



**Final Determination to resolve  
a Dispute between Cable &  
Wireless Access Limited and BT  
relating to BT's charges for  
connecting new customers to fully  
unbundled local loops**

**Issued on:** 19 December 2007

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## Section 1

# Determination

## DETERMINATION UNDER SECTIONS 188 AND 190 OF THE COMMUNICATIONS ACT 2003 (the “Act”) FOR RESOLVING A DISPUTE BETWEEN CABLE AND WIRELESS LIMITED AND BT ABOUT CHARGES FOR CONNECTING NEW CUSTOMERS TO FULLY UNBUNDLED LOOPS

### WHEREAS:

- A. Section 188(2) of the Communications Act 2003 provides that where there is a dispute between different communications providers, and Ofcom has decided pursuant to section 186(2) of the Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the Act, together with a full statement of the reasons on which the determination is based.
- B. Section 190 of the Act sets out the scope of Ofcom’s powers on resolving a dispute which may include, in accordance with section 190(2) of the Act:
  - (i) making a declaration setting out the rights and obligations of the parties to the dispute;
  - (ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
  - (iii) giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
  - (iv) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.
- C. On 16 December 2004 Ofcom published its “Review of the Wholesale Local Access Market”, determining that BT Group plc (“BT”) has significant market power (“SMP”) in the wholesale local access market in the UK excluding the Hull Area. Ofcom imposed conditions on BT in the wholesale local access market:
  - (i) not to unduly discriminate; and
  - (ii) to charge prices that were oriented to costs for Network Access.
- D. Ofcom also imposed charge ceilings on specific local loop unbundling (“LLU”) services, including a charge ceiling of £168 per connection for the service known as MPF new provide (the “New Provide” service). BT’s published service description for this service includes a visit by a BT engineer to the premises where the service is to

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<sup>1</sup> [Ofcom RWLAM statement](#)

be connected (a “site visit”). In setting the connection charge ceiling, Ofcom’s published decision expressly included the cost of a site visit.

- E. On 1 and 18 August 2005, Ofcom published its conclusions in both the cost of capital and cost of copper studies. As a result the charge for a New Provide was reduced in December 2005 to the current charge of £99.95.
- F. On 1 July 2006, BT began providing another LLU-based service, known as the “Stopped Line Provide” which was priced at £47.43 (currently £40.49)<sup>2</sup>. One of the features of this service is that it does not include a site visit.
- G. On 2 August 2007, Cable & Wireless Access Limited (“C&WA”) wrote to Ofcom to refer a dispute for resolution between C&WA and BT about the connection charges paid by C&WA to BT before 1 July 2006 for the New Provide.
- H. On 7 September 2007, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of its decision.
- I. In order to resolve this dispute, Ofcom has considered, among other things, the current regulatory framework for LLU charges, the SMP conditions imposed upon BT in the wholesale local access market, the information supplied by the parties and Ofcom’s relevant duties as set out in sections 3 and 4 of the Act.
- J. A fuller explanation of the background to the dispute and Ofcom’s reasons for making this determination is set out in the explanatory statement accompanying this determination.
- K. This determination is issued to the parties in dispute on 19 December 2007 and published on 20 December 2007.

**NOW, THEREFORE, PURSUANT TO SECTION 186 AND 190 OF THE ACT OFCOM MAKES THE FOLLOWING DETERMINATION:**

- 1. It is hereby determined that BT’s charge of £168 (as charged between 16 December 2004 and 14 December 2005) for the New Provide service, and specifically the inclusion of the cost of a site visit within that charge, is consistent with its obligations under FA3 and FA9;
- 2. Furthermore, BT’s charge of £168 (as charged between 16 December 2004 and 14 December 2005) is to be regarded as having been provided at a fair and reasonable charge under FA9.2 and at a charge which was reasonably derived from costs of provision based on a forward-looking long-run incremental cost approach under FA3.1;
- 3. In light of the fact that a charge for a site visit was not included within the price for the New Provide service (as charged between 15 December 2005 and 30 June 2006), C&WA’s allegations are not relevant to the New Provide connection charge during the 15 December 2005 to 30 June 2006 period;
- 4. BT has not breached Condition FA2 by unduly discriminating in favour of its own business and making available to itself those inputs in the wholesale local access

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<sup>2</sup> [Openreach LLU price list](#)

market which it uses in its own downstream business on more favourable terms than those it offers to C&WA;

5. The Determination shall take effect on 19 December 2007.



**Neil Buckley**

**Director of Investigations**

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

19 December 2007

## Section 2

# Executive Summary

- 2.1 This dispute concerns BT's charges for connecting new customers of C&WA to fully unbundled local loops between 16 December 2004 and 30 June 2006.
- 2.2 C&WA referred this dispute to Ofcom for resolution on 2 August 2007<sup>3</sup>.
- 2.3 Ofcom decided that it was appropriate for it to handle the dispute and opened a formal investigation on 7 September 2007.
- 2.4 Following submissions from both parties, Ofcom published the scope of the dispute in its Competition Bulletin<sup>4</sup>:

*"Whether BT's charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and*

*Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA".*

- 2.5 A previous dispute between C&WA and BT involving the same facts had been accepted for resolution by Ofcom on 5 January 2007 (the "First Dispute"). In conducting this investigation, Ofcom has reconsidered all the evidence and submissions gathered where relevant as part of the First Dispute. The facts of that dispute were similar to this one, and much of the work performed before that dispute was withdrawn is relevant to this dispute.
- 2.6 Broadly speaking, there are 2 aspects to C&WA's allegations, namely inefficient charging and undue discrimination, as follows:
  - 2.6.1 That BT's charges for the New Provide service (which in all cases included an engineer site visit) were not efficient when a process without a site visit may have been possible; and
  - 2.6.2 That in providing certain inputs in the wholesale local access market with a reactivate facility, BT unduly discriminated in favour of its own downstream business.

### Inefficient charging for the New Provides

- 2.7 When local loop unbundling ("LLU") products were first being developed by BT and other communication providers ("CPs"), those CPs specified that a BT engineer site visit would be a requirement of the New Provide process<sup>5</sup>.
- 2.8 At the beginning of the period covered by the dispute, Bulldog Communications Ltd ("Bulldog")<sup>6</sup> was the main user of MPF<sup>7</sup>, although other LLU operators also used

<sup>3</sup> Please note that as further explained at paragraph 3.51, C&WA had previously submitted a dispute on the same facts which was accepted by Ofcom on 5 January 2007. This dispute was subsequently withdrawn by C&WA.

<sup>4</sup> [Ofcom Competition Bulletin entry](#)

<sup>5</sup> Please refer to paragraphs 5.34 and 5.35 of this document

<sup>6</sup> Bulldog was purchased by C&WA in May 2004, and renamed Cable & Wireless Access Ltd.

<sup>7</sup> Please see explanation of MPF at paragraph 3.16 below

MPFs. Bulldog played an important role in establishing LLU as a means of effectively competing with BT in the provision of fixed line services in the UK.

- 2.9 As Bulldog's residential business developed it considered that a reactivation product would be cheaper and more efficient. However, other CPs still wanted the site visit<sup>8</sup> (indeed in many cases there was no stopped line to reactivate<sup>9</sup>).
- 2.10 C&WA however believes that BT should have offered a Stopped Line Provide product as part of the MPF new provide product range for the period of this dispute.
- 2.11 C&WA notes that BT's SMP conditions only allow it to recover costs that are efficiently and necessarily incurred. Therefore C&WA argues that BT's charges for the New Provide product did not reflect efficiently-incurred costs.
- 2.12 Ofcom recognises that reactivating stopped lines, where it is an option, has a lower cost than using the full New Provide product. However, whether reactivating stopped lines is more efficient will depend on whether the CP actually wants a site visit to be carried out. If a CP does want a site visit then reactivating stopped lines is not more efficient.
- 2.13 Since different CPs have different requirements, Ofcom places general access conditions on BT. In this case the applicable condition is FA1<sup>10</sup> – the requirement to provide Network Access on reasonable request. Where CPs require a particular product, or a variation on a product, they request it from BT.
- 2.14 This is in fact what C&WA did on 7 June 2005 when it submitted a request to BT for a Stopped Line Provide service, which resulted in the introduction of the product on 1 July 2006.
- 2.15 Ofcom recognises the role that C&WA played in developing and establishing LLU in the UK, and also recognises that C&WA was (and is) keen for efficient processes to be in place. However, in Ofcom's view, BT fulfilled its regulatory obligations by providing the product on reasonable request.
- 2.16 C&WA's argument that BT should have offered the Stopped Line Provide product before it was requested would imply that there is an obligation for BT to determine CP's requirements, not only today but in the future, and to develop and offer products accordingly. This could, depending on the facts of the case, require BT to invest resources in developing products that may have no immediate demand and potentially no future demand, and thus may potentially be an inefficient use of resources.
- 2.17 Whilst Ofcom considers that BT should provide CPs with sufficient information about the relevant service to enable CPs to assess their requirements and request them, on the facts of this case, Ofcom does not share C&WA's view that BT was required to develop and offer a products before it was requested. BT's obligation is to provide network access on reasonable request.
- 2.18 While Ofcom understands and supports C&WA's desire for efficient charging, in this particular instance based on the facts of this case, Ofcom believes that BT fulfilled its regulatory obligations by providing the Stopped Line Provide product on reasonable

<sup>8</sup> Please refer to paragraphs 5.34 and 5.35 of this document

<sup>9</sup> Please refer to paragraph 5.30 of this document

<sup>10</sup> [Ofcom's review of the wholesale broadband access market Annex F](#)

request, and that C&WA's allegations in relation to inefficient charging are unfounded.

### Undue discrimination

- 2.19 In Ofcom's view, a reactivation facility for MPF New Provides constitutes a form of non-price difference in transaction conditions.
- 2.20 According to Ofcom's non-discrimination guidelines<sup>11</sup> in the case of non-price differences in transaction conditions, Ofcom begins with a presumption of undue discrimination. The SMP provider then has the opportunity to demonstrate that these differences are objectively justifiable. The presumption of undue discrimination does not require a consideration of harm to competition if the differences are objectively justifiable.
- 2.21 In Ofcom's view, there is an objective justification for the New Provide product not having a reactivation facility, since the specification for that product was developed by BT in conjunction with industry (including C&WA).
- 2.22 When C&WA wanted a New Provide product with a reactivate facility, it submitted a SoR to BT, which BT responded to.
- 2.23 Therefore, Ofcom concludes that BT did not unduly discriminate in favour of its own business during the period in question.
- 2.24 The background to this investigation is set out in **section 3**. Ofcom's consideration of this dispute and its decision is set out in **section 5**.

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<sup>11</sup> <http://www.ofcom.org.uk/consult/condocs/undsmc/contraventions/>

## Section 3

# Background and history of the dispute

## The parties to the dispute

### *BT/Openreach*

- 3.1 BT is a communications provider whose principal activities include local, national and international telecommunications services, and higher-value broadband and internet products and services and networked IT services. In the UK, BT serves more than 20 million business and residential customers with more than 30 million exchange lines, as well as providing network services to other communications providers.<sup>12</sup>
- 3.2 BT's local access network and, specifically, the copper pairs linking BT's exchange sites with the residential and business premises of its customers (known as the "local loop"), is the only ubiquitous fixed access network for the provision of telecommunications in the UK.<sup>13</sup>
- 3.3 Openreach is a business unit within the BT group that is operationally separate from BT's other businesses (such as BT Retail and BT Wholesale). Openreach was established in January 2006 as one element of undertakings offered by BT, and accepted by Ofcom in lieu of a reference to the Competition Commission, on 22 September 2005 (the "Undertakings").<sup>14</sup>
- 3.4 The purpose of Openreach is to manage and operate BT's local access and backhaul network. Openreach provides access services to communication providers who purchase them to enable those communications providers to offer their own downstream (e.g. retail) services. The Undertakings specify that Openreach will offer those services to all communications providers (including BT Wholesale and BT Retail) on an equivalent basis (applying a principle known as "equivalence of inputs").
- 3.5 One of the services that Openreach provides is access to unbundled local loops pursuant to BT's SMP conditions FA1 to FA9.
- 3.6 References in this document are to either BT or Openreach, depending on the time period in question.

### *C&WA*

- 3.7 C&WA is a wholly-owned subsidiary of Cable & Wireless PLC. Under its previous name of Bulldog, it has been an active participant in the local loop unbundling process from the very beginning. C&WA provides wholesale services to Cable & Wireless and other wholesale customers including retail ISPs. Unlike many providers, C&WA has predominantly used a fully unbundled loop strategy rather than shared loops (for further details of what these terms mean, see paragraphs 3.11 to 3.17 below), and since September 2004, has used fully unbundled loops for all new customers.
- 3.8 Although the Bulldog retail customer base was sold on 7 September 2006 to Pipex, C&WA retains all of the other assets and liabilities of Bulldog. Services which were

<sup>12</sup> Source: see [BT's website](#)

<sup>13</sup> [Ofcom's Telecoms Strategic Review statement](#)

<sup>14</sup> [BT Undertakings](#)

formerly provided direct to end users by Bulldog Communications Ltd are still provided over C&WA's infrastructure, which includes unbundled local loops.

- 3.9 For ease of reference we refer to Cable & Wireless PLC, Cable & Wireless Access Ltd and Bulldog as C&WA throughout this document.

## **The services relevant to this dispute**

### *Unbundled Local Loops and MPFs*

- 3.10 Ofcom has imposed a regulatory condition on BT that it must provide access to unbundled local loops, as a result of Ofcom's finding that BT has significant market power within the wholesale local access market.<sup>15</sup>
- 3.11 There are two types of access using LLU: full and shared.
- 3.12 In "full" unbundling, local loops are physically disconnected from BT's equipment and connected to another communications provider's equipment (i.e. the LLU operator takes over control of the line). This type of unbundling is available from BT as the metallic path facility ("MPF") product.
- 3.13 In "shared" unbundling, the line remains connected to the BT network, but an additional connection is made to a competing provider's network to enable that provider to use that line to deliver services to customers. This type of unbundling is available from BT as the shared metallic path facility ("SMPF") product.
- 3.14 In essence, LLU enables competing providers partly or wholly to control a customer's access line and provide voice and/or data services directly to customers without further intervention by BT.
- 3.15 The requirement to provide LLU was imposed to promote competition in downstream electronic communications services (particularly the provision of broadband internet access and voice services). The advantages of LLU over other forms of network access includes the ability of competing providers to innovate, to differentiate their services to a greater extent and to provide higher-bandwidth services, as well as a better range of applications and improved service levels.
- 3.16 MPF is a form of full LLU comprising a two-wire point to point metallic transmission path extending between a network termination point ("NTP") at the (end-user) customer's premises to the line side of a main distribution frame ("MDF") in the relevant BT exchange.
- 3.17 Communications providers who purchase an MPF are therefore able to connect the MPF directly to their own communications network (assuming that it has a point of presence in the relevant local exchange), and provide services directly to end users who are connected to that loop.

### *Wholesale line rental*

- 3.18 Wholesale Line Rental ("WLR") allows alternative suppliers to rent access lines on wholesale terms from BT, and resell the lines to customers, providing a single bill that covers both line rental and telephone calls.

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<sup>15</sup> [Ofcom RWLAM statement](#) - please refer to section 7

### *Transfer*

- 3.19 Prior to July 2006, communications providers who wanted to use MPF had two options in taking control of a specific loop.
- 3.20 The first was a process referred to as “transfer”. Transfer occurs if a communications provider takes over service from an exchange to a site with an active connection supplied by another provider.
- 3.21 This dispute concerns cases where the customer is either not taking a service from an existing supplier or requires a new connection.

### *The New Provide service*

- 3.22 The second option available to communications providers to use MPF before June 2006 was to purchase the New Provide service from BT.
- 3.23 The New Provide service comprises the provision of a new line (including the installation of a new physical connection and the installation of a new NTP in the customer’s premises). BT’s process documentation sets out the detailed specification for the steps comprising the New Provide service and is attached as Annex 2 to this explanatory statement.
- 3.24 BT submitted that the New Provide service had been introduced in May 2001, following consultation with communications providers who had sought to provide services direct to end-users via MPFs.<sup>16</sup> For example, in such circumstances the resultant MPF was required to have certain minimum characteristics as specified by the DSL Task Group<sup>17</sup> and documented within SIN349.<sup>18</sup> In addition, communications providers’ broadband equipment has to conform to the Industry agreed Access Network Frequency Plan.<sup>19</sup>
- 3.25 From Ofcom’s involvement in discussions with industry at the time<sup>20</sup>, it was clear that a site visit was originally requested by communications providers as part of the New Provide service. One reason for this was that, at the time, MPF was primarily being considered to support business services and as such the communications providers were keen to have a more managed installation service, which included the identification and possibly the repositioning of the Network Termination Equipment (master socket).

### *The Stopped Line Provide service*

- 3.26 On 1 July 2006, BT commenced offering the “Stopped Line Provide” service.
- 3.27 Stopped Line Provide is a service that is suitable in situations where a stopped line (that is, a line that has previously been active and that could be re-activated without an engineer site visit) already existed providing for reactivation of an uninterrupted loop from the exchange to the NTE at the customer’s premises.

<sup>16</sup> Submitted in BT’s response dated 19 February 2007 to Ofcom’s information request under section 191 of the Act dated 13 February 2007

<sup>17</sup> Digital Subscriber Line Task Group

<sup>18</sup> Supplier Information Note about BT MPF Interface Description

<sup>19</sup> [Openreach LLU product description](#)

<sup>20</sup> This is in keeping with the letter from BT to C&WA following the industry meeting of 16 July 2003; please refer to paragraph 5.35 below for a quote from this letter

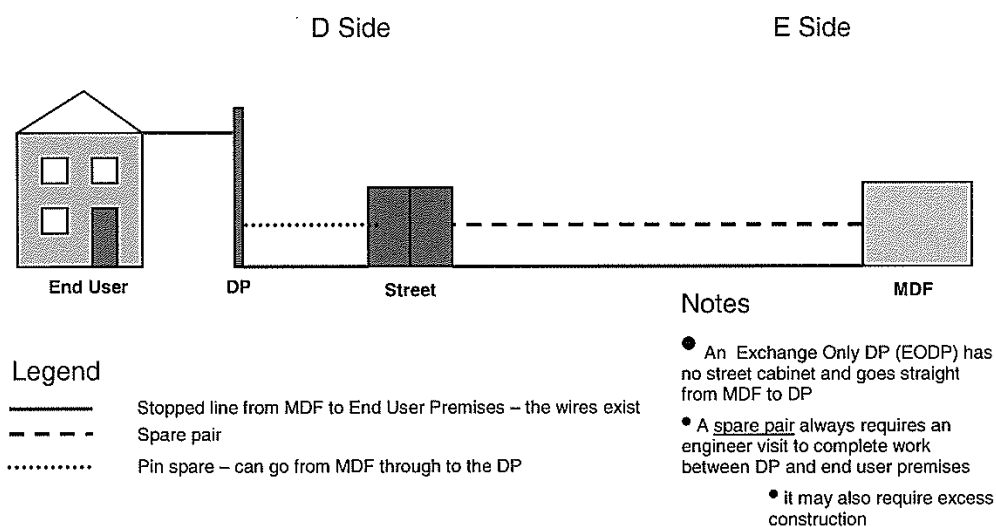
- 3.28 Therefore, the Stopped Line Provide service can be provided only when a communications provider orders a New Provide at their customer's premises and there is an existing line to the premises which is not currently in use.

### 'Spare Pairs'

- 3.29 A spare pair refers to the presence of existing copper capacity in the access network between the exchange and the distribution point to deliver service to an end user without requiring the deployment of new copper or infrastructure between the distribution point and the customer's premises. The presence of a spare pair does not imply the same functionality associated with a "stopped line".
- 3.30 The spare pair is simply a physical connection (a copper wire) joining the exchange and the distribution point ("DP") that is not currently in use as an active or stopped line. It does not imply that a drop wire (the physical connection between the DP and the customer's premises) is necessarily in place.
- 3.31 Figure 1 below has been provided by Openreach:

**Figure 1**

### Overview of spare pairs in the Openreach network



Source: Openreach/LRC/TEF/V1/Feb\_07

### Regulatory reviews relevant to this dispute

- 3.32 A number of Ofcom's previous regulatory reviews are relevant to this dispute.

### Wholesale local access market review

- 3.33 On 16 December 2004 Ofcom published the *Review of the Wholesale Local Access Market* ("RWLAM")<sup>21</sup>, which:
- 3.33.1 concluded that BT had significant market power ("SMP") in the wholesale local access market in the UK excluding the Hull area. Ofcom also identified co-location as an appropriate technical area for the purposes of imposing appropriate regulatory remedies. LLU services fall within the wholesale local access market and co-location; and
  - 3.33.2 imposed various SMP conditions on BT (amongst other things) to provide Network Access on fair and reasonable terms and not to unduly discriminate against persons.
- 3.34 These SMP conditions included:
- 3.34.1 Condition FA3 (basis of charges);
  - 3.34.2 Condition FA9 (requirement to provide Local Loop Unbundling Services);
  - 3.34.3 Condition FA2 (requirement not to unduly discriminate in relation to Network Access).
- 3.35 Under Condition FA3.1 BT shall secure that each charge payable for Network Access under FA9 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach.
- 3.36 Condition FA9.2 states that BT must provide Local Loop Unbundling Services as soon as reasonably practicable and on fair and reasonable charges, and on such terms, conditions and charges as Ofcom may from time to time direct.
- 3.37 Condition FA2.1 states that BT shall not unduly discriminate against particular persons in relation to matters connected with Network Access.
- 3.38 Conditions FA3 and FA9 contain a direction-making power for Ofcom to set terms, conditions and charges for Network Access and LLU services which would include New Provide services.
- 3.39 The RWLAM set charge ceilings for fully unbundled and shared access connection and rental charges. In the case of the MPF New Provide service the charge ceiling was set at £168, effective from 1 January 2005. The service to which this ceiling applied included the cost of a site visit by an engineer<sup>22</sup>.

### *Cost of Copper*

- 3.40 Ofcom deferred setting the charge ceiling for the fully unbundled rental charge at the time the other LLU charge ceilings were set in December 2004 under the RWLAM. This was because a high proportion of the total cost of this charge was determined by the cost of laying and maintaining the copper loop, the costs for which Ofcom was in the process of reviewing.
- 3.41 On 18 August 2005, Ofcom published its statement on *Valuing copper access*<sup>23</sup>. Ofcom was able, therefore, to set a ceiling for the fully unbundled rental charge which

<sup>21</sup> [Ofcom RWLAM statement](#)

<sup>22</sup> [Ofcom RWLAM statement](#) - please refer to paragraph 9.65.

<sup>23</sup> [Ofcom Cost of Copper Statement](#)

was published in *Local loop unbundling: setting the fully unbundled rental charge ceiling* (the “November 2005 LLU Statement”<sup>24</sup>).

#### *LLU: setting the fully unbundled rental charge ceiling*

- 3.42 On 30 November 2005, Ofcom published the November 2005 LLU Statement. In this Statement Ofcom directed that the costs for new drop wire installation for fully unbundled loops were to be recovered in the rental charge in order to achieve consistency between LLU, wholesale line rental and BT’s retail products.
- 3.43 As in the RWLAM, Ofcom considered it preferable to set charge ceilings as opposed to exact charges. Ofcom made a number of assumptions in calculating the proposed ceiling; these are set out in the November 2005 LLU Statement.
- 3.44 A charge ceiling, as opposed to an exact charge, provides BT with the flexibility to charge below the proposed ceiling in the event that its own assumptions were different to those Ofcom applied and if costs moved over the period in which the ceiling was in place.
- 3.45 On 15 December 2005, the cost of a New Provide service was reduced by BT to £99.95. From this date onwards the cost of the site visit associated with the New Provide service has been recovered in the rental charge.

#### *Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services*

- 3.46 In January 2006, Ofcom published the statement *Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services* (the “January 2006 WLR Statement”<sup>25</sup>). In this Statement, Ofcom reduced the annual rental charges which communications providers pay for WLR. Ofcom determined that the ceiling for the WLR connection charge should be £88 per line and confirmed that the approach to setting this ceiling was “reasonable”. In this document, Ofcom emphasised that it intended to set WLR and LLU charges on a consistent basis:

*“[Ofcom has] used the same methodology for projecting cost as used in setting the charges for local loop unbundling”.*

### **History of this dispute**

- 3.47 A previous dispute between C&WA and BT involving the same facts had been accepted for resolution by Ofcom on 5 January 2007 (the “First Dispute”). This dispute was subsequently withdrawn by C&WA and the investigation closed by Ofcom on 19 April 2007 without issuing a final determination<sup>26</sup>.
- 3.48 On 2 August 2007 C&WA referred a dispute between C&WA and BT to Ofcom for resolution, citing BT’s charges to C&WA for connecting new customers to fully local unbundled loops as being in dispute.
- 3.49 On 30 August 2007, C&WA submitted comments on the proposed scope of the present dispute.
- 3.50 On 14 August and 3 September 2007, BT submitted comments on C&WA’s dispute referral.

<sup>24</sup> [Ofcom LLU statement](#)

<sup>25</sup> [Ofcom WLR statement](#)

<sup>26</sup> [Ofcom First Dispute Competition Bulletin entry](#)

- 3.51 On 7 September 2007, after holding discussions with both of the parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision.
- 3.52 Ofcom published the scope of the dispute in its Competition Bulletin on 7 September 2007 as being<sup>27</sup>:

*“Whether BT’s charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and*

*Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA”.*

- 3.53 On 16 November 2007 Ofcom published a draft determination with a consultation period for comments until 5.00pm on 29 November 2007. Following consideration of a request for an extension to this deadline, Ofcom extended the consultation period to 5.00pm on 3 December 2007. This was publicised by an update note on the Competition Bulletin entry on Ofcom’s website.

### Information sought by Ofcom

- 3.54 The parties have been notified that Ofcom has used information obtained during the First Dispute<sup>28</sup>.
- 3.55 Ofcom confirmed that further information received from C&WA on 11 October 2007 was accurate. Specifically, Ofcom used its powers under section 191 of the Act: to confirm whether the information received from C&WA was accurate.
- 3.56 Ofcom received responses to the consultation on the draft determination from C&WA and BT on 3 December 2007.
- 3.57 During the course of the investigation, Ofcom has also met with BT and C&WA on 11 September 2007 and 13 September 2007 respectively, and with C&WA again on 10 December 2007.
- 3.58 Following the meeting with BT on 11 September 2007, Ofcom received a letter from BT on the scope of the dispute on 17 September 2007.
- 3.59 In reaching its decision, Ofcom has used analysis previously undertaken by Ofcom to the extent that it is relevant to the current dispute.
- 3.60 Finally, Ofcom has discussed this dispute with the staff of the Office of the Telecoms Adjudicator (“OTA”) and obtained information from the OTA. The OTA was appointed by Ofcom in July 2004 as an industry facilitation entity, independent of Ofcom and of communications providers. The purpose of the OTA is to facilitate swift implementation of the processes necessary to enable competitors to gain access to BT’s local loop on an equivalent basis to that enjoyed by BT’s own businesses.

<sup>27</sup> [Ofcom Competition Bulletin entry](#)

<sup>28</sup> Emails from Ofcom to BT and C&WA on 5 November 2007

## Section 4

# Submissions of the parties

## Cable and Wireless Access Ltd

### *Charges for the New Provide service*

- 4.1 In its referral to Ofcom, C&WA alleges that BT has been over-recovering for the New Provide service on the following grounds:

*“By charging C&WA for costs it did not incur efficiently, BT was in breach of its cost orientation obligations<sup>29</sup>”.*

- 4.2 C&WA alleges that where it wished to connect a new customer using LLU, BT always charged for a New Provide, when in 50% of cases BT could have reactivated an existing line.
- 4.3 In its submission to the First Dispute, C&WA also stated that the proportion of New Provide connections that should properly be carried out by reactivating the existing line could vary, depending on the source. For example, C&WA states that the most recently available data was BT data from the Stopped Line Provide service trial in 2006-2007, which suggested that the figure could be 36%.<sup>30</sup>
- 4.4 C&WA further stated in the First Dispute that a September 2005 Openreach presentation of September 2005 (in the context of new installations for BT retail in WLR) suggested the figure could be 68%.
- 4.5 In addition, C&WA assert that during negotiation of the New Provide it sought the availability of a reactivate facility to use existing lines that did not require a drop wire installation (i.e. site visit) and so meant a lower charge for MPF.
- 4.6 C&WA therefore alleges that the New Provide service was implemented and charged for in an inefficient manner and BT is not entitled to recover inefficient costs. C&WA also argues that this was the case because BT subsequently introduced the Stopped Line Provide service which re-activates the existing line, at a price that was “less than half” the current New Provide service charge.
- 4.7 Furthermore, C&WA states that BT should have known from its experience in the WLR provision process that existing lines could be identified and reactivated at less cost than connecting via a New Provide service. This would have avoided the need for a site visit. C&WA consider that the process for providing WLR is very similar to that for providing MPF.
- 4.8 In referring the dispute, C&WA divides the history of commercial negotiations between C&WA and BT in relation to the provision of the Stopped Line Provide service into four separate phases:
- 4.8.1 Phase 1 – bilateral discussions. C&WA considers that the components of this phase were:
- 4.8.2 2002 - Discussions through industry groups and bi-lateral meetings.

<sup>29</sup> 2.3.2 (i) of C&WA's dispute referral of 2 August 2007

<sup>30</sup> C&WA's submission in the First Dispute of 22 November 2006 Annex 1

- 4.8.3 30 April 2003 – Letter from C&WA's CEO to BT identifying 12 issues, issue 4 of which was the:

*"High cost of provisioning fully unbundled line based on spare pair (£265) compared to no cost for PSTN service".*

- 4.8.4 March 2004 – dispute sent to Ofcom which included the "reactivate issue".

- 4.8.5 Phase 2 – OTA facilitation/industry discussion: C&WA states that during this time

*"...[the reactivation] issue sat on the OTA's list of industry requirements for much of 2004 under the generic banner of pricing issues...although the OTA and the co-operative approach they sponsored was a success on many levels, this issue was never tackled effectively by that process"<sup>31</sup>*

- 4.8.6 Phase 3 – Joint approach: C&WA state that by mid-2005 C&WA concluded that an industry-wide OTA approach was "not likely to produce a result on the reactivate issue" and recommenced discussions with BT (with ongoing assistance from the OTA). C&WA states that the document that triggered this was C&WA's list of issues for the OTA of 7 June 2005. C&WA state that:

*"...it does appear to have been at around this time that serious discussions began which ultimately resulted in today's Stopped Line Provide product...[BT] agreed to launch a 'tactical' reactivation product late in 2005. In the end...both parties accepted it was not a workable product"<sup>32</sup>.*

- 4.8.7 After 2006 C&WA sought further discussions.

- 4.8.8 Phase 4 – First Dispute: following the issuing of the Ofcom draft determination on 5 April 2007, C&WA state:

*"On examination of the draft determination, it became clear to C&WA that there had been a potentially significant terminological misunderstanding in relation to the dispute. C&WA therefore withdrew its dispute with the intention of engaging in further discussions with BT"<sup>33</sup>.*

- 4.8.9 Further discussions took place with BT in May followed by a short exchange of letters.

#### *Undue discrimination*

- 4.9 C&WA also considers that BT has unduly discriminated in favour of its own business:

*"By providing a more efficient process for Wholesale Line Rental (and retail PSTN) than for MPF, BT was in breach of the prohibition on undue discrimination in the wholesale local access market."<sup>34</sup>*

- 4.9.1 C&WA alleges that BT had access to copper pairs as a wholesale input enabling it to supply network access internally with a quick cheap way to reactivate stopped lines, including as SMPF. When BT supplied network access externally as MPF it did so without a reactivation facility.

<sup>31</sup> C&WA's dispute referral of 2 August 2007 paragraph 3.1(iii)

<sup>32</sup> C&WA's dispute referral of 2 August 2007 paragraph 3.1(iii)

<sup>33</sup> C&WA's dispute referral of 2 August 2007 paragraph 3.1(iv)

<sup>34</sup> C&WA's dispute referral of 2 August 2007 paragraph 2.3.2(ii)

- 4.9.2 BT therefore provided a more efficient process for Wholesale Line Rental (WLR) and SMPF internally than for MPF externally.
- 4.10 C&WA claims that BT has always reactivated stopped lines for WLR and now does the same for local loop unbundling products (i.e. MPF) through Stopped Line Provide. C&WA believe that the WLR and MPF order processes are very similar and rely on the same appointment books and same access to core systems.
- 4.11 According to C&WA, a New Provide is only used for WLR when wiring is needed behind the Network Termination Point (NTP) whereas a New Provide was used as a matter of course for the provision of MPF when it was not a transfer from an existing provider.
- 4.12 C&WA considers that the copper pair inputs that are used for WLR (including SMPF and MPF) are in the wholesale local access market.
- 4.13 Therefore C&WA views the facility to reactivate such an input as falling within the wholesale local access market and can be considered in terms of the undue discrimination obligation on BT.

## BT

### *The level of the charge for the New Provide Service*

- 4.14 As part of its submission BT refers to a letter of 5 December 2006 sent to Ofcom and information provided under a formal information request dated 13 February 2007 during the First Dispute<sup>35</sup>.
- 4.15 BT notes that the New Provide product was introduced in May 2001 when a new line licence condition (Condition 83) became effective in August 2000.<sup>36</sup> The service was set up as an appointed service, meaning that an appointment was needed with every new provision order.
- 4.16 In July 2003, industry agreed that the engineering visit should be maintained and that no change to the product was required.
- 4.17 BT states that the charge for the New Provide service was subject to a charge ceiling determined by Ofcom in December 2004 following the conclusion of the RWLAM. BT states that the costs behind the current price of the New Provide service (effective from December 2005) were also discussed with Ofcom prior to its notification and implementation and are LRIC-based using average costs across all New Provides.

### *Undue discrimination*

- 4.18 BT states that C&WA's contention that BT unduly discriminated in favour of WLR (and retail PSTN) is unfounded given that WLR products are not captured by BT's obligation not to unduly discriminate as set out in the wholesale local access market review.

### *Additional comments*

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<sup>35</sup> BT's submission of 14 August 2007

<sup>36</sup> BT's submission of 19 February 2007

- 4.19 BT considers that C&WA's dispute submission is in fact the same dispute as the First Dispute positioned in a different way and that it does not contain any new arguments or evidence.
- 4.20 BT maintains that the only discussions which took place between C&WA and BT in May 2007 concerned clarification of terminology, existing processes and cost recovery principles.
- 4.21 BT therefore asserts that C&WA did not raise any new issues.

## Section 5

# Ofcom's analysis and decision

## Ofcom's legal powers

- 5.1 Sections 185 to 191 of the Act give Ofcom the power to resolve disputes submitted to it. Section 186 of the Act requires Ofcom to resolve disputes referred to it under section 185 where Ofcom has determined that it is appropriate for it to resolve the dispute.
- 5.2 Ofcom has general duties under the Act in relation to all of its activities, in particular under section 3 of the Act which include:
  - 5.2.1 the principal duty to further the interests of citizens in relation to communications matters (section 3(1)(a)) and;
  - 5.2.2 to further the interests of consumers in relevant markets, where appropriate by promoting competition (section 3(1)(b)).
- 5.3 The current dispute relates to obligations imposed under SMP Conditions FA2, FA3 and FA9 (i.e. obligations not to unduly discriminate, to ensure that network access and the provision of LLU services occurs as soon as reasonably practicable on fair and reasonable terms and that charges are cost-oriented and LRIC-based).
- 5.4 The obligations in SMP Conditions FA2, FA3 and FA9 came into force on 16 December 2004.

## Issues to be resolved

- 5.5 In resolving this dispute Ofcom has considered the following two issues as set out in the published scope of this dispute. Namely:

*"Whether BT's charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and*

*Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA".*

## Whether BT's charge for New Provides from 16 December 2004 to 30 June 2006 was consistent with Conditions FA3 and FA9

- 5.6 As noted above in paragraph 5.3, FA3 and FA9 require that BT ensures that Network Access and the provision of LLU services occurs as soon as reasonably practicable on fair and reasonable terms and that charges are cost-oriented and LRIC-based.
- 5.7 In referring this dispute C&WA consider that BT has contravened these conditions as follows:

- 5.7.1 BT overcharged for a New Provide service because a new line was not in fact always required;
- 5.7.2 even where a new line was required, it was provided in an inefficient manner; and
- 5.8 In assessing BT's charge for the New Provide service to C&WA, Ofcom has considered whether the site visit costs included in the charge for New Provide services were fair, reasonable and efficient, in accordance with Condition FA3.

*The period from 16 December 2004 to December 2005*

- 5.9 As noted in paragraph 3.39 the New Provide service charge ceiling (of £168) during this period was set by Ofcom in the RWLAM, which was published on 16 December 2004.
- 5.10 Given that the service had been developed on the basis that a site visit was required, as discussed in paragraph 3.22 onwards, Ofcom considered during the RWLAM that it was appropriate for this cost to be included within the New Provide charge.
- 5.11 Ofcom consulted on its proposals in the RWLAM twice before making its final determination. C&WA responded during the original withdrawn dispute of 5 January 2007 by stating that its response at the time to the RWLAM :

*"identifies [C&WA's] concern with the inclusion of the engineering visit in the charge for the new provide product".*

- 5.12 Ofcom has considered C&WA's response to the RWLAM which states that:

*"Bulldog believes that the cost of the site visit for the standard new provide category of MPFs must reflect the fact that over 90 percent of standard new provides are in fact provisioned over spare pairs<sup>37</sup>".*

- 5.13 Ofcom considers that C&WA's response to the RWLAM does not query the inclusion of the engineering visit in the New Provide charge, rather that the cost should take into account the existence of spare pairs (the relevance of the availability of spare pairs is considered further at paragraph 5.28 onwards).

- 5.14 In the final statement<sup>38</sup> concluding the RWLAM, Ofcom confirmed that:

*"[t]he cost of the site visit reflects the number of new provides that are provisioned over spare pairs."*

- 5.15 The RWLAM imposed on BT a requirement to charge for the provision of Network Access in the wholesale local access market (which includes the provision of New Provide services) on the basis of long run incremental cost ("LRIC").
- 5.16 Furthermore, in setting the charge ceiling in the market review, Ofcom considered the question of whether the costs had been incurred efficiently, including BT's estimates for the average length of time spent by engineers during site visits.
- 5.17 Therefore, in the RWLAM, Ofcom set a cost-oriented charge ceiling of £168 for the New Provide service.

<sup>37</sup> [Bulldog's second response to RWLAM](#) - please refer to page 5

<sup>38</sup> [Ofcom RWLAM statement](#)

- 5.18 As noted in the RWLAM, the cost-oriented charge reflects the LRIC of providing the elements of the service to be recovered from the connection charge, plus a mark-up using the average costs across all New Provide connections.
- 5.19 Ofcom has not received any evidence in this investigation to suggest that the charge of £168 was not fair or reasonable, cost-oriented, or efficiently incurred as it concluded in the RWLAM. As a result, Ofcom is applying the decision on the reasonableness of the charge, as taken during this market review, in the context of this dispute.
- 5.20 Therefore Ofcom considers that:
- 5.20.1 BT's charges for the New Provide service were fair and reasonable, including the cost of a site visit which would be required to provide the service; and
- 5.20.2 The price charged by BT (which in turn reflected the charge ceiling imposed by Ofcom) already accounted for the extent to which spare pairs were available in calculating that price in the RWLAM.

*The period 15 December 2005 to 30 June 2006*

- 5.21 On 15 December 2005, BT's charge for New Provide services dropped from £168 to £99.95. Two regulatory reviews are relevant to the New Provide charge during this period.
- 5.22 In the November 2005 LLU Statement Ofcom confirmed that the costs for new drop wire installation (i.e. costs pertaining to a site visit) for fully unbundled loops were henceforward to be recovered in the rental charge. This was to achieve a consistent treatment of drop costs between LLU, WLR and BT's retail products and to reduce incentives for arbitrage and the risk of over-recovery where there is churn between products.
- 5.23 In addition, it is stated that:

*"to reflect this change, BT has notified a new connection charge for fully unbundled new provides which will apply from 15 December 2005<sup>39</sup>".*

- 5.24 This new connection charge was £99.95.
- 5.25 BT has confirmed that since 15 December 2005 the cost of the engineering visit associated with New Provide has been recovered in the rental charge.
- 5.26 C&WA's allegation is that the New Provide connection charge is not based on reasonably incurred costs, including the period between 15 December 2005 and 30 June 2006. This includes a site visit being charged for when in many cases it is not required due to an existing line that can be reactivated at less cost.
- 5.27 Given that the £99.95 charge does not include a site visit element, the allegations in respect of FA3 and FA9 are therefore not applicable to the New Provide connection charge during the 15 December 2005 to 30 June 2006 period.

*The availability of existing lines during the period*

<sup>39</sup> [Ofcom LLU statement](#) – please refer to paragraph 4.40 page 17

- 5.28 C&WA has argued that BT has breached its regulatory obligations by supplying the New Provide service to C&WA in an inefficient manner, rather than reactivating an existing line.
- 5.29 C&WA claims that in up to 50% of cases an existing line could have been reactivated, and this is the basis of its financial claim.
- 5.30 However, according to data received from BT<sup>40</sup>, the number of existing lines that could be reactivated appears much lower, in actual fact between 5% and 20%.

*Industry requirement for a site visit*

- 5.31 In addition to C&WA's assertion that there were more existing lines available to reactivate it also maintains that it sought to have the facility to reactivate existing lines where available. This would have meant that the specification of the New Provide product allowed for reactivation and did not necessarily always require a site visit when connecting C&WA to a LLU customer.
- 5.32 The New Provide was designed by BT during a process of negotiation with industry. Bulldog (the forerunner of C&WA) took part in the New Provide specification process between BT and the industry that started in 1999.
- 5.33 BT has stated (in response to a formal request for information) that a site visit was specified as a requirement by industry during the negotiation process<sup>41</sup>.
- 5.34 At an Industry meeting of LLU operators on 16 July 2003, BT reports that it had "considered sub-categorisation of the standard new provide category to provide an equivalent product to the PSTN take-over, considering that over 90 per cent of all new provides had been over spare pairs". BT further reported that it had established that a new NTE was always being provided as such and so no sub-categorisation was possible.
- 5.35 Following this meeting, BT wrote to C&WA stating:

*"There was an early agreement between BT and LLU operators to install a new NTE for all new provisions. This was discussed at the LLU Industry Group meeting on 16 July and industry consensus was to maintain this position and the associated standard charge for a spare pair. It is unfortunate that this idea did not mature but as agreed it does not appear to be a solution."*

- 5.36 Taking all of this evidence into account Ofcom believes that it is reasonable to consider that a reactivate facility was not requested by industry as part of the New Provide service.
- 5.37 Under SMP condition FA1 BT is required to provide Network Access on reasonable request. Thereby, if a communications provider wanted a stopped line provide service for MPF they have the option to submit such a request to BT. If BT were to refuse such a request then the matter could be brought to Ofcom as a dispute. The OTA's records of industry meetings do not contain any request for a reactivation facility<sup>42</sup>.

<sup>40</sup> Information received by a section 191 information request during the previous withdrawn dispute.

<sup>41</sup> C&WA letter of 11 October 2007

<sup>42</sup> The OTA's LLU Industry Forum Issues Summary 8 September 2004

- 5.38 C&WA states in further comments to Ofcom<sup>43</sup> that it did not formally request a reactivation facility as part of the New Provide product by submitting a SoR because a collaborative bilateral approach had been adopted with BT during the negotiations and the process was also subject to the review of the OTA.
- 5.39 C&WA asserts that during the latter stages of the negotiation process, which coincides with the period under review in this investigation, SoRs were no longer being submitted as normal practice.
- 5.40 Whilst it is true that informal discussions and negotiations were conducted by the industry during this period, it remains true that the appropriate means of making a request was via an SoR.
- 5.41 C&WA did submit an SoR for a reactivate product on 5 June 2005. BT commenced providing another LLU-based service, known as MPF stopped line provide on 1 July 2006.
- 5.42 The OTA has stated the following<sup>44</sup>:
- 5.42.1 It was normal practice to use SoRs during negotiations for LLU products, including during the period of 2004 to 2006.
- 5.42.2 Negotiations were difficult during the early stages around 2002 to 2003 but this was not specifically the fault of one party.
- 5.42.3 During the 2004-2006 period of the negotiations, a more co-operative form of negotiation developed between BT and other communication providers (such as C&WA's forerunner Bulldog), which included offers from BT to look at product development without SoRs.
- 5.42.4 The decision not to submit SoRs was made by Bulldog but it is clear that SoRs provide an unambiguous product specification and ultimately should result in more effective negotiation.
- 5.42.5 Furthermore, while CPs stated that they would be submitting SoRs for desired products, in several cases SoRs were not submitted.
- 5.43 There was no record of a requirement for a reactivate facility on the issues list from early OTA minutes of industry meetings<sup>45</sup>.
- 5.44 Ofcom does not consider that BT's obligations are only triggered by the submission of a formal SoR. In general, Ofcom would not expect that a request for interconnection would have to be made in an unnecessary bureaucratic or rigid way.
- 5.45 C&WA have submitted that they raised the issue of a reactivate facility with BT in 2003<sup>46</sup>: on 30 April 2003 C&WA wrote to BT attaching a list of 12 key issues with LLU. The "high cost of provisioning over spare pairs" is listed as issue 4 on the list of 12 issues.
- 5.46 As stated above, whilst we would not expect BT to refuse a request because it was not adequately formulated, we do not consider that the obligations under FA1 and

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<sup>43</sup> C&WA letter of 11 October 2007

<sup>44</sup> Note of discussion with OTA on 31 October 2007

<sup>45</sup> The OTA's LLU Industry Forum Issues Summary 8 September 2004

<sup>46</sup> CWA submission of 2 August 2007

FA9 have been triggered in this particular case by this general and short comment on the price of a particular method of network access.

- 5.47 The evidence submitted to Ofcom during the First Dispute<sup>47</sup> shows that at a meeting on 24 June 2003 between BT and C&WA, C&WA proposed that because the standard New Provide product included cases with and without wiring, subdivision of this category should be investigated. BT agreed to do so.
- 5.48 C&WA had stated that BT should have known from its experience in the WLR provision process that existing lines could be identified and used. However C&WA was involved in the industry negotiation for the New Provide product. The evidence shows that there was no requirement from industry to provide the product with a reactivate facility. When C&WA identified that it needed such a facility, it submitted a request to BT in June 2005. BT then provided the product in July 2006. In these circumstances, Ofcom does not consider that BT acted unreasonably.

### Conclusion

- 5.49 In the light of the evidence above, Ofcom's conclusion is that BT's charge for the New Provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9.

### Undue Discrimination – the legal framework

- 5.50 As noted above, FA2 requires BT not to unduly discriminate against persons or particular persons in relation to matters connected with Network Access.

- 5.51 Article 10(2) of the Access Directive<sup>48</sup> states:

*“Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.”*

- 5.52 In addition Ofcom has published guidelines on how it will investigate potential contraventions of requirements not to unduly discriminate imposed upon SMP providers (“the Guidelines”)<sup>49</sup>. In all cases, the Guidelines set out the questions that may be considered during an investigation. This would not prevent Ofcom from considering each potential contravention on the facts of the case.

- 5.53 The Guidelines state that

*“In the case of non-price differences in transaction conditions, offered by a vertically integrated SMP provider in wholesale communications markets, Ofcom may take an alternative approach. Ofcom will begin the investigation with a presumption that these differences amount to undue discrimination.”*

- 5.54 Non-price transaction conditions refer to features of a product other than price. In such a case, the SMP provider will then have the opportunity to provide evidence demonstrating that differences are objectively justified, and Ofcom will consider any evidence provided.

<sup>47</sup> This meeting was notified to Ofcom by C&WA in a submission during the First Dispute.

<sup>48</sup> [2002/19/EC]

<sup>49</sup> Undue discrimination by SMP providers - How Ofcom will investigate potential contraventions on competition grounds of Requirements not to unduly discriminate imposed on SMP providers at <http://www.ofcom.org.uk/consult/condocs/undsmc/contraventions/>

**Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA.**

5.55 In its submission of 2 August 2007, C&WA claimed that BT provided a more efficient process for WLR (and retail PSTN) than for the New Provide service and therefore was unduly discriminating in favour of its own downstream business. C&WA noted that:

- 5.55.1 for WLR a New Provide only applies where wiring is required behind the NTP;
  - 5.55.2 for MPF a New Provide is used whenever the connection was not a transfer;
  - 5.55.3 C&WA uses the New Provide product to compete with BT and other communication providers in retail markets for voice services;
  - 5.55.4 BT discriminated in the provision of SMPF because SMPF/retail broadband is attached to WLR;
  - 5.55.5 therefore C&WA suffered from the effects of undue discrimination in both voice and broadband markets; and
  - 5.55.6 Ofcom had considered undue discrimination between MPF and SMPF during the Opal case<sup>50</sup>.
- 5.56 In terms of the Opal case, the issue was not one of assessing undue discrimination between the provision of SMPF and MPF but rather considering undue discrimination in how customers could migrate between different wholesale services. The issue was resolved in that case by Ofcom noting:

*“...the particular features and stage of development of LLU services during the relevant period and the lack of any evidence of harm or intent to harm competition...”<sup>51</sup>*

**Further allegations by C&WA- copper loop input**

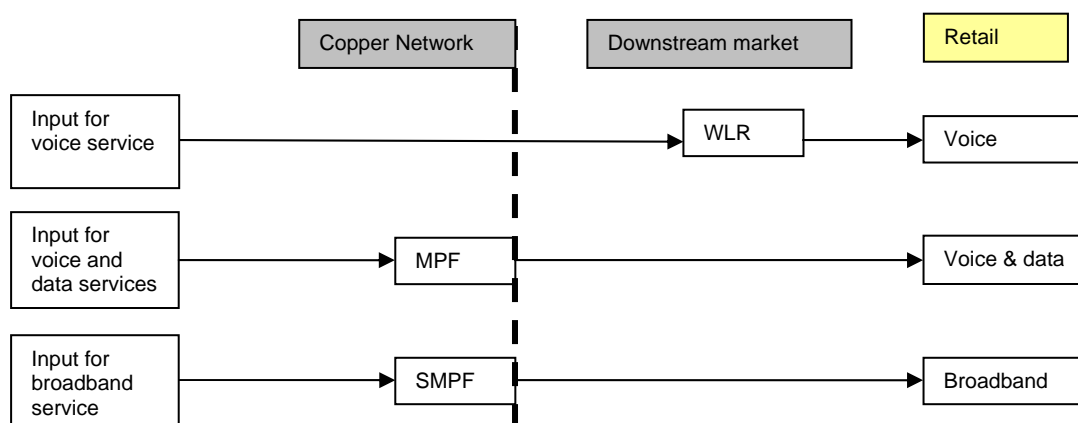
5.57 In its further submission to Ofcom on 30 August 2007 C&WA claimed that BT had provided access to copper pairs as an input for voice and data services on favourable terms to its own downstream business. Specifically, for the period of the dispute, C&WA alleges that:

- 5.57.1 BT has provided the copper loop input for voice services (as an input to WLR) with the facility of reactivating stopped lines which, at the relevant times, was not available to those who purchased Network Access in the WLAM as the New Provide product.
  - 5.57.2 BT discriminates against C&WA in the provision of the New Provide product when compared to the provision of SMPF by allowing SMPF to use the “stopped line provide” facility.
- 5.58 In relation to the second allegation, C&WA noted that SMPF, in addition to being sold externally to BT’s wholesale customers, is also used internally by BT to create downstream broadband products.

<sup>50</sup> [Opal case Competition Bulletin entry](#)

<sup>51</sup> [Opal case determination](#) – please refer to paragraph 5.71 page 27

- 5.59 C&WA's claims refer to the provision of copper inputs for downstream products (in particular WLR) and products falling in the WLAM. C&WA considers the reactivate facility to be a more efficient process than that used for the New Provide product and as such C&WA believes that BT's use of it when providing WLR (and retail PSTN) and SMPF (which is used by itself and other communications providers) therefore constitutes undue discrimination in favour of BT's downstream business.
- 5.60 Figure 2 below shows how the copper inputs in the WLAM relate to the voice and broadband retail markets. The dotted line shows the boundaries of the WLAM.



**Figure 2: WLAM products and copper inputs in WLR and retail markets**

***Discrimination in favour of the provision of the copper inputs to WLR***

- 5.61 C&WA claims that the inputs into WLR, that is to say the copper pair, are in the wholesale local access market. It further states that by providing this product with a reactivate facility, BT is providing this service on more favourable terms than those offered to C&WA for products which compete with WLR.
- 5.62 C&WA state:
- "WLR uses the same basic network elements as are made available to C&WA through MPF and as such, the availability of functionality in one product that is not available in the other must constitute discrimination"<sup>52</sup>.*
- 5.63 C&WA uses the New Provide product to provide voice services which directly compete with external providers using WLR and with BT in the voice retail markets. C&WA believes that BT discriminated in favour of its own downstream products (e.g. WLR) and also in favour of communications providers who use WLR, and against it in the provision of the New Provide service.
- 5.64 The discrimination alleged by C&WA relates to the ability to reactivate a stopped line. Paragraph 3.15 of the Guidelines note that non-price differences in transaction conditions can include the "functionality" of a product. Therefore Ofcom has considered the inclusion of a reactivate facility by BT in WLR as a non-price difference in the provision of the services in question. As BT is a vertically integrated SMP provider, the Guidelines state that there may be a presumption of undue discrimination without the need to consider if there has been harm to competition.

<sup>52</sup> C&WA's submission 30 August 2007 paragraph 2.2

- 5.65 Ofcom has considered whether there is an objective justification to explain why the New Provide product offered to C&WA and external communications providers in this case does not have a reactivate facility but the inputs used by BT for WLR does have a stopped line provide service.
- 5.66 It is clear that the specification for the New Provide product was developed by the industry with a site visit and without a stopped line service (see paragraphs 5.31 to 5.48 above). C&WA was involved in these negotiations. In addition C&WA was aware that a reactivate facility was available in WLR.
- 5.67 When C&WA wanted an MPF product to be provided with a reactivate facility it submitted a SoR. BT provided this product on 1 July 2006.
- 5.68 On the facts of this particular case, the objective justification derives from the fact that the industry had knowingly decided not to include a reactivate facility within the New Provide service whilst there was an opportunity to do this. In reaching this conclusion Ofcom has examined the evidence submitted by C&WA in the First Dispute (please see paragraphs 5.31 - 5.48 above). When C&WA wanted to have such a facility within MPF, this was developed and provided by BT.

### ***Discrimination in the provision of SMPF***

- 5.69 The second allegation made by C&WA relates to MPF versus SMPF, both products in the WLAM.
- 5.70 SMPF is only available on telephone lines that already support a WLR (PSTN) service. Indeed, Openreach's SMPF product specification<sup>53</sup> states that:

*"In order for a metallic path to be eligible for a Line Share Arrangement:*

*The analogue PSTN service must be provided to the end user by Openreach and the dial tone must originate from Openreach Equipment in the MDF Site where the Line Share Arrangement is being requested.*

*An existing metallic path carrying telephone service must be available to the end customer".*

- 5.71 Therefore, by definition it would not be possible to provide a new telephone line, either using the New Provide or Stopped Line Provide service, when provisioning SMPF. Rather the line must already be in place and supporting a PSTN service. MPF and SMPF are therefore not sufficiently similar or comparable products to enable an assessment of whether BT has unduly discriminated in the provision of SMPF to itself and the New Provide product to C&WA.
- 5.72 Ofcom is aware that BT offers a service whereby WLR and SMPF are provided simultaneously. However, SMPF is only available on lines that already support a PSTN service (i.e. WLR). Therefore, this particular service does not provide a comparable product to enable an assessment of whether BT has unduly discriminated in the provision of SMPF to itself and the New Provide product to C&WA.
- 5.73 In light of the above, Ofcom is of the view that BT has not discriminated against C&WA in the provision of SMPF with a reactivate facility and MPF without such a service.

<sup>53</sup> [Openreach SMPF product description](#) – please refer to paragraph 3.3

## **Conclusion**

- 5.74 Ofcom's conclusion is that BT did not unduly discriminate in favour of its own business during the period 16 December 2004 to 30 June 2006, and that it did not breach SMP Condition FA2.

## Section 6

# Responses to the draft determination

### C&WA response

- 6.1 On 3 December 2007 C&WA provided a response to Ofcom's draft determination.
- 6.2 In its response, C&WA stated that it disagreed with Ofcom's draft conclusions and considered that the main issues raised by C&WA had not been properly investigated with Ofcom relying on the work undertaken during the First Dispute.
- 6.3 C&WA states that in its letter of 30 August 2007 to Ofcom that it set out the two key questions in the dispute: whether BT's costs were incurred efficiently and whether there was undue discrimination. C&WA maintains that, to the best of its knowledge, these questions were not considered as part of Ofcom's investigation into the First Dispute.
- 6.4 C&WA further states that Ofcom's failure to consider the case properly establishes a precedent that it is acceptable for BT to engineer its processes inefficiently and recover those inefficient costs from CPs and ultimately end users. C&WA reiterated its basic case that:

*"C&WA's basic case is that it was inefficient for BT to carry out a full New Provide in cases when it could simply have reactivated a Stopped Line; and that BT is not entitled to recover for inefficiently incurred costs. Accordingly, C&WA should be refunded the difference between the New Provide charge and the Stopped Line Provide charge in all of those cases.*

*If there was a Stopped Line already on the premises - with a clear, usable path from exchange to user - what possible justification can there have been for installing another one? It is clear BT could easily have provided the services efficiently all along because*

- *. BT has always reactivated Stopped Lines for WLR (see below); and*
- *. BT now does the same in LLU through the Stopped Line Provide product."*

- 6.5 C&WA stated that its concern "with regard to the efficiency of completing a New Provide when it was possible to reactivate a stopped line " goes to the heart of the dispute. It further asserted that BT always reactivated stopped lines for WLR.

### Ofcom Comment

- 6.6 During its analysis of the dispute, Ofcom took into account all evidence and information that it considered relevant to the facts of the case. This included analysis undertaken and information gathered during the First Dispute as the facts of that dispute are the same as this dispute. Ofcom has taken into account C&WA's submissions and comments made during meetings, and has considered the issues raised.
- 6.7 Ofcom understands C&WA's concerns over the possible effects of inefficient cost recovery by BT and is committed to addressing this where it is found to have occurred. C&WA's comments suggest that in their view, if there was a stopped line

already at the site, BT should not have used the New Provide product but instead reactivated a stopped line. Ofcom does not agree with this view in this particular case. SMP condition FA 3 must be looked at under the regulatory framework within which it sits and C&WA's claims must be examined in the context of the facts of this dispute.

- 6.8 The regulatory framework also includes a further requirement in FA 1.1 and FA9.1 to provide Network Access when reasonably requested in writing. It was therefore open to C&WA to request a Stopped Line Provide product if it needed one. Indeed C&WA were aware that this facility was available in WLR. If BT had not responded to a request in writing as soon as reasonably practicable, it may have been in breach of these SMP conditions.
- 6.9 The facts of this dispute show that C&WA was well aware of the New Provide specification, and that a stopped line provide was an option that they could have pursued and subsequently did request via the SoR process.

### **Spare pairs vs Stopped Lines**

- 6.10 C&WA considers that the draft determination does not touch on the issue of the use of an available stopped line by BT resulting in lower, and efficient, costs. Rather, C&WA consider that the draft determination focuses on the issue of spare pairs:
- 6.10.1 C&WA state that it appreciates the implications of spare pairs during service provision but that the dispute centres on the availability of stopped lines.
- 6.10.2 The focus on spare pairs is an indication of Ofcom's reliance on previous analysis according to C&WA.
- 6.10.3 Furthermore, C&WA considers that the draft determination is also concerned with the costs of unnecessary site visits when C&WA do not raise the issue of site visits in this context. It disagrees with Ofcom's previous assertion that C&WA's issue with the charge for the New Provide service was that a site visit by an engineer was unnecessary and considers that Ofcom has failed to consider the allegations made i.e. that BT was provisioning New Provides instead of reactivating stopped lines.
- 6.10.4 The focus according to C&WA should be the reactivation of stopped lines and C&WA considers that Ofcom should have looked at the work involved in reactivating a stopped line as compared with the work required for a New Provide.

### **Ofcom comment**

- 6.11 Ofcom does not consider that the issue of spare pairs forms the focus of the dispute. The issue of spare pairs was set out within the draft determination as part of the technical background. It was also relevant to C&WA's claim that in 50 per cent of cases an existing line could have been reactivated and to the calculation of the New Provide charge in the RWLAM<sup>54</sup>.
- 6.12 Ofcom considers that C&WA's preference for reactivating stopped lines is based on the fact that the cost of doing so is less than that of a New Provide. The cost of a New Provide is greater than that of the Stopped Line Provide due to the inclusion of a site visit within the cost stack. Therefore the cost of a site visit is relevant and the analysis of this is important to the dispute.

<sup>54</sup> Please see paragraph 5.20.2 above

## The basis of charges

- 6.13 C&WA responds on the issue of the basis of charges and compliance with conditions FA3 and FA9:
- 6.13.1 C&WA accepts that it may be true that the ceiling for the period 16 December 2004 and 14 December 2005 (established by the RWLAM<sup>55</sup>) took into account the proportion of spare pairs and average time of engineering visits.
- 6.13.2 However, C&WA considers this to be irrelevant and also considers that the RWLAM does not address the proportion of stopped lines that could have been reactivated without recovering the costs of a New Provide.
- 6.13.3 For the period 15 December 2005 to 30 June 2006, C&WA considers that two questions have been ignored: what costs were included in the New Provide charge of £99.95 over and above the cost of a transfer and were those costs incurred efficiently where there was a stopped line available for reactivation?
- 6.13.4 While C&WA agree that the first question above is not core to its case (“our argument is not about the cost stack of the New Provide charge”), it believes that the second question is relevant.
- 6.13.5 C&WA considers on the basis that the charge for a Stopped Line Provide is less than half the charge for a New Provide either:
- a) there is no difference between the work required for a Stopped Line Provide and a New Provide apart from the site visit; or
  - b) there is some additional work required in the case of a New Provide that is not required for a Stopped Line Provide and therefore BT’s costs were not efficiently incurred in those cases where a Stopped Line Provide could have been undertaken.

## Ofcom Comment

- 6.14 The basis of the charge for the New Provide was examined by Ofcom and this analysis is at paragraphs 5.6 to 5.27. C&WA’s comments would require Ofcom to undertake an analysis of the charge for the Stopped Line Provide which is beyond the scope of this dispute.
- 6.15 Ofcom has addressed the scope determined at the beginning of the investigation (as set out in paragraph 2.4 above). This scope was set after consultation with both C&WA and BT, and both parties were given ample opportunity to comment on it at the time.
- 6.16 Ofcom agrees with C&WA that BT’s charges for the New Provide service should be incurred efficiently, based on the product specification requirements. Furthermore, any new products developed by BT in response to a reasonable request by CPs should also have an associated charge that is incurred efficiently.
- 6.17 In Ofcom’s view, the New Provide product that BT developed (in conjunction with the industry) was not inefficient because it did not have a stopped line provide option attached to it.

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<sup>55</sup> [Ofcom RWLAM statement](#)

- 6.18 On the basis that the New Provide product was originally requested by industry, and because the charge ceiling for that product was set by the RWLAM, Ofcom does not believe that this constitutes evidence that the charges of £168 or £99.95 were inefficiently incurred (as set out in paragraphs 5.9 - 5.27).

### **The lack of a Statement of Requirement (“SoR”) from C&W**

- 6.19 C&WA states that Ofcom relies on the lack of the submission by C&WA of a formal SoR for a justification for BT not reactivating stopped lines where one was available:
- 6.19.1 C&WA consider that formal SoRs were not required during the development of the LLU product and that the evidence supplied by the OTA supports this (as stated in paragraph 5.42.3) and that this contradicts paragraph 5.42.1.
- 6.19.2 Further C&WA believe Ofcom should have requested copies of all relevant SoRs to compare this with developments to the product that were actually made and notes that Ofcom has refused to provide a copy of the note of its meeting with the OTA.
- 6.19.3 C&WA consider that BT cannot rely on the submission of SoRs to meet its obligations to engineer its processes efficiently. It is of the view that this obligation exists independently of the SoR process.

### **Ofcom Comment**

- 6.20 BT has an SMP obligation to deliver efficiently-priced products. The specifications of these products that this dispute relates to were set out through discussion with the industry, and, if necessary, reasonable request by CPs.
- 6.21 This process is very clearly set out in FA1, BT’s requirement is to provide network access on reasonable request<sup>56</sup>. BT must respond to reasonable request from CPs, and this is what it did when responding to C&WA’s request of 7 June 2005 for a Stopped Line Provide product for MPF new connections.
- 6.22 The evidence provided by the OTA is not contradictory. Rather it sets out the facts of the situation: SoRs were and are common practice throughout industry negotiation with BT, including during the period of the dispute (see paragraph 5.42.1). However, BT and industry agreed to a more co-operative form of negotiation in the later stages (paragraph 5.42.3).
- 6.23 Ofcom does not consider that BT’s obligations are only triggered by the submission of a formal SOR. What is reasonable will depend on the circumstances and facts of each case.
- 6.24 In this case Ofcom considers that BT was meeting its efficiency obligations in relation to the New Provide product, as specified.
- 6.25 In accordance with the Access Guidelines<sup>57</sup> Ofcom will also consider the clarity of the request in assessing whether BT has acted in accordance with its SMP obligations.
- 6.26 BT and C&WA had mutually consented to a more co-operative form of negotiation. Nevertheless, SoRs remained the standard vehicle for requesting particular specifications and provides the clearest indication of what a CP requires from BT. It

<sup>56</sup> [Ofcom's review of the wholesale broadband access market Annex F](#)

<sup>57</sup> [Access Guidelines](#)

should be noted that in addition to an absence of a clear request from C&WA the reactivation issue was not noted by the OTA on its issues list in the general context of the negotiations.

- 6.27 In the First Dispute, C&WA provided evidence<sup>58</sup> to show that they had raised the need for a Stopped Line Provide with BT in 2003. Ofcom has reviewed this evidence and does not consider that a reasonable request for such a product was made to BT (see paragraphs 5.46 - 5.35 above).
- 6.28 On the note of the meeting with the OTA, all relevant information from the note is included word for word in the draft determination.
- 6.29 Ofcom appreciates C&WA's concerns about the submission of SoRs and BT obligations during negotiation. However, in the particular circumstances of this case Ofcom has considered the absence of a reasonable written request for a reactivation facility as an important element in its considerations.

### The nature of BT's obligation

- 6.30 C&WA highlight a statement in the RWLAM which says:

*Charges for regulated services can also be set so as to reflect long run incremental costs. This approach consists of setting the charges on a cost-oriented basis, where the costs included in the charges are:*

- *the forward-looking long run incremental costs efficiently and necessarily incurred by the regulated firm to provide the service to which the charge refers<sup>59</sup>;*

- 6.30.1 C&WA claim that costs of a New Provide were not “necessarily” incurred when there was a stopped line available for reactivation and that the obligation is not a reactivate one: BT must proactively strive to meet this obligation.
- 6.30.2 C&WA claim that BT must pro-actively strive to meet this obligation.

### Ofcom comment

- 6.31 Ofcom recognises that reactivating stopped lines, where this is an option, has a lower cost than using the full New Provide product. However, whether reactivating stopped lines is more efficient will depend on whether the CP wants a site visit to be carried out. If a CP does want a site visit to be carried out then reactivating stopped lines is not more efficient.
- 6.32 C&WA's argument that BT should have offered the Stopped Line Provide product before it was requested would imply that there is a requirement for BT to determine CPs requirements, not only today but in the future, and to develop and offer products accordingly. This could, depending on the facts of the case, require BT to invest resources in developing products that may have no immediate demand and potentially no future demand, which may potentially be an inefficient use of resources.
- 6.33 Ofcom does not share C&WA's view in this regard – BT's obligation is and was to provide Network Access on reasonable request and to provide CPs with sufficient

<sup>58</sup> Letter from Bulldog to BT of 30 April 2003 and agenda and issues list of meeting of 24 June 2003 between Bulldog, BT and Ofcom

<sup>59</sup> [Ofcom's RWLAM](#) please refer to page 47 paragraph 6.49

information about the relevant service to enable CPs to assess their requirements and request them.

### **Undue Discrimination**

- 6.34 C&WA considered it incomprehensible that Ofcom concludes that C&WA could have used WLR plus SMPF rather than MPF as C&WA consider WLR is not a substitute in any technical sense for MPF.
- 6.35 According to C&WA this forces CPs downstream through the BT product set until they find something where the effect of the discrimination is not felt and is at odds with Ofcom's policy to promote competition at the deepest level of infrastructure.
- 6.35.1 C&WA state that if one were to accept (which they do not) Ofcom's premise that the presumption of undue discrimination has been rebutted, Ofcom has failed to investigate whether the discrimination is undue on other grounds e.g. on the grounds of materiality or capability of harm to competition. C&WA considers that the discrimination it suffered harmed competition.
- 6.35.2 C&WA believes that Ofcom reaches no conclusion in relation to discrimination in favour of SMPF and fails to investigate price discrimination at all.

### **Ofcom Comment**

- 6.36 Ofcom has noted C&WA's concerns on the availability of WLR plus SMPF as an alternative to MPF.
- 6.37 Ofcom does not consider that the availability of WLR (plus SMPF) frees BT from its obligations in regard to MPF, or that WLR plus SMPF is a substitute for MPF. However, Ofcom has taken into account the opportunity C&WA had to negotiate the specification of the New Provide product and to determine whether it should include a reactivation facility as was present in WLR.
- 6.38 Ofcom has conducted its analysis of whether undue discrimination took place in line with its Guidelines (see paragraphs 5.50 - 5.68). Having determined that the ability to reactivate a line is a potential non-price discrimination, the Guidelines allow Ofcom to presume undue discrimination without the need for Ofcom to assess harm to competition. In determining that the presumption of undue discrimination applied, Ofcom considered if the ability to reactivate a stopped line was a price or non-price difference in transaction condition. Paragraph 3.15 of the Guidelines note that this can include the "functionality" of a product.
- 6.39 Ofcom's conclusion on discrimination in favour of SMPF is at paragraph 5.73 of the explanatory statement.

### **Other Issues**

- 6.40 C&WA state that (in response to the question from Ofcom) it provided three questions that Ofcom could ask BT that were pertinent to the dispute. C&WA believe there is no evidence that the draft determination considers these questions.
- 6.41 C&WA also state that the process diagram provided at annex 2 actually shows the EMP New Provide process and is not relevant to the dispute. C&WA consider this is indication of a lax approach by Ofcom in investigating the issues C&WA raised.

- 6.42 C&WA consider that the draft determination is defective procedurally and from a fairness perspective in that:
- a) Ofcom has failed to consider the case actually made by C&WA.
  - b) Ofcom has addressed issues that were not raised, for example spare pairs, and has therefore gone outside the context of the scope of the dispute.
  - c) The draft determination refers to documents in certain footnotes which have not been disclosed to C&WA and were not disclosed on request.
- 6.43 C&WA believe Ofcom must review the substantive facts of the case which will lead to a completely different conclusion.

### Ofcom Comment

- 6.44 Ofcom has conducted its investigation in line with the scope of the dispute agreed at the outset, using all the information considered relevant by Ofcom. Within the limited time constraints of a dispute, Ofcom is confident that this investigation has followed the investigations guidelines published by Ofcom in July 2004<sup>60</sup> and has been given all due care and attention.
- 6.45 Ofcom included the process diagram at annex 2 as general background information.
- 6.46 Ofcom has considered the case actually made by C&WA but has investigated within the scope set out at the beginning of the investigation.
- 6.47 In the case of information referred to in the footnotes of the draft determination, either the relevant information is contained in the paragraph referred to or the relevant information has been provided to C&WA. Specifically the following information in relation to footnotes in the draft determination was either clarified or provided upon request from C&WA:
- 6.47.1 **Footnotes 10 and 29:** the information relevant to these was contained in paragraphs 3.24 and 4.15 respectively of the draft determination.
  - 6.47.2 **Footnote 28:** BT's submission of 14 August 2007 (which was a letter to Ofcom on the scope of the dispute) had been sent to C&WA on 16 August 2007.
  - 6.47.3 **Footnote 33:** This referred to information that was provided to Ofcom in a monthly format and we understood this was provided to C&WA on 12 January 2007 in a weekly format by Openreach as part of the stopped line provide trial. The monthly collation was provided to C&WA on 22 November 2007 for ease of reference.
  - 6.47.4 **Footnote 34:** The ownership of the OTA summary of the industry group document was unclear as the industry group had changed. While attempting to identify current ownership Ofcom noted that Bulldog had been a major contributor to the drafting of the document on which the OTA formed its summary.
  - 6.47.5 **Footnote 37:** paragraphs 5.40.1 to 5.40.5 of the draft determination contained all relevant information exactly as set out in the note of the meeting with the OTA.

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<sup>60</sup> [Ofcom's Investigations Guidelines](#)

- 6.48 In addition C&WA were provided with Openreach's comments on the scope of the dispute in the form of a letter of 17 September 2007 which was a follow up to a meeting between Openreach and Ofcom on 11 September 2007.

***BT's response to the draft determination***

- 6.49 BT agrees with Ofcom's conclusions in relation to charges for the New Provide service and in relation to the alleged undue discrimination. BT reiterates that the MPF New Provide service was introduced in May 2001 as an appointed service (i.e. requiring a site visit) and notes that CPs now have the option of accepting a Stopped Line Provide if a suitable line is already available for reactivation and they do not want to keep the appointment.
- 6.50 From the results of the reactivate trial run in 2006, BT believes that CPs (or their end users) value the engineering site visit. According to BT, CPs agreed to maintain the engineering site visit following discussions in July 2003 (at an LLU industry meeting) because the site visit was perceived to be of value by them.
- 6.51 BT welcomes Ofcom's conclusions on the New Provide charge given the in-depth analysis of costs which took place during the RWLAM in 2004. BT notes that Ofcom did not receive any new evidence to suggest that the charge was not fair or reasonable, cost orientated or efficiently incurred.
- 6.52 BT states that, while related, WLR and LLU are different products that fall within separate markets.
- 6.53 BT notes that whether (technically or otherwise) discrimination can apply between separate economic markets is not a question that Ofcom considered in its analysis.
- 6.54 BT consider there is no convincing argument for discrimination based on the concept of copper inputs that would be part of the WLAM and common to MPF, SMPF and WLR as implicitly accepted by Ofcom.
- 6.55 BT consider that C&WA inconsistently define the copper input as:
- a) The ability to reactivate a stopped line.
  - b) The underlying facility in the WLAM.
  - c) Being copper or copper pairs or loop.
- 6.56 BT believes C&WA has confused common input and downstream attributes or functionalities.

**Ofcom Comments**

- 6.57 BT's view of the value of the site visit to CPs concurs with Ofcom's own understanding of why it was maintained for the New Provide service.
- 6.58 Ofcom notes BT's point about the question of whether discrimination can apply between separate economic markets, but considers that discrimination is possible in the supply of the service input into different wholesale products within the same retail value chain.

- 6.59 Ofcom does not fully agree with BT in the case of copper inputs not being in the same market and appreciates C&WA's assertion that the inputs into WLR and MPF are in the same market (as set out in Figure 2 of the draft determination).
- 6.60 Ofcom notes BT's view of the inconsistency of C&WA's definition of copper inputs.

## Annex 1

# Glossary

**BT:** British Telecommunications plc.

**DSL** (Digital Subscriber Line): a family of technologies generically referred to as DSL, or xDSL, capable of transforming ordinary local loops into high-speed digital lines, capable of supporting advanced services such as fast Internet access and video-on-demand. ADSL (Asymmetric Digital Subscriber Line), HDSL (High bit rate Digital Subscriber Line) and VDSL (Very high data rate Digital Subscriber Line) are all variants of xDSL.

**Hull area:** the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc.

**Local loop:** the access network connection between the customer's premises and the local serving exchange, usually comprised of two copper wires twisted together.

**Local loop unbundling (LLU):** a process by which a dominant provider's local loops are physically disconnected from its network and connected to competing provider's networks. This enables operators other than the incumbent to use the local loop to provide services directly to customers.

**Main distribution frame (MDF):** the equipment where local loops terminate and cross connection to competing providers' equipment can be made by flexible jumpers.

**Metallic path facilities (MPF):** the provision of access to the copper wires from the customer premises to a BT MDF that covers the full available frequency range, including both narrowband and broadband channels, allowing a competing provider to provide the customer with both voice and/or data services over such copper wires.

**Network Access:** has the meaning given to it under section 151(3) of the Communications Act 2003.

**Network termination point (NTP):** the point of demarcation between a communications provider's network and the end user's premises.

**PSTN:** Public Switched Telephone Network

**Shared metallic path facility (SMPF)/shared access:** the provision of access to the copper wires from the customer's premises to a BT MDF that allows a competing provider to provide the customer with broadband services, while the dominant provider continues to provide the customer with conventional narrowband communications.

**SMP:** The Significant Market Power test is set out in European Directives.

**Wholesale line rental (WLR):** allows alternative suppliers to rent access lines on wholesale terms from BT, and resell the lines to customers, providing a single bill that covers both line rental and telephone calls.

Annex 2 – MPF New Provide Process Chart

