

Notification under Section 107(6) of the Communications Act 2003

Proposal to give a direction applying the Electronic Communications Code to FibreSpeed Limited

1. The Office of Communications (“Ofcom”) propose to give a direction under section 106(3) of the Communications Act 2003 (the “Act”) applying the electronic communications code (the “Code”) to FibreSpeed Limited.
2. The draft Direction and accompanying explanatory statement setting out Ofcom’s reasons for the proposal are available on Ofcom’s website <http://www.ofcom.org.uk>. Hard copies of the draft Direction and the explanatory statement will be made available on request. For hard copies, please contact Michael Galvin on 020 7783 4158 or by sending an email to michael.galvin@ofcom.org.uk.
3. Representations on the proposal may be made to: Michael Galvin, Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA by not later than 5pm on **18 December 2007**.
4. All confidential information should be clearly marked as such and separated out into a confidential annex. All representations received will be published, unless it is clearly marked that the response is confidential, and made available in Ofcom’s Knowledge Centre. Please contact Jan Kacperek (jan.kacperek@ofcom.org.uk) for further information with respect to public inspection or, for responses to the draft Direction, visit Ofcom’s website (www.ofcom.org.uk).
5. In this Notification, unless the contrary intention appears, words and phrases shall have the same meaning as in the Act.
6. In this Notification, “FibreSpeed Limited” means FibreSpeed Limited (registered company number 6340164).

Neil Buckley
Competition Policy Director

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

14 November 2007

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

[A Notification of this proposal was published on 14 November 2007]

Whereas:

- (A) On 26 October 2007, FibreSpeed Limited made an application for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network in the United Kingdom in accordance with section 107(1) of the Act and the notification published by Ofcom by virtue of the Transitional Provisions under section 107(2) of the Act on 10 October 2003 setting out their requirements with respect to the content of an application for the electronic communications code and the manner in which such an application is to be made;
- (B) On 14 November 2007, Ofcom published a notification of their proposal to give a direction applying the Code to FibreSpeed Limited in accordance with section 107 of the Act;
- (C) Ofcom have consider every representation made to them about the proposed Direction;
- (D) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

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

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

Definitions and Interpretation

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

"Act" means the Communications Act 2003;

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

"Ofcom" means the Office of Communications; and

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

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

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

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

Neil Buckley
Competition Policy Director

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

14 November 2007

Explanatory Statement

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

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

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

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

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

1.5 As explained in paragraph 1.2, Ofcom understands that the network concerned will be used to provide wholesale services to retailers wishing to offer broadband services in parts of Wales which do not presently have direct broadband access or, at best, this is limited in terms of capacity and speed. Broadband capabilities play an increasingly prominent part of business and social needs and growth in the use of broadband services in the UK has increased dramatically. Nonetheless, there remain pockets of the UK in which broadband network rollout is less likely because the costs involved are likely to outweigh the potential gains. FibreSpeed’s network – with Welsh Assembly Government backing – is intended to provide broadband capabilities to parts of North Wales which suffer from a lack of investment in broadband technologies and therefore address those needs. A resilient broadband network would benefit the relevant communities.

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

The practicability of the provision of the network without the Code

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

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

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

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

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

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

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

(i) the application of the Code; and

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

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

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

How to respond

1.14 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **18 December 2007**.

1.15 Ofcom prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

1.16 Please can you send your response to michael.galvin@ofcom.org.uk.

1.17 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Michael Galvin
Competition and Markets
4th Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7783 4158
Fax: 020 7783 4109

Confidentiality

1.18 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

1.19 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

1.20 Ofcom reserves its power to disclose certain confidential information where this is necessary to fulfil its functions, although in practice it would do so only in limited circumstances.

1.21 Please also note that copyright and all other intellectual property in responses will be assumed to be assigned to Ofcom unless specifically retained.

Next steps

1.22 Unless there are any reasoned objections to Ofcom's proposals, Ofcom intends to grant Code powers to FibreSpeed shortly after the end of the consultation period.

Ofcom's consultation processes

1.23 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on 18 December 2007.

1.24 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

1.25 Please can you send your response to: michael.galvin@ofcom.org.uk

1.26 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Michael Galvin
Competition Group
4th Floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Fax: 020 7783 4158

1.27 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

1.28 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 11. It would also help if you can explain why you hold your views.

Further information

1.29 If you have any wish to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Michael Galvin using the contact details given above.

Confidentiality

1.30 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential and specify why. Please also place such parts in a separate annex.

1.31 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those which are marked as confidential, in order to meet legal obligations.

1.32 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements.

Ofcom's approach on intellectual property rights is explained further on its website, at http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

1.33 Following the end of the consultation period, Ofcom intends to publish a Final Statement around March 2008.

1.34 Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

1.35 Ofcom is keen to make responding to consultations easy, and has published some consultation principles which it seeks to follow, including on the length of consultations.

1.36 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.

1.37 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
Email vicki.nash@ofcom.org.uk

Annex 1

Ofcom's consultation principles

Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

1 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

2 We will be clear about who we are consulting, why, on what questions and for how long.

3 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

4 We will normally allow ten weeks for responses to consultations on issues of general interest.

5 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

6 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

7 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 2

Consultation response cover sheet

2.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, unless we are asked not to.

2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.

2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to confirm on the response cover sheet that Ofcom can publish their responses upon receipt.

2.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.

2.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/ job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

Yes

No

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and all intellectual property rights in the response vest with Ofcom. If I have sent my response by email, Ofcom can disregard any standard email text about not disclosing email contents and attachments.

Ofcom can publish my response: on receipt once the consultation ends

Name

Signed (if hard copy)