ofcom's mission to further the interests of citizen-consumers as there would be a detrimental effect downstream in terms of the resources available to be devoted to programming. Viewers and listeners may not through their buying decisions bring influence to bear in such a way as to mitigate excessive pricing: there remains the need to procure terrestrial transmission. Therefore a small but significant, non-transitory increase in price of either access to masts and sites by ntl:broadcast or Crown Castle cannot currently be mitigated through, for example, use of an alternative transmission mode such as satellite or cable. In addition, the existence of SMP at the level of access to masts and sites, when the remedy of network access at that level is applied, should aid the promotion of competition through allowing the potential for market entry at the downstream level of managed transmission services for both television and radio.

Comparison of the regulatory options available

No *ex ante* regulation

- A5.4 As an effectively competitive market will produce a more efficient outcome than a regulated market, the promotion of competition is central to Ofcom's mission to further the interests of citizen-consumers. Where markets are capable of being effectively competitive, *ex post* competition law is sufficient to deal with such competition abuses that may arise. However, without the imposition of *ex ante* regulations to promote competition in markets that are not effectively competitive, it is unlikely that *ex post* powers would be sufficient to ensure that effective competition became established. Given ntl:broadcast and Crown Castle's SMP, Ofcom's view is that there is merit in retaining some form of regulation, offering the ability for communications providers to appeal to Ofcom in the event of negotiations not arriving at satisfactory prices, terms and conditions.

Requiring access to transmission masts and sites on cost-orientated; fair, reasonable and non-discriminatory and transparent terms for the purpose of national, regional and metropolitan broadcasting.

- A5.5 Oftel published guidelines for how it would impose access obligations upon operators with SMP (http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/acce0902.pdf). Obligations covered by the guidelines would only be imposed on market players designated with SMP following a market review undertaken in accordance with the 2002 EU Regulatory Framework.
- A5.6 In most such cases, Ofcom imposes access obligations in the form of an obligation to meet all reasonable requests for access from providers of public electronic communications networks or services. Ofcom may also require operators to set out terms and conditions in a reference offer which gives the information potential purchasers of access need to determine whether they want to enter the market and make the commercial decision to do so. The guidelines explain how Ofcom would assess whether a request is reasonable, whether the terms (including non-price terms such as service level agreements and provision times) are reasonable and what should be included in the reference offer.
- A5.7 For transmission, ntl:broadcast and Crown Castle have been proposed as having SMP in their respective geographical markets for access to masts and sites for the purposes of national, regional and metropolitan broadcasting. Imposing an access obligation upon both companies to meet all reasonable requests for access might be a means to mitigate the risk of a detrimental effect upon UK end-users. This could also open up alternative potential routes for transmission, with broadcasters having available to them the options of self-supplying from the transmission companies' sites, or of third party providers entering the market to supply.
- A5.8 Both ntl:broadcast and Crown Castle each have approximately 50% market share each of the markets for providing access to the masts and sites used for national, regional and metropolitan analogue and digital terrestrial transmission. However, in light of the proposed access obligations there should be easier entry into the market. It should be possible for anyone wishing to provide terrestrial transmission from sites to have access to the Crown Castle and ntl:broadcast masts and sites. This form of provision already takes place in the market for local radio transmission. Ofcom considers that the realistic possibility of entry, with cost based prices for access, into this market will restrict Crown Castle and ntl:broadcast's ability to increase prices beyond the competitive level and mitigate the risks associated with SMP. Ofcom has sought to confine the proposed regulation as appropriate: hence its proposal that the regulation of access to sites for local broadcasting should not be subject to regulation – evidence suggests that the market for access to sites for local broadcasting tends towards greater substitutability and consequently towards competitiveness.

Accounting separation

- A5.9 The transmission companies were required as part of their licence conditions to maintain separate accounts for analogue terrestrial transmission, although this was not retained in the continuation notices. Ofcom is minded to not impose such a condition in the future regulation. This arises from the fact that this document proposes that terrestrial transmission for the future will be subject to regulation as fair, reasonable and non-discriminatory; and cost-orientated. Given that digital terrestrial transmission has hitherto not been subject to any regulation, to impose a

new requirement for fully separated accounts on that part of the providers' businesses would be neither proportionate nor compatible with light touch regulation.

- A5.10 Accounts pertaining to the services listed in the proposed regulations may be requested, for example, in the event of a dispute via the information gathering powers in Article 5 of the Framework Directive. Ofcom may also gather such information via its investigation powers under competition legislation. Ofcom's proposals for the use of these information gathering powers are detailed in Ofcom's policy statement of 10 March 2005 "Information gathering under section 145 of the Communications Act 2003 and Section 13B of the Wireless Telegraphy Act 1949"⁹.

The risks, benefits and costs of each option

- A5.11 Section 5 of this document outlines how the proposed regulatory remedies fit with the four tests outlined in section 47 of the Communications Act 2003 ("the Act"). Ofcom has also taken views from stakeholders on the implications, costs and benefits of the proposed regulatory remedies. Stakeholders understood Ofcom's view that the imposition of a network access requirement at the level of access to masts and sites did not represent a major regulatory burden: both providers operate a site sharing agreement for access and also permit commercial operators to use their networks, using a similar approach to the operation of the site sharing agreement. Thus the imposition of the network access obligation and the reference offer requirement should be a good fit with the reality of the commercial operation of using and maximising the commercial potential of the mast and site network.

Rationale for the preferred option

- A5.12 Ofcom has considered the imposition of a range of remedies, including the possibility of no *ex ante* regulation. In proposing this solution, the views of stakeholders taken during both the November consultation and informal discussions have been taken into account.
- A5.13 Ofcom has proceeded as outlined for a number of reasons. SMP was identified at the level of access to masts and sites – which are a crucial input for broadcasting. Clearly to introduce the possibility of market entry at that level would be a positive step towards promoting competition and in line with the light touch regulatory aspirations of Ofcom. The ideal outcome for an uncompetitive market is to introduce competition (or the threat of competition) such as to guard against excessive pricing or other exploitation of SMP.
- A5.14 Ofcom is of the view that the decision in this document will represent a reduction of regulation in certain aspects of the broadcasting transmission market. The prior position with regard to terrestrial transmission was a substantial degree of regulation of analogue television transmission in particular, including a price control and accounting separation. Although digital television transmission was not regulated, all parties behaved as if regulation were present or there was strong likelihood of regulation, owing to the likelihood of Oftel intervening strongly in the event of anticompetitive behaviour. The present proposals with regard to television transmission have removed the price control and accounting separation and imposed a lighter *ex ante* regime whereby the regulation will only intervene in the event of a substantiated complaint or a dispute. The regulatory regime that Ofcom is imposing will seek to encourage market at the managed transmission layer.

⁹ http://www.ofcom.org.uk/consult/condocs/info_gathering/policy/policy.pdf

A5.15 With regard to radio transmission, Ofcom has removed the requirement to provide services to all licensees. Ofcom's decision will also encourage competition and self-provision at the access level of the market for national, regional and metropolitan radio broadcasters. Finally, Ofcom has decided to lift all obligations on ntl:broadcast and Crown Castle with regard to local radio broadcasters, to reflect their greater range of options for transmission.

The costs associated with the preferred option

A5.16 The markets under consideration in this review have been subject to heavy regulation since their privatisation and split from vertical integration in the mid 1990s. Ntl:broadcast and Crown Castle were required to offer transmission services to radio broadcasters (but not on regulated terms) and to offer analogue managed transmission services on a price controlled basis with a requirement for separated accounts. They were also required to share sites with each other (though not with others) with the regulator able to intervene should negotiations be unsuccessful at any point. Digital broadcasting, as a new development, was not regulated but all digital negotiations took place against a backdrop of heavily regulated analogue services.

A5.17 In considering the options outlined above, Ofcom is of the view that the regulation imposed is the lightest touch compatible with the level of market power resting with the incumbent providers. Ntl:broadcast and Crown Castle have a strong position as the legacy providers with a history of vertical integration with their customers and thus, as outlined in section 4, a position of significant market power at the upper (access) level of the market. As noted above, Ofcom's preferred outcome is for the emergence of competition and it is hoped that the access regulation will lead to stronger competition downstream over time. Taken as a whole, these obligations are considerably lighter in touch than previously in place under the Telecommunications Act 1984 licensing regime: the price control and accounting separation requirements have been removed and the access obligation should not be unduly burdensome as it may sensibly be developed from the prior requirement upon ntl:broadcast and Crown Castle to share sites, and to have a site sharing agreement in place to govern that sharing.