

Statutory Notification: proposed USP access condition

NOTIFICATION OF PROPOSALS TO IMPOSE A REGULATORY CONDITION IN ACCORDANCE WITH SECTION 53 OF, AND PARAGRAPH 3 OF SCHEDULE 6 TO, THE POSTAL SERVICES ACT 2011

BACKGROUND

A. On 23 March 2001, the Postal Services Commission (“**Postcomm**”) granted to Royal Mail a licence (the “**Licence**”) under section 11 of the Postal Services Act 2000. The Licence included a Condition requiring Royal Mail to grant access to its postal facilities.

B. On 13 June 2011, the Postal Services Act 2011 (the “**Act**”) received Royal Assent, the Act makes provision (among other things) about the new regulation of postal services. The new regulatory regime is set out in Part 3 of the Act, which Part came into force on 1 October 2011 and on which day the regulatory responsibility was also transferred from Postcomm to Ofcom. The provisions of the Act also give effect to Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008, which amends Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services.

C. On 29 September 2011, following a consultation, Ofcom published a statement entitled ‘*Postal regulation: Transition to the new regulatory framework*’¹ (the “**September Statement**”) setting out various decisions, including the provisional designation of Royal Mail as universal service provider with effect from 1 October 2011 under paragraph 3(1) of Schedule 9 to the Postal Services Act 2011 (see Annex 1 to that Statement). Ofcom also imposed various regulatory conditions and directions in accordance with the transitional provisions under section 66 of, and paragraphs 4 to 6 of Schedule 9 to, the Act, including conditions relating to access to Royal Mail’s postal network to carry forward corresponding conditions in the Licence (see Annex 2 to the September Statement).

D. On 20 October 2011, following previous consultations by Postcomm², Ofcom published a consultation document entitled ‘*Securing the Universal Postal Service – Proposals for the future framework for economic regulation*’ (the “**October Consultation**”). The closing date for responses to that consultation is 5 January 2012 and it includes proposals for the imposition of a USP access condition on the universal service provider for the purposes of participating in the retail D+2 and later than D+2 letters and large letters markets involving access at the Inward Mail Centre (“**IMC**”) (see, in particular, Sections 7 and 9 of, and Annex 7 to, the October Consultation). Whilst that consultation sets out details of those proposed requirements, it explains that Ofcom would further consult on the proposed USP access condition under section 38 and Schedule 3 of the Act which would give effect to our policy proposals set out in the October Consultation.

¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/postal-regulation/statement/statement.pdf>

² See documents entitled ‘*The building blocks for a sustainable postal service – Access Review – Initial Proposals*’, March 2011, Postcomm and ‘*The building blocks for a sustainable postal service – Initial proposals for regulatory safeguards*’, April 2011, Postcomm.

PROPOSAL

1. Ofcom hereby proposes, in accordance with section 53 of, and paragraph 3 of Schedule 6 to, the Act and pursuant to powers in section 38 and Schedule 3 of the Act, to impose on the universal service provider a USP access condition to make provision for matters set out in section 38 and Schedule 3, such as access to the universal service provider's postal network, imposition of a price control, imposition of a non-discrimination requirement, imposition of a requirement for a fair and reasonable approach for dealing with requests for access and transparency requirements etc.
2. The proposed USP access condition is specified in the Schedule hereto.
3. The effect of, and Ofcom's reasons for, making this proposal are set out in the October Consultation as well as in the accompanying consultation document.

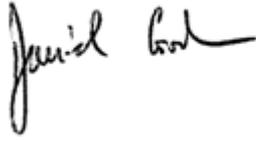
OFCOM'S DUTIES AND LEGAL TESTS

4. Ofcom is satisfied that this proposal satisfies the general test in paragraph 1 of Schedule 6 to the Act.
5. In making this proposal, Ofcom has considered and acted in accordance with its principal duty in section 29 of the Act and its general duties in section 3 of the Communications Act 2003.

MAKING REPRESENTATIONS

6. Representations may be made to Ofcom about the proposal set out in this Notification by no later than **31 January 2012**.
7. Copies of this Notification and the accompanying consultation document have been sent to the Secretary of State in accordance with paragraph 5(1)(a) of Schedule 6 to the Act.
8. By virtue of paragraph 3(5) of Schedule 6 to the Act, Ofcom may give effect, with or without modifications, to a proposal with respect to which it has published a notification only if Ofcom has—
 - (a) considered every representation about the proposal that is made to Ofcom within the period specified in this Notification; and
 - (b) had regard to every international obligation of the United Kingdom (if any) which has been notified to Ofcom for this purpose by the Secretary of State.
9. The Schedule to this Notification shall form part of this Notification.

Signed by **Daniel Gordon**

A handwritten signature in black ink that reads "Daniel Gordon". The signature is written in a cursive style with a long, sweeping underline.

Director of Competition Policy

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

13 December 2011

SCHEDULE

USP ACCESS CONDITION

I. USP access condition for D+2 Access

1. Application, definitions and interpretation

- USPA 1.1 This USP access condition (“**USPA Condition**”) shall apply to Royal Mail as the Universal Service Provider designated by Ofcom.
- USPA 1.2 This USPA Condition shall apply to access to the Universal Service Provider’s postal network at the Inward Mail Centre (“IMC”) for the purposes of providing D+2 and later than D+2 Letters and Large Letters services (“D+2 Access”).
- USPA 1.3 In this USPA Condition—
- (a) “**Act**” means the Postal Services Act 2011 (c.5);
 - (b) “**Access**” means allowing other companies operating in the postal market, or other users of postal services, to use the Universal Service Provider’s postal network for the partial provision of a postal service;
 - (c) “**Access Terms and Conditions Change Notice**” has the meaning given to it in USPA [6];
 - (d) “**D+2 Access Operator**” means a postal operator or a user of postal services which has or seeks D+2 Access to the Universal Service Provider’s postal network;
 - (e) “**D+2 Access**” means access to the Universal Service Provider’s postal network at the IMC for the purposes of providing D+2 and later than D+2 Letters and Large Letters services;
 - (f) “**D+2 Access Contract**” means a contract entered into by the Universal Service Provider and another postal operator or a user of postal services for the provision by the Universal Service Provider of access to the IMC for the purposes of providing D+2 Access;
 - (g) “**D+2 and later than D+2 Letters and Large Letters services**” mean retail services that aim to deliver two working days (or later) after collection from the sender, also known as a day C service, or later.
 - (h) “**Equivalence Differences**” means those adjustments to the Relevant Upstream Costs that Ofcom directs the Universal Service Provider to make in order to address issues of non-equivalence;
 - (i) “**FAC**” means Fully Allocated Costs, as defined in accordance with Royal Mail’s Costing Manual;

- (j) **“Inward Mail Centre” or “IMC”** means the activities in a mail centre related to the inward sorting of mail for delivery in an Inward Mail Centre’s catchment area;
- (k) **“Letters”** means any item up to length 240mm, width 165mm, thickness 5mm, and weighing no more than 100g;
- (l) **“Large Letters”** means any item larger than a Letter and up to length 353mm, width 250mm, thickness 25mm, and weighing no more than 750g;
- (n) **“Regulatory condition”** means any condition of authorisation set by Ofcom under the Act;
- (o) **“Related person”** means
 - (i) in relation to an undertaking within the meaning of section 1161 of the Companies Act 2006 (“the principal undertaking”), a parent or subsidiary undertaking of the principal undertaking or a subsidiary undertaking of a parent undertaking of the principal undertaking, in each case within the meaning of section 1162 of the Companies Act 2006; and
 - (ii) in relation to any person (including such an undertaking), a connected person of that person within the meaning of section 286 of the Taxation of Chargeable Gains Act 1992;
- (p) **“Relevant Access Service”** means access services which have attributes which are all or substantially all equivalent to the inward processing and delivery attributes of the Relevant Retail Services;
- (q) **“Relevant Downstream Costs”** has the meaning given to it in USPA [5] below;
- (r) **“Relevant Downstream Revenue”** has the meaning given to it in USPA [5] below;
- (s) **“Relevant End to End Costs”** has the meaning given to it in USPA [5] below;
- (t) **“Relevant End to End Revenue”** has the meaning given to it in USPA [5] below;
- (u) **“Relevant Period”** means, for the purposes of USPA [5], the financial reporting period most closely aligned with the twelve month period starting on 1 April in every year;
- (v) **“Relevant Retail Services”** means all Second Class Mailsort and Second Class Walksort services, and any current, new or successor retail services that are substantially similar services, offered by Royal Mail. Royal Mail shall notify Ofcom from time to time of any changes

to the group of services that fall within the definition of Relevant Retail Services. Ofcom reserves the right to direct Royal Mail to include any services within that group which it reasonably considers fall within the definition of Relevant Retail Services and to exclude any services from that group which it reasonably considers fall outside the scope of that definition;

- (w) “**Relevant Upstream Costs**” has the meaning given to it in USPA [5] below;
- (x) “**Relevant Upstream Revenue**” has the meaning given to it in USPA [5] below;
- (y) “**Royal Mail**” means Royal Mail Group Limited, whose registered company number in England and Wales is 04138203;
- (z) “**Standard Terms and Conditions**” mean such terms and conditions that are common to all D+2 Access Contracts or, where D+2 Access Contracts are individually negotiated, such standard terms and conditions that are appended to such D+2 Access Contracts;
- (aa) “**Statement of Notice**” has the meaning given to it in USPA [6.5] below;
- (bb) “**Statement of Process**” has the meaning given to it in USPA [3] below;
- (cc) “**USPA Condition**” means a USP access condition imposed on the Universal Service Provider under section 38 of the Act;
- (dd) “**Working day**” means any day which is not a Sunday or a public holiday.

USPA 1.4 For the purpose of interpreting this USPA Condition—

- (a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in USPA [1.3] above and otherwise any word or expression shall have the same meaning as it has been ascribed for the purpose of Part 3 of the Act;
- (b) headings and titles shall be disregarded;
- (c) expressions cognate with those referred to in this Notification shall be construed accordingly; and
- (d) the Interpretation Act 1978 (c. 30) shall apply as if the Condition set out in this Condition were an Act of Parliament.

2. Requirement to provide D+2 Access on reasonable request

- USPA 2.1 Where a D+2 Access Operator reasonably requests in writing D+2 Access, the Universal Service Provider shall provide that D+2 Access. The Universal Service Provider shall also provide such D+2 Access as Ofcom may from time to time direct.
- USPA 2.2 The provision of D+2 Access in accordance with USPA [2.1] above shall occur as soon as it is 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.
- USPA 2.3 The Universal Service Provider must comply with any direction given by Ofcom from time to time under this Condition.

3. Requests for D+2 Access or variations to existing D+2 Access Contracts

- USPA 3.1 The Universal Service Provider shall, for the purposes of transparency, publish a reasonable statement of the processes that will apply to requests for D+2 Access and variations to existing D+2 Access Contracts made to it (a "Statement of Process"). Such Statement of Process shall include:
- (a) the form in which such a request should be made;
 - (b) the information that the Universal Service Provider reasonably requires in order to consider a request for new D+2 Access or a variation to existing D+2 Access; and
 - (c) the reasonable time-scales in which such requests will be handled by the Universal Service Provider.
- USPA 3.2 The Universal Service Provider shall publish the Statement of Process described at USPA [3.1] above within three months of the date that this USPA Condition enters into force following a consultation with Ofcom and with D+2 Access Operators. The Universal Service Provider shall keep the Statement of Process under review and consult with Ofcom and D+2 Access Operators before making any amendments to the Statement of Process. The provisions set out in the Statement of Process (as amended from time to time) will apply to all requests for D+2 Access or variations to existing D+2 Access Contracts subject to any direction by Ofcom as to the terms of those provisions or the manner in which they are to apply.
- USPA 3.3 The Universal Service Provider shall, upon reasonable request from a D+2 Access Operator considering making a request for D+2 Access or a variation to an existing D+2 Access Contract, provide that D+2 Access Operator with such information as is reasonably

necessary to enable that D+2 Access Operator to make a request for D+2 Access or a variation to an existing D+2 Access Contract. Such information is to be provided within a reasonable period.

USPA 3.4 On receipt of a written request for D+2 Access or a variation to an existing D+2 Access Contract, the Universal Service Provider shall deal with the request in accordance with the Statement of Process described at USPA [3.1] above. A modification of a request for D+2 Access or a variation to an existing D+2 Access Contract which has previously been submitted to the Universal Service Provider, and rejected by the Universal Service Provider, shall be considered as a new request.

4. Requirement not to unduly discriminate or to obtain an unfair commercial advantage

USPA 4.1 The Universal Service Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with D+2 Access.

USPA 4.2 In this Condition, the Universal Service Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Universal Service Provider.

USPA 4.3 The Universal Service Provider shall conduct its business as a postal operator in the manner best calculated to secure that neither –

- (a) the Universal Service Provider; nor
- (b) any related person of the Universal Service Provider; nor
- (c) any other person;

obtains any unfair commercial advantage in connection with the provision by the Universal Service Provider of access to its postal network under any USPA Condition.

USPA 4.4 Subject to USPA [4.5], the Universal Service Provider shall use all reasonable endeavours to secure that no information in the possession of the Universal Service Provider as a result of giving access to its postal network under any USPA Condition to other persons –

- (a) is disclosed for the benefit of or used for the purpose of any trading business conducted by the Universal Service Provider; or
- (b) is disclosed for the benefit of or used for the purpose of any trading business conducted by any related person of the Universal Service Provider.

USPA 4.5 USPA [4.4] shall not apply in so far as -

- (a) Ofcom may consent in writing,
- (b) every person to whom the information relates has consented in writing to its disclosure or use as mentioned in USPA [4.4],
- (c) the disclosure is to, or the use is by, a person who –
 - (i) is acting as an agent of the Universal Service Provider for the provision of postal services;
 - (ii) is engaged by the Universal Service Provider for the purpose of the Universal Service Provider's business as a postal operator and has access to the information only for that purpose; and
 - (iii) is restricted by contract with the Universal Service Provider from making any further disclosure or use of the information; or
- (d) the information has been published or is required to be disclosed in pursuance of any other regulatory condition to which the Universal Service Provider is subject; or
- (e) the information is in the public domain otherwise than in consequence of a contravention of any regulatory condition to which the Universal Service Provider is subject.

5. Control to prevent price squeeze

USPA 5.1 Unless Ofcom directs otherwise, the Universal Service Provider shall in setting prices be subject to the requirement to take all reasonable steps to ensure that it:

- (a) maintains a minimum margin between the retail prices of the Relevant Retail Services and the access charges for the Relevant Access Services during the Relevant Period in accordance with USPA [5.2] to USPA [5.5] below; and
- (b) maintains a minimum margin in relation to every individual contract between the retail price of the Relevant Retail Service and the access charge for the Relevant Access Service during the Relevant Period in accordance with USPA [5.2] to USPA [5.5] below.

USPA 5.2 In order to satisfy the requirements in USPA [5.1(a) and (b)] to maintain a minimum margin, the Universal Service Provider must have a reasonable expectation that:

- (a) Relevant Upstream Revenue will be no less than Relevant

Upstream Costs for the Relevant Period; and

- (b) the Relevant Upstream Revenue for each individual contract for any Relevant Retail Service(s) will be equal to or more than 50% of the Relevant Upstream Cost for that individual contract for the Relevant Period.

USPA 5.3 Relevant Upstream Revenue should be calculated by deducting Relevant Downstream Revenue from Relevant End to End Revenue where:

- (c) Relevant End to End Revenue is the revenue that the Universal Service Provider earns from the supply of Relevant Retail Services during the Relevant Period; and
- (d) Relevant Downstream Revenue is calculated by multiplying the average price per unit charged by the Universal Service Provider for Relevant Access Services by volume during the Relevant Period.

USPA 5.4 Relevant Upstream Costs should be calculated by deducting Relevant Downstream Costs from Relevant End to End Costs where:

- (a) Relevant Downstream Costs are the costs attributed to the provision of Relevant Access Services calculated on an FAC basis, subject to Equivalence Differences that Ofcom may direct from time to time; and
- (b) Relevant End to End Costs are the total costs of providing the Relevant Retail Services on an end to end basis calculated on an FAC basis. Unless Ofcom otherwise directs, the value of Equivalence Differences shall be zero.

USPA 5.5 The Relevant Period during which the minimum margin referred to in USPA [5.1(a)] and [5.1(b)] above shall be maintained is twelve months.

USPA 5.6 The Universal Service Provider shall set prices for the Relevant Retail Services and the Relevant Access Services at the start of each Relevant Period on the basis of a forecast of the costs and volumes for that period.

USPA 5.7 The Universal Service Provider shall be required to provide such information as is necessary in order to enable Ofcom to ensure compliance with the requirements of USPA [5] at the start of the first Relevant Period and thereafter on a quarterly basis.

6. Requirement to publish and notify charges, terms and conditions

USPA 6.1 Except in so far as Ofcom may otherwise consent in writing, the Universal Service Provider shall publish and notify charges, terms and conditions and act in the manner set out below.

- USPA 6.2 The Universal Service Provider shall:
- (a) publish a set of the current Standard Terms and Conditions in such manner as will ensure reasonable publicity for them within one month of the date that this USPA Condition enters into force; and
 - (b) thereafter ensure that the set of Standard Terms and Conditions that has been made publicly available is updated promptly following any amendments that are made to the Standard Terms and Conditions.
- USPA 6.3 The Universal Service Provider shall be subject to the following publication and notification requirements for any amendments to its charges for the provision of D+2 Access:
- (a) The Universal Service Provider shall send to every person with which it has entered into a D+2 Access Contract a written notice of any amendment to the charges under the D+2 Access Contract. The Universal Service Provider shall provide a minimum of ten weeks' notice of any amendments to such charges or any other shorter period of notice agreed between the Universal Service Provider and D+2 Access Operators; and
 - (b) At the same time as the Universal Service Provider sends the written notice of amendments to charges, it shall publish the amendments to those charges in such manner as will ensure reasonable publicity for them.
- USPA 6.4 The Universal Service Provider shall be subject to the following publication and notification requirements for any amendments to the Standard Terms and Conditions other than amendments to charges:
- (a) Where amendments to the Standard Terms and Conditions have been made with the prior consent of the D+2 Access Operators, the Universal Service Provider shall publish those amendments in such manner as will ensure reasonable publicity for them. Such publicity shall take place no less than ten weeks before the date on which the amendment is due to take effect or any other shorter period prior to that date agreed between the Universal Service Provider and D+2 Access Operators; and
 - (b) Where amendments to the Standard Terms and Conditions do not require the prior consent of the D+2 Access Operators, the Universal Service Provider shall:
 - (i) provide every D+2 Access Operator with which it has entered into a D+2 Access Contract a written notice of the amendment to the Standard Terms and Conditions (an "Access Terms and Conditions Change Notice");

- (ii) provide sufficient notice of the amendment to the Standard Terms and Conditions as set out in the Access Terms and Conditions Change Notice as meets the reasonable needs of access users; and
- (iii) publish those amendments in such manner as will ensure reasonable publicity for them. Such publication shall take place no less than ten weeks before the date on which the amendment is due to take effect or any other shorter period prior to that date agreed between the Universal Service Provider and D+2 Access Operators.

USPA 6.5 For the purposes of determining what a sufficient period of notice is, the Universal Service Provider shall be required to publish a statement within one month of the date that this USPA Condition enters into force setting out the different periods of notice that will apply to the different categories of Standard Terms and Conditions that it is entitled to amend without the prior consent of D+2 Access Operators (a "Statement of Notice"). Where the Universal Service Provider amends the periods of notice set out in the Statement of Notice, it shall take into account the reasonable needs of D+2 Access Operators and shall provide one month's notice of any such amendments. Ofcom reserves the right to direct the Universal Service Provider to amend the period of notice for any category of amendment to Standard Terms and Conditions.

USPA 6.6 The Universal Service Provider shall ensure that an Access Terms and Conditions Change Notice includes:

- (a) a description of the Standard Terms and Conditions that are the subject of the amendment(s);
- (b) the date on which, or the period for which, the amendment(s) to the Standard Terms and Conditions will take effect (the "effective date"); and
- (c) the current and proposed new Standard Terms and Conditions affected by the amendment(s).

USPA 6.7 The Universal Service Provider shall not apply any new Standard Term and Condition identified in an Access Terms and Conditions Change Notice before the effective date.

USPA 6.8 The Universal Service Provider's obligations for prior notification and publication set out in this USPA [6] will not apply:

- (a) where the new or amended charges or terms and conditions are directed or determined by Ofcom or are required by a notification or enforcement notification issued by Ofcom under Schedule 7 of the Act; or
- (b) to any amendments to charges, terms or conditions that have been individually negotiated between the Universal

Service Provider and an individual D+2 Access Operator.

7. Quality of service

USPA 7.1 The Universal Service Provider shall publish all such information as is reasonably necessary for the purposes of securing transparency as to the quality of service in relation to D+2 Access provided by the Universal Service Provider in an appropriate manner and form, or as Ofcom may otherwise direct.

USPA 7.2 The Universal Service Provider shall comply with any direction Ofcom may make from time to time under USPA [7.1].

Table of terms defined in the Act

This table is provided for information and does not form a part of this condition. We make no representations as to its accuracy or completeness. Please refer to the Act.

<i>Defined term</i>	<i>Section of the Act</i>
<i>Ofcom</i>	<i>s.90</i>
<i>Postal network</i>	<i>s.38(3)</i>
<i>Postal operator</i>	<i>s.27(3)</i>
<i>Postal services</i>	<i>s.27(1)</i>
<i>Universal Service Provider</i>	<i>s.65(1) and Schedule 9, paragraph 3</i>