

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of FibreSpeed Limited

A Notification of this proposal was published on 14 November 2007

Whereas:

- (A) On 26 October 2007, FibreSpeed Limited made an application for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network in the United Kingdom in accordance with section 107(1) of the Act and the notification published by Ofcom by virtue of the Transitional Provisions under section 107(2) of the Act on 10 October 2003 setting out their requirements with respect to the content of an application for the electronic communications code and the manner in which such an application is to be made;
- (B) On 14 November 2007, Ofcom published a notification of their proposal to give a direction applying the Code to FibreSpeed Limited in accordance with section 107 of the Act;
- (C) Ofcom did not receive any representations in relation to the proposed Direction;
- (D) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

NOW, therefore, pursuant to section 106(3) of the Act, Ofcom make the following Direction-

1. The electronic communications code shall apply to FibreSpeed Limited for the purposes of the provision by FibreSpeed Limited of an electronic communications network to have effect in the United Kingdom.

Definitions and Interpretation

2. In this Direction, unless the contrary intention appears-

"Act" means the Communications Act 2003;

"FibreSpeed Limited" means FibreSpeed Limited (registered company number 6340164)

"Ofcom" means the Office of Communications; and

"Transitional Provisions" means sections 408 and 411 of the Act, the Communications Act 2003 (Commencement No.1) Order 2003 and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003.

3. Except in so far as the context otherwise requires, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded and expressions cognate with those referred to in this Direction shall be construed accordingly.

4. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day that it is published.

Neil Buckley
Director of Investigations

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

15 January 2008

Explanatory Statement

1.1 On 26 October 2007, FibreSpeed Limited (“FibreSpeed”) applied for the electronic communications code (the “Code”) for the purposes of the provision by it of an electronic communications network. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets the requirements for any such application for a Direction applying the Code, and the manner in which such an application has to be made, as set out in the Notification published by Ofcom (by virtue of the Transitional Provisions in the Act) on 10 October 2003 under section 107(2) of the Act.

1.2 On 14 November 2007, Ofcom published a notification of its proposal to give a direction applying the Code to FibreSpeed in accordance with section 107 of the Act. Representations on the proposal were invited by 18 December 2007. None were forthcoming.

1.3 In considering FibreSpeed’s application, Ofcom has acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty in section 3(1)(b) “to further the interests of consumers in relevant markets, where appropriate by promoting competition” and the first Community requirement set out in section 4(3)(a) to promote competition “in relation to the provision of electronic communications networks and services”. In this case, Ofcom understands that the Welsh Assembly Government appointed FibreSpeed to deliver a broadband electronic communications network that will provide Wales with a robust and resilient network in areas which do not presently benefit from effective broadband capabilities. Ownership of the FibreSpeed network will eventually pass to the Welsh Assembly Government.

1.4 FibreSpeed intends to offer wholesale capacity to other electronic communications providers who would then be able to offer broadband services to retail customers. Code powers would therefore help to promote competition in the provision of retail broadband services in areas which are less likely to benefit from vigorous innovation, quality and price competition. The network will extend to parts of England near the border with North Wales and therefore the proposal is to grant the Code powers on a UK-wide basis.

1.5 In addition to the requirements of section 3 and 4 of the Act, Ofcom has also had regard to its duties set out in section 107(4) of the Act. These are set out below.

The benefit to the public of the electronic communications network by reference to which the Code is to be applied to the applicant

1.6 As explained in paragraph 1.3, Ofcom understands that the network concerned will be used to provide wholesale services to retailers wishing to offer broadband services in parts of Wales which do not presently have direct broadband access or, at best, this is limited in terms of capacity and speed. Broadband capabilities play an increasingly prominent part of business and social needs and growth in the use of broadband services in the UK has increased dramatically. Nonetheless, there remain pockets of the UK in which broadband network rollout is less likely by a variety of network operators because the costs involved are likely to outweigh the potential benefits that they might accrue. FibreSpeed’s network – with Welsh Assembly Government backing – is intended to provide broadband capabilities to parts of North Wales which suffer from a lack of investment in broadband technologies and

therefore address those needs. A resilient broadband network would benefit the relevant communities.

1.7 For these reasons, Ofcom considers that it is appropriate to grant Code powers to FibreSpeed.

The practicability of the provision of the network without the Code

1.8 The Code enables, amongst other things, operators to construct their networks and, in particular, states that they “shall, for the statutory purposes, have the right to....(a) install electronic communications apparatus, or keep electronic communications apparatus installed, under, over, [in, on] along or across...a street.” The Code is therefore a means by which these networks could be developed more quickly.

1.9 The application submitted on behalf of FibreSpeed explained that the company wished to install electronic communications apparatus and that part of this will involve the installation of ducts below public land. The underlying reason for the provision of the network is to increase broadband capability in areas which do not benefit from such networks and therefore rapid deployment would be advantageous and benefit consumers. The absence of Code powers might delay the rollout of the network.

1.10 For these reasons, Ofcom considers that it should grant Code powers to FibreSpeed and that, in doing so, it would enable the broadband network to be deployed more quickly.

The need to encourage the sharing of the use of electronic communications apparatus

1.11 Ofcom understands that FibreSpeed’s network (ducting) will provide wholesale capacity only and will not compete in the retail market. Its network will therefore offer opportunities for retail providers to serve retail customers in areas in which – in the absence of alternative infrastructure – they would not choose to construct or offer retail services. The network would, in effect, substitute for direct provision of other infrastructure.

1.12 Ofcom also understands that it is possible that FibreSpeed’s ducting might be shared in future.

Whether the Applicant will be able to meet liabilities as a consequence of:

(i) the application of the Code; and

(ii) any conduct in relation to the application of the Code

1.13 FibreSpeed is part of the Hutchison Network Services UK Limited group (trading as Geo) which already operates under the Code. On this basis, FibreSpeed has confirmed that it would be able to put funds for liabilities in place to meet any relevant liabilities.

1.14 Ofcom is satisfied that FibreSpeed would be able to put in place sufficient securities to meet its Code obligations relating to potential liabilities.